

## LOCAL DEMOCRACY, COMMUNITY ADJUDICATION, AND CRIMINAL JUSTICE

*Laura I Appleman*

**ABSTRACT**—Many of our criminal justice woes can be traced to the loss of the community’s decisionmaking ability in adjudicating crime and punishment. American normative theories of democracy and democratic deliberation have always included the participation of the community as part of our system of criminal justice. This type of democratic localism is essential for the proper functioning of the criminal system because the criminal justice principles embodying substantive constitutional norms can only be defined through community interactions at the local level. Accordingly, returning the community to its proper role in deciding punishment for wrongdoers would both improve criminal process and return us to fundamental criminal justice ideals.

**AUTHOR**—Associate Dean of Faculty Research and Professor of Law, Willamette University. J.D., Yale University; B.A., M.A., University of Pennsylvania. Many thanks to Rick Bierschbach, Joshua Kleinfeld, and my extremely helpful student editors, Sarah Crocker and Ariel Volpe.

INTRODUCTION..... 1414

I. EARLY AMERICAN JURIES, COMMUNITY, AND CRIMINAL PUNISHMENT..... 1415

II. CRIMINAL JUSTICE, COMMUNITY PARTICIPATION, AND CONSTITUTIONAL  
VALUES..... 1419

III. INCREASING LEGITIMACY AND FAIRNESS THROUGH COMMUNITY  
PARTICIPATION ..... 1422

IV. COMMUNITY INVOLVEMENT AND CRIMINAL JUSTICE NORMS..... 1424

CONCLUSION..... 1426

INTRODUCTION

The twenty-first-century criminal justice system is rife with problems with no easy answers. Among many needed reforms, one promising path is reincorporating the local community into criminal justice decisionmaking, expanding the lay public’s participation beyond the minimal role currently available. Many of our modern woes in the criminal justice system can be traced to the loss of the community voice and decisionmaking ability in adjudicating crime and punishment.

Returning the community to its proper role in deciding punishment for wrongdoers would both improve criminal process and return us to fundamental criminal justice ideals. This kind of community participation, a form of local democracy, is essential to our original, historical vision of criminal process where the lay public was closely involved in adjudicatory justice.<sup>1</sup> Ideally, community-based criminal punishment provides for strong, local popular participation within existing criminal justice institutions.

One significant aspect of our criminal justice problem is the confusing legacy of bureaucratic attitudes, structures, and incentives,<sup>2</sup> all of which remove the decisionmaking aspect of criminal justice from its community roots. By stripping away some of these bureaucracies, we can return to the foundations of criminal justice, making it once again more community-focused and responsive to lay influences. This is necessary because, as the late Bill Stuntz observed, the county or local community remains the major unit of governing criminal justice.<sup>3</sup> Criminal justice needs to once again be local, democratic justice.

---

<sup>1</sup> See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 8–9 (2011).

<sup>2</sup> See, e.g., Stephanos Bibas, *Observers as Participants: Letting the Public Monitor the Criminal Justice Bureaucracy*, 127 HARV. L. REV. F. 342, 343 (2014).

<sup>3</sup> See STUNTZ, *supra* note 1, at 6.

From our nation's beginning, a key aspect of the criminal jury trial was, and continues to be, the local community's role in conveying punishment to criminal offenders. Indeed, Article III of the Constitution and the Sixth Amendment both protect the criminal jury trial right. Because Article III had no specific promise of the jury trial, "many Anti-Federalists wanted an explicit guarantee that juries would be organized around local rather than statewide communities."<sup>4</sup>

With its enshrinement of the local community, the Sixth Amendment community jury trial right delineates one of the most important rights in our criminal justice system—a right that has for too long been neglected. As a fundamental matter of democratic political theory, it is the people who should run the government, not the legal elite. This extends to the criminal justice arena as well as the legislature and the executive.

The local, democratic nature and history of the jury trial provides some of the strongest support for this vision of democratizing criminal justice. As I have developed elsewhere, the original historical right to a jury trial, particularly in the criminal context, was viewed almost exclusively as a right of the people, not as a right of the accused.<sup>5</sup> For the colonists and fledgling United States citizens, a trial by jury was primarily focused on the local community's ability to judge its own people and pronounce its punishment.<sup>6</sup> Returning to historical origins, then, teaches us that the early American community played a pivotal role in deciding punishment for criminal offenders and determining their moral blameworthiness.<sup>7</sup> Our modern criminal justice system, however, has retreated from this central focus on the local community, leading to some of the major issues we see today.

#### I. EARLY AMERICAN JURIES, COMMUNITY, AND CRIMINAL PUNISHMENT

Early Americans believed that the best way to ensure that the offender felt the moral weight and indignation of the community as part of the punishment was having a fair cross section of said community determine that punishment via the jury. Having a determination of culpability handed down by an offender's fellow citizens, rather than the state or the judge,

---

<sup>4</sup> Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1197 (1991). As Amar explains, the jury was central to both the Bill of Rights and the Constitution: "Not only was it featured in three separate amendments (the Fifth, Sixth, and Seventh), but its *absence* strongly influenced the judge-restricting doctrines underlying three other amendments (the First, Fourth, and Eighth)." *Id.* at 1190.

<sup>5</sup> See LAURA I APPLEMAN, DEFENDING THE JURY 14 (2015).

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 15.

meant the punishment was fully legitimized and the normative judgment of the community was properly imposed.<sup>8</sup>

The local jury served as a legal lynchpin for the American colonies and early nation as it was used both to resolve conflict and to adjudicate criminal offenses. Juries guided the public trial and punishment of offenders, leaving courts with minor tasks such as delivering jury instructions and deciding pleas in abatement.<sup>9</sup> The “jury was viewed as a means of controlling judges’ discretion” and curtailing their authority.<sup>10</sup>

Importantly, the jury trial was the conduit for the community’s expression of democratic justice. As a symbol and a tool of popular power, the petit jury represented the vox populi and was thus intimately tied to the local community.<sup>11</sup> In many villages, the institutions were one and the same. Both grand and petit juries played central roles in mediating conflicts of interest between local communities and the governing authorities.<sup>12</sup> Significantly, the right to trial by jury was understood as the people’s right.<sup>13</sup>

Early Americans relied on juries to maintain and reify their social values through the criminal law. Criminal jury trials and the law helped reinscribe the mores of the people because the local community was able to both create and control the content of the colony’s substantive law. In many respects, local governance *was* the criminal law. In colonial and revolutionary America, then, decisionmaking on matters of criminal justice—and community governance—trickled up. Local juries took an active and critical role in self-government both by translating the law down to the community and by translating values up to the governing bodies.<sup>14</sup> In

---

<sup>8</sup> See Laura I Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 409 (2009).

<sup>9</sup> See WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW* 20 (Univ. of Ga. Press 1994) (1975).

<sup>10</sup> See *id.*

<sup>11</sup> See DANIEL J. BOORSTIN, *THE AMERICANS: THE COLONIAL EXPERIENCE* 27 (1958).

<sup>12</sup> See J. R. Pole, *Reflections on American Law and the American Revolution*, 50 WM. & MARY Q. 123, 126 (1993). In early America, grand juries played a much larger role in criminal justice than they do today. For example, any layman could bring matters to a grand jury, and if there was sufficient evidence, the grand jury would indict and the crime would be prosecuted. See Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 292–93 (1989) (noting that citizens presented evidence of crimes directly to the grand jury). As a result, the grand jury was able to make decisions on both whether and what to charge. See Roger A. Fairfax, Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL RTS. J. 339, 344 (2010).

<sup>13</sup> See generally Appleman, *supra* note 8.

<sup>14</sup> See SHANNON C. STIMSON, *THE AMERICAN REVOLUTION IN THE LAW* 59–61 (1990).

particular, the criminal law was “mediated to society” through the courts and the representative roles of the grand and petit juries.<sup>15</sup>

In this way, the twinned roles of the community and the jury have always been located in the heart of American ideals of government and justice. Much of the heft of America’s new representative government came from the jury’s key role in two central arenas: (1) in dispensing the law to the community and (2) in creating and maintaining the community’s centrality to both politics and the polity.

Although aware of the dangers of prejudice, Americans of the Constitutional Era fervently believed that it was only local juries that could fully adjudicate and represent the community.<sup>16</sup> Revolutionary colonists understood that the jury trial right was inextricably linked to the community’s moral judgment, ultimately constructing the constitutional right to a jury trial based on that understanding.<sup>17</sup>

The right of the accused to a “public” trial, as articulated in the Sixth Amendment, was another direct nod to the rights of the local community. This public, expressive aspect of the jury trial right was another way in which the power of the local community was formalized into the Constitution. Thus, as originally envisioned, the right to a jury trial manifested itself both expressively and morally, allowing community members a way to contribute simultaneously to the politics of the local, as well as a greater national, polity. The criminal jury trial right was a critical tool to validate the community’s right to propound moral judgments on local citizens. Accordingly, incorporating the judgment of the community was considered an essential part of criminal justice from the earliest days of our nation. The use of the jury accomplished this goal by ensuring that the interests of the local public were incorporated into the institution of the judiciary. In other words, one of the key roles of the jury at the time of the Founding was to guarantee that the community’s concerns and beliefs were central when punishing an offender. This punishment was not something left to the judge but rather a responsibility and right of a defendant’s immediate society.<sup>18</sup>

---

<sup>15</sup> See Pole, *supra* note 12, at 125.

<sup>16</sup> See Steven A. Engel, *The Public’s Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1673 (2000).

<sup>17</sup> See Appleman, *supra* note 8, at 423.

<sup>18</sup> See *id.* at 434.

Given how many Revolutionary Era Americans deeply distrusted the judicial branch,<sup>19</sup> one of the primary reasons for enshrining the community jury as the arbiter of criminal punishment was to ensure that adjudication of crime was never severed from popular authority. Thus, the desire to protect the community jury trial right cannot be seen merely as a way to incorporate popular checks and accountability into the justice system because the criminal jury trial right also guaranteed that the citizenry would have a direct hand in determining the moral blameworthiness of punishment.

Today, however, the community has little role in the workings of the criminal justice system. But because criminal justice is a largely local process with primarily local effects, the local community must be involved much more substantially in its application. Citizens need to participate in criminal justice decisionmaking. Indeed, an important aspect of localism in criminal justice is “its tendency to make the enforcement of criminal law more responsive to the values, priorities, and felt needs of local communities.”<sup>20</sup> This is because crime has always been specifically envisioned as an offense against the local community. Put another way, localism is inherent in the American conception of crime—indeed, it is hardwired into our historical and constitutional understanding of criminal justice.<sup>21</sup>

Democratic localism is essential for the proper functioning of the criminal system because the criminal justice principles embodying substantive constitutional norms can only be defined through community interactions at the local level.<sup>22</sup> Here, as elsewhere, the practice of public participation helps serve the public interest.<sup>23</sup>

American normative theories of democracy and democratic deliberation have always included the participation of the community as part of our system of criminal justice. If you accept that conceptions of egalitarian moral worth are part of our culture’s normative values, and have thus set the normative standards for acceptable treatment of people in our

---

<sup>19</sup> See Roger Roots, *The Rise and Fall of the American Jury*, 8 SETON HALL CIR. REV. 1, 7–8 (2011). Revolutionary Era Americans’ distrust of the judiciary stemmed from their experiences with the British court system and the Stamp Act, among other colonial outrages.

<sup>20</sup> See Stephen F. Smith, Response, *Localism and Capital Punishment*, 64 VAND. L. REV. EN BANC 105, 110 (2011).

<sup>21</sup> See *id.*

<sup>22</sup> See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 519 (1999).

<sup>23</sup> See *id.*

society,<sup>24</sup> then the community must help determine all aspects of punishment however and whenever it is imposed.

## II. CRIMINAL JUSTICE, COMMUNITY PARTICIPATION, AND CONSTITUTIONAL VALUES

Greater local participation in criminal justice has the advantage of helping community members feel connected to both the inner workings of the criminal justice system and the larger civic structure. Noting and preserving the use of the local citizen's public voice will help create positive experiences, inform the wider community about the service given, and link said service to involvement in other democratic responsibilities. In this way, partaking in criminal adjudication transforms from an individual's isolated undertaking to an act of civic participation where people in a local community see how constitutional ideals and the promise of criminal justice are made real.

The juror's role as constitutional actor provides another reason to concentrate on the local community. By focusing on the constant potential of most local citizens to be participants in the criminal justice system, service can then be framed along an active continuum, encouraging community members to view their interaction with criminal process as an ongoing project not just an isolated, one-time role.<sup>25</sup> The importance of being invited to participate equally in the constitutional system is one of the reasons jury service has always been such a contested enterprise.<sup>26</sup> Thus, involving the full community in service to the criminal justice system as a continuing duty of citizenry is one way of empowering more individuals within the polity.

Granted, most citizens are generally ignorant of both the role formerly played by jurors in the founding of the Republic as well as the potential role they could play now. So, one first step to injecting more democratic legitimacy into the criminal justice system would be to educate citizens on the history of the jury and the larger role the community should now play.

More critically, citizens need to understand that participating in criminal adjudication is a central way to meaningfully connect with the community, the larger constitutional system, and even more broadly, the polity. The local public can be a formidable aspect of the criminal justice system with significant constitutional power. Specifically, community

---

<sup>24</sup> See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1668 (1992).

<sup>25</sup> See Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1108 (2014).

<sup>26</sup> See *id.* at 1111–12.

members should realize that their role in the criminal system allows them to provide a strong voice against government oppression,<sup>27</sup> whether that government is city, county, state, or federal.

Because the sanctions applied in the criminal justice system can be severe, the Framers expected the community, in the role of the jury, to prevent abuses of state power.<sup>28</sup> But the practical landscape of the current criminal justice system, enmeshed as it is in guilty pleas and other hasty bureaucratic adjudications, leaves no room for the voice of the community.

Ultimately, restoring the public voice to the vast bulk of criminal adjudication can be achieved by envisioning the community's integration into all aspects of criminal adjudication, theoretically as well as procedurally. This includes inserting the community voice into criminal procedures for bail,<sup>29</sup> jail,<sup>30</sup> sentencing,<sup>31</sup> probation,<sup>32</sup> parole,<sup>33</sup> post-release supervision,<sup>34</sup> and criminal justice debt,<sup>35</sup> among others. Reincorporating the community right to adjudicate crime and that right's underlying jurisprudence into criminal process will both reestablish the lost voice of the people and instigate much-needed change in our current criminal justice system. Restoring the community voice to its full volume will not only permit us to follow the constitutional requirements of the Court,<sup>36</sup> the Sixth Amendment, and Article III but also provide balance and new energy into the business of adjudicating criminal cases.

Local representation within the criminal justice system, however, cannot simply rely upon the extremely limited role of the traditional criminal jury. First and foremost, most criminal indictments—ranging from

---

<sup>27</sup> See *id.* at 1156.

<sup>28</sup> See John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 123–24 (1992).

<sup>29</sup> See generally Laura I Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297 (2012).

<sup>30</sup> See *id.*

<sup>31</sup> See generally Laura I. Appleman, *Retributive Justice and Hidden Sentencing*, 68 OHIO ST. L.J. 1307 (2007).

<sup>32</sup> See APPLEMAN, *supra* note 5, *passim*.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.*

<sup>35</sup> See generally Laura I Appleman, *Nickel and Dimed into Incarceration: Cash Register Justice in the Criminal System*, 57 B.C. L. REV. 1483 (2016).

<sup>36</sup> See, e.g., *Blakely v. Washington*, 542 U.S. 296 (2004) (holding that a court can only sentence defendant on facts found by jury beyond reasonable doubt or admitted by defendant himself); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact increasing defendant's sentence beyond statutory maximum, aside from prior conviction, must be submitted to jury and proved beyond reasonable doubt).

90% to 95%—are resolved not through a jury trial but through guilty plea,<sup>37</sup> thus entirely cutting out the community role in criminal adjudication. Moreover, depending on the current formulation of the criminal jury is itself problematic, what with the jury’s well-known tendency to exclude a variety of groups including felons, minorities, students, recent immigrants, the poor, homeless citizens, and many others.<sup>38</sup>

Accordingly, we must look to enhance local, popular participation within our existing criminal justice institutions such as bail hearings, guilty pleas, and sentencing determinations.<sup>39</sup> Incorporating citizen decisionmaking in existing procedures allows the positives of community contribution without requiring new courts, vast infusions of money, or immense change in the existing system. Through citizen involvement, the “cynicism and contempt” created by our more secretive criminal justice system will be minimized.<sup>40</sup> This is especially important for communities that have felt distanced, punished, or isolated by the criminal justice system; by allowing these communities to adjudicate punishment, the local public may feel some investment or purchase in the workings of the system.

Restoring both power and voice to the local community as arbiters of criminal justice and punishment would serve a variety of purposes. First, as detailed above, returning some measure of the criminal decisionmaking to the citizenry would comport with the original understanding of criminal adjudication both as practiced in the eighteenth century and as formalized in the Bill of Rights.

In addition, there are substantive legal and theoretical values that are strengthened and improved by this integration of the public into the private workings of the criminal justice system. Our current system of criminal adjudication shortcuts many classic substantive and procedural values,<sup>41</sup>

---

<sup>37</sup> See LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING 3 (2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> [<https://perma.cc/89TZ-HS8J>].

<sup>38</sup> See, e.g., Sanjay K. Chhablani, *Re-Framing the ‘Fair Cross-Section’ Requirement*, 13 U. PA. J. CONST. L. 931, 947–48 (2011).

<sup>39</sup> Increasing the number of short criminal justice procedures makes it more likely that lower income citizens will be able to participate in criminal justice because many of these procedures will take less time than taking part in grand or petit juries, where the commitment can be lengthy and thus impossible for impoverished individuals to do.

<sup>40</sup> Kenneth Kipnis, *Plea Bargaining: A Critic’s Rejoinder*, 13 LAW & SOC’Y REV. 555, 557 (1979).

<sup>41</sup> See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1362, 1389 (2003) (defining substantive values as those which reform, educate, or vindicate victims; produce catharsis; and express condemnation and defining procedural values as efficiency, accuracy, informed choice, and procedural fairness).

ones taken for granted in criminal justice. The principles that justify our imposition of punishment in public jury trials rapidly disintegrate in the informal, private realm of bail hearings, plea agreements, criminal justice debt, sentencing, and the imposition of probation, parole, and post-release supervision. This difference “between promise and performance, between text and reality,”<sup>42</sup> is particularly acute because of the vast distance between the rights elaborated in the Sixth Amendment and the workings of our modern criminal process. Meaningful lay participation by the local community would help shrink the current distance between the criminal law’s “legitimizing promise” and the “systemic reality” of criminal adjudication.<sup>43</sup>

### III. INCREASING LEGITIMACY AND FAIRNESS THROUGH COMMUNITY PARTICIPATION

Restoring the community voice to the imposition of punishment serves both theoretical and practical interests. These positive aspects include the public’s increased understanding of the criminal justice system, a restoration of criminal adjudication’s educative function, a better fit between imposed punishment and the constitutional theory of the Sixth Amendment, and greater moral consensus within the community.

Reinserting the local community into our criminal process would also inject some actual deliberation and adjudication into our current system, something that is badly needed. Our current criminal process functions largely out of sight of the average citizen. Procedures such as the bail hearing, the guilty plea, the sentencing hearing, and the imposition of post-release supervision are overwhelmingly hidden processes, preventing the public from learning about the defendant’s crime.<sup>44</sup> These hidden processes prevent community involvement and input into the criminal justice process from the community in two major ways: (1) citizens do not get to decide the proper punishment for community wrongdoers and (2) the community is not publicly informed of misconduct by offenders except in notorious or infamous cases.

By requiring a community role in all forms of criminal adjudication, we enhance local, popular participation within existing criminal justice institutions, thus combining the positive attributes of community

---

<sup>42</sup> Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 548 (1997).

<sup>43</sup> *Id.* at 551.

<sup>44</sup> See Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 951 (2006). See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012).

involvement with no need for new courts or complete upheaval of the existing system. The community's repeated involvement in criminal process will help it arrive at a better understanding of how the system adjudicates and punishes crime, which itself will help educate the public about how criminal justice actually works. Through citizen engagement, the cynicism about the criminal justice system that is invariably created by secretive proceedings will be minimized.

Equally important, the current complex, behind-the-scenes machinations of current criminal process are greatly frustrating to the public. Where the initial charges and the ultimate indictment and punishment are incongruent and this discrepancy is never publicly explained, there can be disappointed expectations and, often, community anger and demoralization as seen most recently in the Black Lives Matter movement.<sup>45</sup> Allowing the lay public into the criminal processes to help with the decisionmaking will, at a minimum, shed light onto the process for the community and possibly ease some frustration.

Some frustration with the criminal justice system can be blamed on the community's current role as an outsider. A significant gulf divides the criminal justice system's insiders and outsiders. Insiders—such as prosecutors, defense counsel, and judges—possess power and knowledge, while outsiders—such as crime victims, bystanders, and the general public—frequently feel excluded and confused.<sup>46</sup> This divide creates a tension between the two groups, which hinders the public's faith in law's legitimacy and blocks the criminal law's moral, instrumental, and expressive goals. With a high guilty plea rate combined with the innumerable punishment decisions made by judges and bureaucrats, it is no wonder that outsiders voice considerable anger about the workings of the criminal justice system.

Since most criminal adjudications are not well-publicized, if publicized at all, having a formal mechanism to incorporate the lay public into existing criminal process would unquestionably shed light into the black hole. Such transparency has important trickle-down benefits, including the public's more realistic understanding of all kinds of criminal penalties from pretrial detention to fines to post-release supervision. Increased access, which helps create transparency, will increase comprehension of how criminal process works.

The participatory benefits of having the local community take part in criminal processes similarly accrue. There are few roles for the public in

---

<sup>45</sup> See APPLEMAN, *supra* note 5, at 1–3.

<sup>46</sup> See Bibas, *Transparency and Participation*, *supra* note 44, at 912–13.

the modern criminal justice system. Grand juries are controlled by prosecutors;<sup>47</sup> jury trials are few and far between;<sup>48</sup> the local public has virtually no role at bail or sentencing hearings;<sup>49</sup> and decisions on criminal fines, probation, parole, conditions of incarceration, and post-release supervision usually occur far away from the community. At most, the public can affect the practice of criminal law by electing district attorneys and judges or through referenda, and even this is relatively remote and controlled by imperfect information.<sup>50</sup> Thus, incorporating the community into criminal justice supplies a way for many different citizens to partake in the practice and imposition of criminal justice, one that is frequent, inclusive, thoughtful, and meaningful—an exercise that has become increasingly rare in the modern era.

Regular community participation also helps mend the substantive gulf between criminal procedure and community values. By better fostering the lay public's understanding of criminal process and by clarifying the link between crimes and specific penalties, participating in the criminal justice process both educates the community as a whole and reinforces retributive justice, which requires that offenders must know the punishment for crimes before they are committed.

Local citizens are more likely to think that the criminal justice system is fair if they have had a direct part to play in its workings. This is especially true if the community helps impose punishment on offenders who have, more likely than not, committed crimes in the local neighborhood. If impenetrability reduces the public's belief in the law's legitimacy, then participating in the adjudication of the community's wrongdoers permits the public to see how criminal justice works both procedurally and substantively. This, in turn, allows some lost trust in the system to be rebuilt.

#### IV. COMMUNITY INVOLVEMENT AND CRIMINAL JUSTICE NORMS

Community participation also assists in inculcating public preference directly into the criminal law. There are few, if any, majoritarian ways in

---

<sup>47</sup> See Peter F. Vaira, *Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line?*, 75 J. CRIM. L. & CRIMINOLOGY 1129 (1984).

<sup>48</sup> See, e.g., Benjamin Weiser, *Trial by Jury, a Hallowed American Right, Is Vanishing*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/nyregion/jury-trials-vanish-and-justice-is-served-behind-closed-doors.html> [<https://perma.cc/79XE-BW7Y>].

<sup>49</sup> See generally APPLEMAN, *supra* note 5.

<sup>50</sup> See, e.g., Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 582 (2009); Juleyka Lantigua-Williams, *Are Prosecutors the Key to Justice Reform?*, ATLANTIC (May 18, 2016), <http://www.theatlantic.com/politics/archive/2016/05/are-prosecutors-the-key-to-justice-reform/483252/> [<https://perma.cc/3DTQ-ELW4>].

which the citizenry may straightforwardly affect change in any administrative-type body, let alone one as important as the criminal justice system. Having the community partake in active criminal justice processes cannot replace the power and consequence of the jury trial, but it is a decent compromise: the lay public still gets to adjudicate an offender's punishment, but there is no tremendous sacrifice in efficiency or procedural change such as there would be in bringing back the jury trial for all criminal adjudications.

The lay citizen's ability to integrate community values into criminal justice decisionmaking also helps the jury fulfill one of its primary duties under the Constitution: resisting governmental abuse of power against the public and counteracting any judicial bias or corruption.<sup>51</sup> The fact that the jury has been entirely eliminated from the current plea process means that the experiences of average members of society have also necessarily been eliminated from the criminal justice system.

Criminal law plays a critical part in helping sustain the moral agreement needed to maintain social norms in our diverse society. By eliminating the role of the lay citizen, our current criminal procedure robs us of an important norm-creating opportunity in the realm of criminal justice. Restoring community participation to our common criminal procedures likewise restores the community's role in creating meaningful social norms.

There is undeniably an important civic interest in having some inquiry and adjudication occur in front of the community, particularly for a serious crime. Allowing the public to learn, through its participation in criminal process, the circumstances of the alleged crime and the proposed punishment provides a positive externality. Although there is not the public expiation of a trial, the local community's role in criminal adjudication provides at least some measure of how our institutions have responded to current events.

If part of the court's role in American society is helping express our social values, then the public's knowledge that the community is helping impose those values is particularly useful. By requiring the criminal justice system to incorporate the lay public into the criminal process, we help signal to everyone that fairness and procedural due process are intrinsic parts of the criminal justice system.

Finally, requiring the local community to participate in the imposition of punishment helps inculcate an important aspect of deliberative democracy into the criminal justice process. This is partially because the

---

<sup>51</sup> See AHKIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 11 (1998).

lay public is generally acknowledged to be a critical part of democratic government. Indeed, citizen participation in lawmaking promotes democracy because the express participation of community members enhances the legal system's legitimacy, widening its receptivity to local values. Such popular participation in legal deliberation provides a way for citizens to resolve moral disagreements in a quasi-public sphere using collective, reasoned discussion.<sup>52</sup>

The very action of participating in criminal adjudication creates democratic deliberation, a process that is useful to both the individual citizen and the country as a whole. By its very inclusivity of all citizens, democratic deliberation provides political purpose for participants, giving ordinary citizens "confidence about their ability to influence political decisions and thus increases their willingness to participate in politics even after the end of their jury service."<sup>53</sup>

The democratically deliberating citizen is also a local citizen. Only the local citizen can truly bring the values of the community into the courtroom whether for a trial or a plea bargain. Although "strangers" can equally hand down the law, they would not bring the peculiar standards and morals that only those living in the actual community would truly know.

#### CONCLUSION

Restoring interest, power, and accountability to the local community is a critical step in fixing some of the current problems with our criminal justice system. There is a great need to restore a populist aspect to the punishing and sentencing of criminal offenders. When the public feels too distant from the workings of crime and punishment—and only sees the media representation of crimes and the occasional (in)famous trial—they often react by calling for ever harsher and lengthy sentences. In contrast, allowing the community to participate in a much larger slice of criminal procedure gives the lay public a more realistic—and more personalized—view of the criminal justice system, hopefully fostering a less punitive streak.

Although incorporating community participation within our current structure of criminal adjudication might be both challenging and expensive, the results might make it well worth the difficulty. Including the local community will ultimately increase our familiarity, as well as our comfort level, with the processes of criminal justice. To combat the system's

---

<sup>52</sup> See Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 125, 130–31.

<sup>53</sup> Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 342 (2003).

current reality of hurried, incomplete justice, it may well be necessary to slow down the inexorable machinery of criminal process. If a system's credibility is proven by how it treats its poorest, weakest, and most disadvantaged, then our criminal justice system is in dire need of reworking. Inserting the community voice into the process may be one of the easier ways of doing so without bringing the whole machinery to a halt.

As both a practical measure and a fundamental matter of political theory, the people should be involved in the machinations of criminal punishment. Our current system cuts the lay public entirely out of the picture. Although there is no one perfect solution to the complicated reality of the guilty plea world, reinvolving the community in criminal adjudication is one way to start, a way that reflects our constitutional history, our democratic structure of government, and our desire to ensure that criminal justice is both fair and proportional. Local adjudicatory participation may not be the magic bullet for the woes of our criminal system, but it is an important aspect of criminal justice that has been neglected for far too long.

