

UPSIDE-DOWN JURIES

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ABSTRACT—The practical disappearance of the jury trial ranks among the most widely examined topics in American criminal justice. But, by focusing on trial scarcity, scholars have managed to tell only part of the story. The unexplored first-order question is whether juries even do their work well. And the answer to that question turns on the kinds of work jury members are typically required to do. Once upon a time, trials turned upon practical reasoning and general moral blameworthiness. Modern trials have come to focus upon legal reasoning and technical guilt accuracy. In turn, the jury has evolved from a flexible body to a rule-bound institution. But, of course, even as trials have changed, laypeople’s capacities have stayed largely the same. Laypeople remain more skilled at the art of equitable evaluation than the science of legal analysis.

It does not follow, however, that the criminal justice system should revert to equitable trial practices. The modern trial is professional and legalistic for good reason. The rule of law commands that criminal convictions be products of precisely drawn criminal codes and formal processes. Nevertheless, there are other procedural stages—arrest, charge, bail, bargain, and sentence—where equitable discretion is more appropriate. These are the stages at which criminal justice should concentrate lay efforts.

In this Symposium Essay, I describe the historical and constitutional trends that have entrenched popular participation in all the wrong places. And I propose redirecting jury practice from criminal trials to other adjudicatory sites. Finally, I make the case that my reforms are consistent with (and perhaps even integral to) the legality principle, properly considered.

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INTRODUCTION

The hallmark of the American jury trial is popular participation. The lay jury has long been celebrated as a lay buffer against the “arbitrary action[s]” of legal professionals—“against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”¹ But there is some reason to believe that the Sixth Amendment’s jury trial right could, in fact, undermine meaningful popular participation in American criminal justice. Indeed, a number of prominent plea bargaining critics have offered a version of this claim.² They maintain that the contemporary jury trial is just too costly to scale. As Albert Alschuler colorfully observed almost forty years ago: “Here we have an elaborate jury trial system, and only 10% of the accused get to use it That’s like solving America’s transportation problems by giving 10% [of drivers] Cadillacs and making the rest go barefoot.”³ In the decades since Alschuler uttered those words, the problem has grown only worse. As of 2006, jury trial rates for felony offenders in state court had flattened out in the low single digits.⁴

I remain somewhat hesitant to sacrifice hard-fought procedural protections in favor of some fictionalized historical ideal.⁵ Modern evidentiary rules are important. And the right to counsel is indispensable.

¹ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

² “Albert Alschuler and Stephen Schulhofer have expressed support for the so-called ‘Philly model’” that couples a ban on bargaining with stripped-down bench trials to lesser charges. Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 358 n.168 (2012); see Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652 (1981); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037 (1984). John Langbein has expressed support for the kinds of informal jury trials that typified common law criminal justice. John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 21 (1978) (proposing an inquisitorial “streamlined . . . procedure” as “a middle path between the impossible system of routine adversary jury trial and the disgraceful nontrial system of plea bargaining”).

³ *Is Plea Bargaining a Cop-Out?*, TIME, Aug. 1978, at 44 (quoting Albert Alschuler).

⁴ BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 24 (2009), <https://www.bjs.gov/content/pub/pdf/fssc06st.pdf> [<https://perma.cc/MP8L-E4KB>] (noting that just 4% of felony offenders “were found guilty by a jury”).

⁵ Bowers, *Normative Grand Juries*, *supra* note 2, at 358–59.

Nevertheless, it does seem that the full-dress jury trial, which Justice Antonin Scalia once termed the “exorbitant gold standard of American justice,” is just that—exorbitant.⁶ All the same, my immediate claim is somewhat different. I intend to put to one side the question of whether we can afford the “gold standard” to ask whether, in the first instance, the full-dress jury trial even *is* the gold standard. It might not be.

I do not mean to question the virtue or value of popular participation. To the contrary, I am at least a reluctant proponent of criminal justice reforms designed to promote democratic experimentalism and localism.⁷ But I worry that we have lost track of which questions lay bodies are best equipped to consider and answer. Succinctly, they are particularly well suited to evaluate the moral (and even prudential) questions of when and whether it is equitably appropriate to arrest, charge, brand, and punish.⁸ They are comparatively worse at analyzing and applying formal legal tests.⁹ Here, I use the terms “evaluate” and “analyze” quite consciously. As applied to criminal justice, the art of equitable evaluation is constructive. It demands *particularistic* attention—a qualitative effort to contextualize the offense and the purported offender. The layperson strives to understand the *whole story* affectively—to use her everyday wisdom to reach sensible determinations in light of the circumstances.¹⁰ The science of legal analysis, by contrast, is deconstructive and rule-bound. The professional breaks legal tests down to their constituent parts—or elements—and determines whether the evidence proves each element according to the prevailing burden of proof.¹¹

Of course, the lines between the two crafts may blur. For example, an adjudicator cannot determine whether a particular defendant acted negligently or recklessly without first making a normative determination about the appropriate standard of conduct or care.¹² But, generally

⁶ *Lafler v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting); see also Bowers, *Normative Grand Juries*, *supra* note 2, at 358–59.

⁷ See, e.g., Bowers, *Normative Grand Juries*, *supra* note 2, at 331; Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85 (2007); *infra* notes 68–83 and accompanying text (discussing where and when I welcome popular participation in criminal justice).

⁸ *Infra* notes 42–67 and accompanying text.

⁹ *Infra* notes 68–74 and accompanying text.

¹⁰ *Infra* notes 22–29, 48–52, 59–67 and accompanying text.

¹¹ *Infra* notes 30–39, 68–73 and accompanying text.

¹² See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a “Pointless Indignity,”* 66 STAN. L. REV. 987, 1019–21 (2014); see also LEON GREEN, JUDGE AND JURY 184 (1930) (“[T]here is no method of ascertaining in advance whether conduct is negligent or non-negligent. . . . As an element of legal responsibility it is at large, and defies the efforts of legal scientists to bring it under more definite control.”); Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 332 (1940) (“The law cannot tell us exactly what is an unreasonable risk of

speaking, there are procedural stages that demand somewhat more *evaluation* and procedural stages that demand somewhat more *analysis*. And the dominant conception of the legality principle, as it applies to criminal justice, commands a high level of analytic exactness on questions of statutory guilt—what I will call *legal guilt*. This contemporary emphasis on formalism finds expression, most notably, in the constitutional prohibition against vague statutes. But it may be found elsewhere, as well. Juries are commanded to follow precise legal instructions. And modern *mens rea* standards are given meanings more thoroughly defined than abstract historical culpability concepts, like malice and moral blameworthiness. These substantive and procedural rules and standards are designed to promote rule of law values—like consistency, coherence, and predictability.¹³

Elsewhere, I have criticized the dominant conception of legality as an unwarranted form of rule fetishism.¹⁴ But formalism has its place. And, for better or worse, the criminal justice system has made the trial the principal place for formalism.¹⁵ But trials are not the only meaningful stages of criminal justice. Cases are shaped and fates may be sealed by decisions to arrest, charge, set bail, and sentence. These decisions permissibly may remain relatively flexible. But significantly, these are also the very decisions that, constitutionally, have been left almost entirely to professionals. There are narrow exceptions. The capital sentencing jury comes to mind, for instance. But noncapital discretionary jury sentencing is almost nonexistent. And, even though grand juries are comparatively widespread, their ability to exercise qualitative oversight—what I have called “equitable discretion”—has contracted in lockstep with contemporary jury practice.¹⁶ In both jury contexts, authorized lay opportunities to evaluate cases contextually have been replaced by fixed procedures and structured law, dictated from on high.¹⁷ Simply put, moral and prudential questions are professional questions only. If lay bodies are

injury. It is unreasonable to define the reasonable. The reasonable depends on circumstances, and times and places . . .”).

¹³ *Infra* notes 30–37 and accompanying text.

¹⁴ Bowers, *Pointless Indignity*, *supra* note 12; Josh Bowers, *Annoy No Cop*, 166 U. PA. L. REV. (forthcoming 2017) (on file with author).

¹⁵ *Infra* notes 68–74 and accompanying text (arguing that it may be appropriate to keep trials comparatively rule-bound).

¹⁶ Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010); *infra* notes 22–34, 95 and accompanying text (describing historical and current jury practices).

¹⁷ *Infra* notes 22–37 and accompanying text.

consulted at all, it is often merely to rubberstamp technical legal determinations.¹⁸

This is an unfortunate turn of events. Especially when it comes to equitable questions of moral blameworthiness, laypeople are experts—competent to reach determinations uncolored by certain problematic institutional incentives and cognitive biases of the kind that may plague the repeat player.¹⁹ My premise, then, is that the Sixth Amendment has enshrined popular participation in the wrong place and as to the wrong set of questions. By historical accident, the Constitution has locked laypeople into the very roles they are least equipped to play—formalistic roles.

I favor lay bodies for their competency, not their legitimacy. On this reading, the principal virtue of popular participation is grounded less in democratic theory than moral particularism.²⁰ Lay bodies are to be prized for what they do, not who they are. They are means to the end of equitable discretion, appropriately exercised. If I am right, then we would be wise to get juries out of the business of analyzing legal guilt and into the business of evaluating normative guilt and other relevant moral and prudential considerations. In other words, we should want to move juries from the trial stage to the stages of arrest, bail, charge, bargain, and sentence. And we might even choose to export these normative juries to the very kinds of cases and crimes about which moral minds tend to differ—*mala prohibita* misdemeanors and other public order offenses.²¹

In Part I, I briefly trace and comment upon the historical development of the jury. In Part II, I examine the need for (and exceptional ability of) laypeople to exercise equitable discretion. Finally, in Part III, I revisit and

¹⁸ *Infra* notes 39–41 and accompanying text.

¹⁹ As I argued previously:

[The criminal justice professional] is the *administrative* and *legal* expert and ought to be empowered to exercise significant discretion within these domains. But she has no special claim against lay people to the evaluative art of equitable discretion. To the contrary, her equitable perspective is complicated by her professional position, whereas the lay decision maker is free to make moral judgments with fresh eyes that are unclouded by institutional incentives and biases.

Bowers, *Normative Grand Juries*, *supra* note 2, at 332; *see also* Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 39 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) (“More than the professional, the layperson has the capacity and inclination to cut through the thicket of legal and institutional norms . . . to the equitable question of blameworthiness . . .”).

²⁰ On moral particularism, see JONATHAN DANCY, *ETHICS WITHOUT PRINCIPLES* 1 (2004); *infra* notes 53–60 and accompanying text.

²¹ Bowers, *Normative Grand Juries*, *supra* note 2, at 342 (“[W]hen it comes to the enforcement of public-order crimes, equitable evaluation plays the more robust role.”); *see also infra* notes 68, 75–107 and accompanying text.

introduce a set of proposals for normative juries. I explain that at least some of these reforms are viable under current resource constraints. Moreover, they remain consistent with our original understanding of (and aspirations for) popular participation in criminal justice.

The proposed reforms are ambitious, to be sure. And I am not convinced that we ought to adopt all of them. But some experimentation is warranted. To the extent a significant stumbling block remains, it is a lack of will more than impracticality. The institution of the full-dress jury trial is just too deeply engrained in our ideas and ideals about criminal justice. And the Sixth Amendment is largely responsible for entrenching those ideas and ideals. The paradox is this: the legalistic jury underserves our constitutional aspirations, but its very existence saps energy from viable reform.

I. THE HISTORICAL JURY

At the Founding, substantive and procedural criminal law looked remarkably different. There was no professional police force. Laymen often prosecuted cases. Grand and trial juries played principal (even dominant) roles.²² And, because premodern juries were unencumbered by structured criminal codes (and, for that matter, top-heavy rules of criminal procedure and evidence), these juries were authorized to make normative decisions about whom to charge and convict.²³ Grand juries did more to initiate charges. And these charges—statutory or otherwise—were structured less and open more to interpretation by trial juries.²⁴ At bottom, criminal law was less about “applying a particular set of rules” than “keeping the peace”

²² Cf. Stephanos Bibas, *Transparency & Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 918–19 (2006) (discussing the historical prevalence of jury trials); Bowers, *Normative Grand Juries*, *supra* note 2, at 323–29 (discussing historical influence of grand juries); Lawrence M. Friedman, *Plea Bargaining in Historical Perspective*, 13 LAW & SOC’Y REV. 247, 257 (1979) (noting that “the rise of professional police and full-time prosecutors . . . put an end” to any time where “full-scale trial by jury was the norm”); John Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC’Y REV. 261, 262–65 (1979) (noting the historical evolution of the jury trial).

²³ Cf. RONALD J. ALLEN ET AL., *COMPREHENSIVE CRIMINAL PROCEDURE* 64 (4th ed. 2016) (explaining that, at common law, “the body of rules that define[d] the elements of crimes[] had little meaning, since juries could decide what the law was on an ad hoc basis”); Bowers, *Mandatory Life*, *supra* note 19, at 28 (“[I]t was the jury’s duty to declare the law’s meaning, and, when the jury shaped the law according to a particularistic moral evaluation, the jury was just doing its job. . . . It was not until much later that this robust and legitimate exercise of jury power was recast as unlawful nullification.”).

²⁴ As I have examined elsewhere, the historical grand jury played an especially powerful equitable role. Bowers, *Normative Grand Juries*, *supra* note 2, at 329–43; see also Roger A. Fairfax, Jr., *Grand Jury Discussion and Constitutional Design*, 93 CORNELL L. REV. 703, 706 (2008) (“[T]he grand jury was never designed as a mere sounding board to test the sufficiency of evidence . . .”).

through “a communal legal culture” that “depended on the presence and participation of people in local communities.”²⁵

Deep factual questions of motive and character were integral because contemporary concepts of *mens rea* had not yet crystalized. Instead, the operative measure of criminal culpability was “general moral blameworthiness.”²⁶ The aim, as one nineteenth-century legal scholar put it, was to appeal to the juror’s “downright common sense, unsophisticated by too much learning,” a mode of evaluation in which jurors engaged independent of formal trial rules of evidence and procedure.²⁷ Unlike today, the prevailing model was neither due process nor crime control, but a “summary process” model,²⁸ whereby the jury sought “to do justice between the parties not by any quirks of the law . . . but by common sense as between man and man.”²⁹

The historical approach was neither optimal nor ideal. Too much moral reasoning and too little law can lead to criminal justice that is far from egalitarian.³⁰ But the pendulum has swung hard to the opposite pole.

²⁵ Jessica K. Lowe, Book Review, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 LAW & SOC. INQUIRY 788, 793 (2011) (internal quotation marks omitted). See generally STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* (2012) (describing historical shift to professionalized criminal justice).

²⁶ Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994 (1932); see also JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 31 (1994) (“[J]urors generally had effective power to control the content of the province’s substantive law.” (quoting WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 29 (1975))); JOHN HOSTETTLER, *THE CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY* 41 (2004) (describing how the jury “reflected the interests of the local community as opposed to those of central authorities”); Bowers, *Mandatory Life*, *supra* note 19, at 28 (“[A] given amorphous *mens rea* term typically operated as little more than an arbitrary symbol into which decision-makers could pour the meaning they felt appropriate for the case at hand.” (internal quotation marks omitted)).

²⁷ Edward P. Wilder, *Trial of Issues of Fact—Jury v. Judges*, 13 W. JURIST 391, 395 (1879).

²⁸ Bowers, *Normative Grand Juries*, *supra* note 2, at 359. See generally Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 41 (1979) (observing that historical “rapid trials” have been replaced by “cumbersome and expensive” modern jury trials); Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964) (describing the due process and crime-control models of criminal process).

²⁹ William E. Nelson, *The Eighteenth-Century Background of John Marshall’s Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 910 (1978) (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 297 (1969)); see also *id.* (explaining that eighteenth-century juries were considered to be “good judges of the common law of the land” (quoting Letter from James Sullivan to Elbridge Gerry (Dec. 25, 1779) (on file with Massachusetts Historical Society))). Consider this grand jury instruction from 1759—that prospective charges “need[ed] no Explanation [since] your Good Sense & understanding will Direct ye as to them.” NELSON, *supra* note 26, at 26 (internal quotation marks omitted).

³⁰ *But cf. infra* notes 45–50 and accompanying text (indicating the manner by which localism and a balance of institutional authority and power may promote consistency and limit caprice).

Substantive and procedural law has hardened into the set of casts we recognize today. Whereas historical juries were arbiters of law and fact,³¹ modern juries are no longer authorized to shape law to accommodate even the most compelling equitable circumstances. To the contrary, juries must accept the law as judges give it. As the Supreme Court explained in *Sparf v. United States*:

[I]t is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence. Upon the court rests the responsibility of declaring the law, upon the jury, the responsibility of applying the law so declared³²

Moreover, the legal instructions that judges now give are comparatively precise. Trial judges use pattern instructions to avoid sloppy orders that may open convictions to appeals.³³ Over the past century, American criminal justice has come to reject almost entirely common law criminality and likewise vague or otherwise open-ended statutes.³⁴

We may call this transition the *legality turn*. It arose out of a perceived “especial need for certainty” in criminal law.³⁵ Louis Michael Seidman has pointed to it to explain why “formalism continues to dominate criminal jurisprudence” even though “realism’s lessons for criminal law seem obvious.”³⁶ The idea is that the exceptional stakes of criminal justice entail special protections—protections that rigid rules better provide.³⁷ Premodern

³¹ *Supra* notes 22–29 and accompanying text.

³² 156 U.S. 51, 102 (1895).

³³ Paul Marcus, *Judges Talking to Jurors in Criminal Cases: Why U.S. Judges Do It So Differently from Just About Everyone Else*, 30 AZ. J. INT’L & COMP. L. 1, 60–62 (2013).

³⁴ HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 86–87 (1968) (describing development of the legality principle and concluding that “after centuries of retrospective law-making by judges . . . the process of judicial law-making in the criminal field has . . . come to a halt” (emphasis omitted)).

³⁵ Stephen R. Perry, *Judicial Obligation, Precedent, and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 256 (1987) (internal quotation marks omitted); *see also* Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 217 (2012) (observing that the rule of law is especially important to criminal justice because “its currency is ultimately life and death, prosperity and ruin, freedom and imprisonment”); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 37 (1974) (discussing criminal law’s long tradition of “strict adherence to rules”).

³⁶ Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 103 (1996); *cf.* Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 700 (1967) (“[C]rime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality . . .”).

³⁷ *See* Bowers, *Pointless Indignity*, *supra* note 12, at 988–95 (examining and critiquing the prevailing perspective); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 201 (1985) (explaining that “appeals to the ‘rule of law’” as they apply to the penal law tend to entail “the resort to legal formalism as a constraint against unbridled discretion”); *cf.* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 821 (1994) (explaining that criminal justice is different in kind from other

criminal justice was considered just too formless to adequately protect against official acts of caprice or abuse.

But there are tradeoffs and underappreciated costs. Grand juries have become comparatively useless puppets of the state.³⁸ And the influence of trial juries has been replaced by the technocratic expertise of the professional administrator (to wit, the charging and bargaining prosecutor).³⁹ She alone typically decides whom to charge and when to initiate a bargain. And mandatory sentencing law has magnified her leverage to compel guilty pleas. Lay trial jurors are left with little work to do. And what little work remains is mostly formal application of fixed law to fact. Equitable discretion is not absent from such a system. No system can or should eliminate equitable discretion entirely.⁴⁰ But the executive agent is generally the only actor authorized to work the equitable levers. Equitable power has been made the province of the prosecutor. It is hers to bestow—if it is to be bestowed at all.⁴¹

Setting aside, for present purposes, the question of whether this aggregation of equitable discretion is bad or good, the descriptive points remain: even though jury practice has evolved significantly since the Founding, our aspirations for the institution have remained largely unchanged. The Supreme Court has continued to celebrate the “common-

forms of legal regulation and that “liberty from confinement cannot be relegated to the status of unprotected aspects of daily life”). Elsewhere, I have devoted considerable space to the claim that—at least in some circumstances—a supplemental procedural and comparatively evaluative conception of the rule of law could constrain the state better than a wholly formal approach. A procedural model would provide even technically guilty individuals with meaningful opportunities to tell their stories and demand understanding. Bowers, *Pointless Indignity*, *supra* note 12, at 996–98; Bowers, *Annoy No Cop*, *supra* note 14; *see also infra* notes 53–60 and accompanying text. All the same, I readily concede that the *legality turn* has proven more good than bad.

³⁸ *See* Bowers, *Normative Grand Juries*, *supra* note 2, at 328 (discussing trope that the modern grand jury would “indict a ham sandwich”); William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174, 178 (1973) (arguing that the modern grand jury “operates as a sounding board for the predetermined conclusions of the prosecuting official”).

³⁹ *See* Bowers, *Legal Guilt*, *supra* note 16, at 1660, 1706–12; Bowers, *Mandatory Life*, *supra* note 19, at 25, 34–36; *see also* Rachel E. Barkow, *Mercy’s Decline and Administrative Law’s Ascendance*, in CRIMINAL LAW CONVERSATIONS 666 (Paul H. Robinson et al. eds., 2009) (characterizing the shift in power from juries to prosecutors as a product of “a widespread belief in the administrative sphere that there were right answers to be found by professionals with training and expertise”).

⁴⁰ *See* Bowers, *Normative Grand Juries*, *supra* note 2, at 340 (“[B]ias and discrimination are endemic to any discretionary system. . . . [T]he immediate choice is not between a proposed discretionary regime and a preexisting determinate . . . regime; it is the choice about who may exercise equitable discretion”); *see also* Stephanos Bibas, *Forgiveness in Criminal Procedure*, 4 OHIO ST. J. CRIM. L. 329, 347 (2007) (“[A]ll of these concerns are legitimate but far from fatal. Discrimination, arbitrariness, and variations in temperament, eloquence, and attractiveness are endemic problems in criminal justice. Remorse, apology, and forgiveness are at least neutral metrics and criteria to structure and guide discretion.”).

⁴¹ *See* Bowers, *Legal Guilt*, *supra* note 16, at 1660, 1706–12.

sense” of the jury over “the more tutored but perhaps less sympathetic reaction of the single judge.”⁴² Even Chief Justice William Rehnquist once commented that the lay juror’s “very inexperience is an asset because it secures a fresh perception . . . , avoiding the stereotypes said to infect the judicial eye.”⁴³ In other words, we have grown to prize the very notions of equity that informed our original understanding of the jury, even as we have neutered the body with an ever more legalistic trial structure and substance. Today, the institution often fulfills its aspirational role through subterfuge only, by nullifying law or otherwise operating extralegally.⁴⁴

II. COMPLETE JUSTICE

No stakeholder should wield equitable power exclusively. And there are particular reasons to be wary about leaving this power to the professional American prosecutor. Expansive criminal codes and draconian mandatory sentencing laws make it just too tempting for prosecutors to make guilty pleas the price of equitable punishment. Defendants who insist on exercising trial rights are threatened thereafter with trial penalties.⁴⁵ In such circumstances, a popular body may provide a popular buffer between the prosecutor and her incentives. A healthy dose of localism and populism may serve to moderate otherwise draconian enforcement decisions and to generate meaningful attention to (and affective understanding of) the particulars of particular cases.⁴⁶ On this logic, efforts to experiment

⁴² *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968); *see id.* at 157 (“[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.”); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (explaining that the value of the jury “lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen”); *see also Louisiana v. Taylor*, 419 U.S. 522, 530 (1975) (discussing the need for a representative jury to “guard against the exercise of arbitrary power”); *State v. Pelham*, 824 A.2d 1082, 1095 (N.J. 2003) (Albin, J., dissenting) (“[J]urors, through their collective experience and humanity, are the conscience of the community . . . [and] the best means of delivering justice.”).

⁴³ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 355 (1979) (Rehnquist, J., dissenting) (internal quotation marks omitted).

⁴⁴ *See* Bowers, *Mandatory Life*, *supra* note 19, at 33–36; *supra* notes 31–37 and accompanying text.

⁴⁵ *See* Josh Bowers, *Plea Bargaining’s Baselines*, 57 WM. & MARY L. REV. 1083 (2016) (examining coercion theory as applied to plea bargain practice).

⁴⁶ Bill Stuntz has traced harsh modern penal policies to a lack of localism in criminal justice. William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1974 (2008) (“[For t]he detached managers of urban criminal justice systems . . . criminal justice policies are mostly political symbols or legal abstractions, not questions the answers to which define neighborhood life. Decisionmakers who neither reap the benefit of good decisions nor bear the cost of bad ones tend to make bad ones.”); *id.* at 2033 (noting that in the “sphere of governance, equality and local democracy go hand in hand”); *see also* Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1168 (1998) (arguing that there is “no basis . . . to presume that [criminal justice

democratically serve as means more than ends—means to temper and abolish contextually official opportunities for coercive conduct and harsh treatment.⁴⁷

It is no accident that Martha Nussbaum has defined the practice of equity in criminal justice as “a gentle art of particular perception, a temper of mind that refuses to demand retribution without understanding the whole story.”⁴⁸ Equitable discretion typically goes hand in hand with merciful treatment and a capacity to appreciate and accept claims of normative innocence.⁴⁹ That is my aim—to create noncoercive conditions whereby even a legally guilty offender might be able to articulate his story in an effort to cultivate understanding and, possibly, mitigation.⁵⁰ But what are these conditions? In the first instance, we need unstructured standards to “complement[]” legality’s conventionally rule-bound baselines.⁵¹ Beyond that, we need an audience willing and able to hear and comprehend the stories that unstructured standards invite.⁵² And this is where laypeople come in.

My orientation, then, is not so much with radical democrats or even civic republicans but with rule skeptics (think, for instance, philosophical anarchists or virtue theorists).⁵³ I do not prize popular participation qua

professionals] are better situated than the members of [local] communities to determine . . . a reasonable trade off between liberty and order”); cf. ABRAMSON, *supra* note 26, at 18 (“[L]ocal knowledge . . . qualifies the juror[s] to understand the facts of the case and to pass judgment in ways that a stranger . . . could not . . . [T]hey know the conscience of the community and can apply the law in ways that resonate with the community’s moral values and common sense.”).

⁴⁷ See Bowers, *Normative Grand Juries*, *supra* note 2, at 324 (discussing the concept of a lay screen, such as a grand jury, as “more of a quasi-legislative body than an executive or judicial body[.] . . . a grassroots political [institution] . . . that serves to reshape the rough edges of the law in a decidedly populist fashion”).

⁴⁸ Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 92 (1993).

⁴⁹ See Bowers, *Legal Guilt*, *supra* note 16, at 1678–86 (describing strands of equitable discretion).

⁵⁰ See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 55–56 (2008) (describing the adjudicatory practice of “offering both sides an opportunity to be heard” to be one of the “elementary features of natural justice”).

⁵¹ Seana Valentine Shffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214, 1221 (2010) (“[R]ules without clear methods of application may require standards as complements . . .”).

⁵² *Infra* notes 61–67 and accompanying text (discussing the capacities and experiential wisdom of laypeople, and describing the manner by which unstructured standards invite moral deliberation).

⁵³ Compare DANCY, *supra* note 20, at 1 (expressing the strong particularist account that “moral judgment can get along perfectly well without any appeal to” generally applicable rules), and *supra* note 48 and accompanying text (quoting Martha Nussbaum, a proponent of virtue ethics), and *infra* note 64 and accompanying text (quoting Lawrence Solum, another proponent of virtue ethics), with Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (advocating disaggregated democratic institutions as a means to empower political minorities and distribute participatory experiences among citizens), and Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice* 111 NW. U. L. REV. 1367 (2017) (discussing philosophies of radical democrats and civic republicans).

participation. Rather, I simply reject our overreliance upon rules.⁵⁴ There are overlaps, of course, between the democratic experimentalist and the rule skeptic. Compare, for instance, Jeremy Waldron, who celebrates citizens as “active centers of intelligence,”⁵⁵ with Seana Shiffrin, who likewise emphasizes popular “moral deliberation.”⁵⁶ Both thinkers recognize the “virtue of standards” and “evaluative ideal.”⁵⁷ But Shiffrin is more concerned with the manner by which “opaque” and “evaluative” standards might promote the objectives of democratic experimentalism by “empower[ing] citizens” and fostering “robust democratic engagement with law.”⁵⁸ For Waldron, however, the causal arrows flow the other way. He favors popular participation principally because it is the most likely means to produce moral deliberation and a quality of moral argument integral to “[t]he procedural aspect of the Rule of Law.”⁵⁹ It is Waldron’s “richer conception” of the rule of law to which I am committed—a conception that stands in “tension” with the dominant formalistic conception of the legality principle and its overarching “ideal of formal predictability.”⁶⁰

Laypeople are uniquely well suited to evaluate normative principles, like fairness, dignity, autonomy, mercy, forgiveness, coercion, and even equality.⁶¹ More to the point, laypeople are particularly good at desert judgments. Questions of proportionality, blameworthiness, and social responsibility are ultimately normative and evaluative, more than legal and analytic.⁶² And I am far from alone in this assessment.⁶³ The Aristotelian

⁵⁴ See Bowers, *Pointless Indignity*, *supra* note 12, at 1025 (discussing the rules–standards debate and resisting the criminal justice system’s prevailing emphasis on rules); Bowers, *Annoy No Cop*, *supra* note 14 (same); see also Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1984).

⁵⁵ Waldron, *supra* note 50, at 59.

⁵⁶ Shiffrin, *supra* note 51, at 1222.

⁵⁷ *Id.* at 1222, 1240 (“[O]ne virtue of standards is that their lack of precision induces moral deliberation”); Waldron, *supra* note 50, at 12 (“[W]e need to understand the facts of political life and the reality of the way in which power is being exercised before we can deploy the Rule of Law as an evaluative ideal.”).

⁵⁸ Shiffrin, *supra* note 51, at 1214, 1218, 1227, 1240 (endorsing the “virtues of fog” as a means to promote “deliberation and conversation on the ground, redounding to the moral health of both citizens and a democratic polity”).

⁵⁹ Waldron, *supra* note 50, at 5, 59 (“I do not think that a conception of law or a conception of the Rule of Law that sidelines the importance of argumentation can really do justice to the value we place on governments to treat ordinary citizens with respect as active centers of intelligence.”).

⁶⁰ *Id.* at 8, 58; see also *id.* at 5 (“[O]ur understanding of the Rule of Law should emphasize not only the value of settled, determinate rules and the predictability that such rules make possible, but also the importance of the procedural and argumentative aspects of legal practice.”); Bowers, *Annoy No Cop*, *supra* note 14.

⁶¹ *Infra* notes 62–67 and accompanying text.

⁶² As I argued previously:

view is that human interactions are not captured well by rules.⁶⁴ Moreover, social science has shown that “lay judgments about core wrongdoing are intuitional.”⁶⁵ For the layperson, “the common concerns of life” are more important than any mechanistic measure.⁶⁶ These are the same common concerns that courts continue to credit—consciously or otherwise—whenever they champion “the good sense of a jury.”⁶⁷

[T]he full measure of moral blameworthiness is to be found in neither code nor casebook, court nor classroom. It is the product of neither executive nor judicial pronouncement. To the contrary, it arises out of the exercise of human intuition and practical reason, applied concretely to the particular offender and his act.

Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, A Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 136 (2012); see also Stephanos Bibas, *Political Versus Administrative Justice*, in CRIMINAL LAW CONVERSATIONS, *supra* note 39, at 677 (“Deferring to government officials makes sense when they possess technocratic expertise . . . [C]riminal justice policy is much more about lay moral intuitions than about apolitical expertise.”); Bowers, *Legal Guilt*, *supra* note 16, at 1674 (arguing that “a more particularistic focus on an actor’s blameworthy conduct better accounts for common moral intuitions” (internal quotation marks omitted)); cf. Jeremy Waldron, *Inhuman and Degrading Treatment: The Words Themselves*, 23 CAN. J.L. & JURIS. 269, 284 (2010) (describing a jurisprudential approach that accommodates a more or less “shared sense among us of how one person responds as a human to another human”).

⁶³ See, e.g., Kyron Huigens, *Virtue and Inculcation*, 108 HARV. L. REV. 1423, 1445 (1995) (observing that an evaluation of moral blameworthiness involves an exercise of “practical judgment”); Kyron Huigens, *The Jurisprudence of Punishment*, 48 WM. & MARY L. REV. 1793, 1820 (2007) (“[D]esert for legal punishment is informal and particularistic.”); Stephen J. Morse, *Justice, Mercy, and Crazyness*, 36 STAN. L. REV. 1485, 1493 (1984) (explaining that proportionality provides no “invariant[or] objective deserved punishment for each offensive act”); see also RICHARD J. BONNIE ET AL., CRIMINAL LAW 12 (4th ed. 2015) (explaining that, according to some commentators, “one of the strengths of retributive theory is its sensitivity to contemporary community morality”).

⁶⁴ ARISTOTLE, THE NICOMACHEAN ETHICS 133 (David Ross trans., Oxford Univ. Press rev. ed. 1988) (“[A]bout some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error.”); Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 178, 206 (2003) (“[T]he infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”); cf. *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (“[P]roblems are not solved by the strict application of an inflexible formula. Rather, their solution calls for the exercise of judgment.”).

⁶⁵ Paul H. Robinson, *Reply*, in CRIMINAL LAW CONVERSATIONS, *supra* note 39, at 62.

⁶⁶ *State v. Schoenwald*, 31 Mo. 147, 155 (1860); see also Bibas, *supra* note 22, at 914, 931 (noting that “[lay] [o]utsiders . . . focus on . . . offenders’ just deserts” and “care about a much wider array of justice concerns than do lawyers, including . . . blameworthiness, and apologies”); Bowers, *Blame by Proxy*, *supra* note 62, at 143 (“[R]etributive valuation relies upon particularized exercise of practical intuition and intelligence, not on formal legal designations. It requires a contextualized commonsense determination that is sensitive to all relevant circumstances.” (internal quotations marks and footnotes omitted)).

⁶⁷ *State v. Williams*, 47 N.C. (2 Jones) 248, 259 (1855) (emphasis omitted) (discussing “the good sense of a jury . . . that . . . take[s] a common sense view of every question”); see also *supra* notes 26–29 and accompanying text (citing and quoting contemporary sources); cf. 1 WILLIAM BLACKSTONE,

But, of course, the layperson's talents are not boundless. The pertinent question, then, is when popular perspective adds value or virtue and when it does not. This is why I remain opposed to (or, at least, deeply agnostic about) trial jury nullification. The practice may serve as a needed corrective to a particular normative injustice. But the law is left sullied. As I once observed: "Equitable discretion is necessary and proper, but it also should be kept in its proper place. Trials should remain principally about legal questions; by contrast, other adjudicatory stages—arrest, charge, bargain, and sentence—can appropriately accommodate exercises of equitable discretion."⁶⁸

At trial, I remain committed to the dominant conception of the principle of legality. Formalism fits well with the modern criminal trial and the adjudication of legal guilt. And this is precisely why popular participation no longer fits so comfortably there. That is to say, trials have changed, but moral reasoning has not. What the Michigan Supreme Court wrote in 1874 is equally true today—that lay jurors are “not likely to get into the habit of disregarding any circumstances of fact, or of forcing cases into rigid forms and arbitrary classes.”⁶⁹

By contrast, legal professionals do much better at trial. They tend—as a matter of temperament and training—to sort cases analytically into predetermined categories, boxes, and types.⁷⁰ This form of reasoning is over- and underinclusive and thereby somewhat fictive.⁷¹ But it produces its own kind of accuracy—formal guilt accuracy.⁷² In other words, when the lawyer “generalizes, and reduces everything to an artificial system, formed

COMMENTARIES ON THE LAWS OF ENGLAND 61–62 (1766) (observing that “established rules and fixed precepts” have the capacity to destroy equity’s “very essence” by “reducing it to a positive law”).

⁶⁸ Bowers, *Legal Guilt*, *supra* note 16, at 1685; *see also* Bowers, *Normative Grand Juries*, *supra* note 2, at 338 (explaining that trial nullification problematically “renders law a subjective manifestation of what the community believes it to be”). *See generally* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996) (examining the practice of jury nullification as a threat to the rule of law).

⁶⁹ *Hamilton v. People*, 29 Mich. 173, 190 (1874).

⁷⁰ Bowers, *Pointless Indignity*, *supra* note 12, at 1048 (“[T]he lawyer is—by training, experience, and culture—more inclined to categorize and less inclined to contextualize. To think like a lawyer means to give one’s self over to a mythology of formalism . . . driven by the internal and ineluctable logic of the law. It means pretending that . . . decisions are strictly rule-governed, whether they are or not.” (internal quotation marks and footnotes omitted)); *see also* Dennis Jacobs, Lecture, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2859 (2007) (“[J]udges have a bias in favor of legalism and the legal profession It is a matter of like calling unto like.”).

⁷¹ *See* Bowers, *Legal Guilt*, *supra* note 16, at 1691 (discussing the manner by which formal rules may “substitute hollow make-believe for life in fact”); Bowers, *Mandatory Life*, *supra* note 19, at 36 (“[T]rained professionals typically develop heuristics that may frustrate adequate contextualization.”).

⁷² Bowers, *Pointless Indignity*, *supra* note 12, at 1019–21.

by study,” she is just doing her job.⁷³ For this reason, some scholars have suggested that trials should be bench.⁷⁴ According to this view, technical legal questions should be left to the trained professionals.

And I am inclined to agree—*provided that some space is left for evaluations of normative accuracy*. My position is that there are, in fact, two forms of accuracy: *legal accuracy* and *normative accuracy*.⁷⁵ A legally accurate determination attends to the rules. A normatively accurate determination attends to the particulars. Both forms of accuracy demand transparent attention in a system committed to Waldron’s “richer conception” of the rule of law—which I have termed *complete justice*.⁷⁶ The trick is only to determine how to harness each stakeholder’s respective talents. There is a balance to strike; as Douglas Litowitz once remarked: “[B]oth insider and outsider perspectives have an important role to play in any comprehensive account of law [O]utside and insider perspectives can mediate each other The goal is to play multiple perspectives against each other in a kind of hermeneutic conversation”⁷⁷ This

⁷³ State v. Williams, 47 N.C. (2 Jones) 248, 259 (1855). See generally FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991) (describing rule-bound reasoning as the craft of the lawyer).

⁷⁴ See, e.g., Bowers, *Normative Grand Juries*, supra note 2, at 328; Campbell, supra note 38, at 178; Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 294 (1995) (arguing that trained magistrates are better suited than grand jurors to answer legal question of whether probable cause exists for charge); Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System?*, 82 B.U. L. REV. 1, 45 (2002) (arguing that “grand jurors are inherently unqualified to perform [the] statutory duty” of “evaluat[ing] whether or not there is sufficient evidence to establish reasonable cause that the defendant committed a crime”).

⁷⁵ Bowers, *Pointless Indignity*, supra note 12, at 1019–21 (describing two conceptions of accuracy).

⁷⁶ Waldron, supra note 50, at 58; see Nussbaum, supra note 48, at 93, 96 (“Equity may be regarded as a ‘correcting’ and ‘completing’ of legal justice. . . . The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity’s flexible standard.”); Waldron, supra note 35, at 212 (arguing that exclusive attention to “the clarity and determinacy of rules . . . is to slice in half, to truncate, what law and legality rest upon”); see also Bowers, *Normative Grand Juries*, supra note 2, at 330 (“[C]omplete justice requires law tempered by equity, lest it become, in Blackstone’s terms, ‘hard and disagreeable.’” (quoting BLACKSTONE, supra note 67, at 62)); Bowers, *Legal Guilt*, supra note 16, at 1672 (“Complete justice demands both the simple justice that arises from fair and virtuous treatment and the legal justice that arises from the application of legal rules.”); cf. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 373–74 (1996) (“It’s when the law falsely denies its evaluative underpinnings that it is most likely to be incoherent and inconsistent.”); Dan M. Kahan, *Ignorance of Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 154 (1997) (arguing that “[t]he moralizing that occurs with . . . criminal law” is “on balance a good thing” and “probably inevitable in any event” but that it ought to be done “openly”).

⁷⁷ Douglas E. Litowitz, *Franz Kafka’s Outsider Jurisprudence*, 27 L. & SOC. INQUIRY 103, 132–33 (2002).

principle of allocating responsibility according to respective competency is basic to good governance.⁷⁸

But there is no real balance of power in modern American criminal justice. To the contrary, the authority and power of the modern American prosecutor make abuses of discretion and arbitrary treatment almost inevitable.⁷⁹ As Bill Stuntz explained: “[W]hen prosecutors have enormous discretionary power, giving other decisionmakers discretion promotes consistency, not arbitrariness. Discretion limits discretion; institutional competition curbs excess and abuse.”⁸⁰ Particularly when it comes to petty order-maintenance cases, we need “a division of labor”—a partial “*outsourcing of equitable discretion*” from the professional actors who currently possess almost all such power to the lay actors who currently possess almost none.⁸¹ These low-level cases are the very cases where some measure of equitable discretion is anticipated.⁸² Yet these are likewise the cases where police and prosecutors tend to underexercise equitable discretion, yielding instead to their own institutional incentives and cognitive biases, which motivate them to arrest, charge, and bargain reflexively.⁸³

⁷⁸ See William N. Eskridge, Jr. & Philip P. Frickey, *Introduction to HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, at lx (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958) (“In a government . . . each organ has a special competence or expertise, and the key to good government is . . . figuring out which institutions should be making which decisions and how all the institutions should interrelate.”); Bibas, *supra* note 62, at 677 (“Deferring to government officials makes sense when they possess technocratic expertise.”); Bowers, *Legal Guilt, supra* note 16, at 1676 (“By embracing case-specific equitable valuation, the system is not any less consistent per se (even if the inevitable inconsistencies are more apparent); in fact, such a system may even be more consistent and less arbitrary, especially where normative judgments are made by locally responsive and comparatively more transparent lay collectives.”).

⁷⁹ See Bowers, *Mandatory Life, supra* note 19, at 35 (“[T]he risk of abuse of equitable discretion is endemic—as is the risk of abuse across human endeavors. . . . The risk of abuse merely underscores the need for conscientious institutional and legal design intended to express and cabin equitable discretion optimally.”); Margareth Etienne, *In Need of a Theory of Mitigation, in CRIMINAL LAW CONVERSATIONS, supra* note 39, at 631 (“[T]o leave these hard [normative] questions in the hands of any one institutional actor—the judge, jury (or commonly, the prosecutor)—is to leave that group susceptible to accusations of caprice and lawlessness.”).

⁸⁰ Stuntz, *supra* note 46, at 2039.

⁸¹ Bowers, *Normative Grand Juries, supra* note 2, at 359.

⁸² See *id.* at 327 (“[T]here exists something of a disconnect. Most lay and professional stakeholders already agree that suspected murderers, rapists, and robbers almost always *ought* to be charged where probable cause exists to support such charges. However, reasonable minds may, and often do, disagree about optimal or fair levels of (or strategies for) enforcement of petty public-order offenses.” (footnotes omitted)).

⁸³ See Bowers, *Legal Guilt, supra* note 16, at 1660, 1701–02 (examining prosecutorial incentives to charge); Bowers, *Pointless Indignity, supra* note 12, at 1000, 1008 (examining police incentives to arrest).

The notion of exporting trial juries might strike the reader as radical. And it is. But that only goes to show the tremendous hold the constitutional right has on our popular imagination. The Sixth Amendment casts a long shadow. It has flipped the institution *upside-down* and stuck the jury in its awkward place, relegating it to only resource-intensive full-dress trials.⁸⁴ Juries are misplaced—procedurally and substantively. They answer the wrong types of questions at the wrong stages, adjudicating only formal guilt in the wrong types of cases. Consequently, they are left to play no meaningful role in the borderline cases that raise the most significant normative questions.⁸⁵

III. NORMATIVE JURIES

We should not be too hopeful about prospects for radical jury reform. Reform is likely to remain impossible as long as the Sixth Amendment occupies the field, sapping all efforts to critically reconceive of what it means to be a “circuitbreaker in the State’s machinery of justice.”⁸⁶ All the same, I have in mind five proposals—one of which I have already described elsewhere in great detail, and four of which I will just sketch lightly now. These are, essentially, five sites where a lay body might better serve our aspirational hopes for the institution.

First, I have outlined a proposal for a normative grand jury, which would presume probable cause and proceed directly to the normative question of whether a prospective charge was morally or prudentially warranted.⁸⁷ I even described a practical means—involving summary proceedings comparable to brief bail hearings—by which we might extend these normative grand juries also to the kinds of petty cases for which equitable screens are most sorely needed.⁸⁸ Defense attorneys would

⁸⁴ See Bowers, *Normative Grand Juries*, *supra* note 2, at 323–324, 327; *supra* notes 31–41, 44 and accompanying text.

⁸⁵ See Deborah Ramirez, *Affirmative Jury Selection: A Proposal to Advance Both the Deliberative Ideal and Jury Diversity*, 1998 U. CHI. LEGAL F. 161, 166 (explaining that it is “in those close cases where . . . different perspectives . . . can generate results that are different”). A number of grand jury proponents have made a version of this point. See, e.g., Simmons, *supra* note 74, at 23 (observing that “[t]he true power of the grand jury . . . manifests itself in the marginal cases . . . [where] the defendant has a . . . sympathetic story to tell”); *id.* at 44, 50 (observing that juries are likelier to play equitable roles in “cases on the margins”).

⁸⁶ *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

⁸⁷ Bowers, *Normative Grand Juries*, *supra* note 2, at 347–49.

⁸⁸ *Id.* Notably, this would be no great deviation from historical practice, when grand juries not only exercised normative influence, but also commonly considered trivial misdeeds that would probably constitute misdemeanors today. Leipold, *supra* note 74, at 283 n.120 (“Early grand juries might accuse individuals of offenses such as . . . excessive frivolity, . . . failing to grind corn properly and ‘giving short measure’ when selling beer.”); see also Bowers, *Normative Grand Juries*, *supra* note 2, at 324–25

endeavor briefly—through a narrative recitation of equitable considerations specific to the offender or the offense—to convince the normative grand jury not to issue one, some, or all charges. And, because the normative questions are nontechnical, the grand jury could do its work with little instruction.

To be sure, the normative grand jury would look quite different than the positive model. But, notably, some jurisdictions experiment already with grand jury proceedings that allow for defendant and defense participation.⁸⁹ More to the point, the normative grand jury would exercise a kind of latitude widely considered permissible.⁹⁰ Charging is meant to be a discretionary exercise. Indeed, this is precisely why some commentators have rejected the pejorative label of so-called “grand jury nullification.”⁹¹ Their claim is that equitable charging discretion is not only institutionally acceptable but welcome and anticipated.⁹² As Roger Fairfax explained, the grand jury was never meant to be “a mere probable cause filter.”⁹³

Second, we could imagine a normative sentencing jury. Indeed, several scholars have done so already.⁹⁴ Moreover, positive models exist for such a body: not only do some states rely upon sentencing juries in run-of-the-mill felony cases, but also a normative jury is constitutionally required in capital cases at the sentencing phase.⁹⁵ Previously, I proposed

(discussing historical cases in which grand juries refused to indict for equitable reasons, notwithstanding obvious legal guilt).

⁸⁹ Bowers, *Normative Grand Juries*, *supra* note 2, at 344–45.

⁹⁰ *Id.*

⁹¹ Fairfax, *supra* note 24, at 708 n.10 (“The term ‘grand jury nullification’ is somewhat of a misnomer [T]he term . . . does not capture the essence of the enterprise of the grand jury’s exercise of discretion . . . and unfairly yokes grand jury discretion with petit jury nullification” (citations omitted)); Simmons, *supra* note 74, at 48 (“The term ‘grand jury nullification’ is . . . a misnomer because it equates the grand juror’s *proper* exercise of discretionary judgment with a trial juror’s *improper* decision to acquit those whom have been proven guilty.”); *see also* Niki Kuckes, *The Democratic Prosecutor: Explaining the Constitutional Function of the Federal Grand Jury*, 94 GEO. L.J. 1265, 1269 n.19 (2006) (“[J]ury nullification . . . criticisms do not readily apply to grand juries, which have the valid power to decline prosecution even on meritorious criminal charges.”).

⁹² *See* Bowers, *Legal Guilt*, *supra* note 16, at 1662–69. In then-Judge Warren Burger’s words, the prosecutor “is expected to exercise discretion and common sense.” *Newman v. United States*, 382 F.2d 479, 482 (D.C. Cir. 1969).

⁹³ Fairfax, *supra* note 24, at 720.

⁹⁴ For arguments in favor of jury sentencing, *see* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999); Jenia Iontcheva Turner, *Implementing Blakely*, 17 FED. SENT’G REP. 106, 111 (2004) (“Greater jury involvement in sentencing ensures that sentences do not stray too far from popular understandings of blameworthiness and fairness.”).

⁹⁵ *See* *Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (noting that a defendant is entitled to frame arguments for mitigation “in the most expansive terms”); *Ring v. Arizona*, 536 U.S. 584, 609 (2002)

extending the equitable capital model to prospective sentences of life without parole.⁹⁶ We could extend a lite version of the same to all different kinds of cases, including even misdemeanors. Of course, we would need first to overhaul our mandatory sentencing laws (a heavy lift, beyond the scope of this project). But if we could achieve substantive sentencing reform, then the procedural reform—the normative sentencing jury—might be an attractive next step. After all, equitable discretion fits more comfortably with our objectives for sentencing anyway.⁹⁷ In any event, misdemeanor sentencing is typically discretionary already.

My last three proposals are a bit more ambitious and a bit less conventional. I remain unconvinced that they are even viable. But that should not keep us from experimenting cautiously. The first idea is a normative plea jury.⁹⁸ Especially in low-level cases, plea negotiations resemble the kinds of everyday exchanges—sometimes heated, sometimes cordial—that laypeople experience and understand. As Malcolm Feeley observed in his famous examination of misdemeanor justice in practice, these negotiations tend to have more to do with “fleshing out . . . the setting and circumstances of the incident . . . [and] the defendant’s background” than the legal merits of the pending charges.⁹⁹

(requiring a jury to find aggravating factors necessary to impose death sentence); *Payne v. Tennessee*, 501 U.S. 808, 822 (1991) (“[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances . . .”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (observing that the capital sentencing body is allowed to consider “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death” (emphasis omitted)); see also Bowers, *Mandatory Life*, *supra* note 19, at 25.

⁹⁶ Bowers, *Mandatory Life*, *supra* note 19, at 39 (“[T]he layperson has the capacity and inclination to cut through the thicket of legal and institutional norms (that are not the layperson’s stock in trade) to the equitable question of blameworthiness that is and ought to be central to the sentencing determination.”).

⁹⁷ See DAVID GARLAND, *PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY* 1 (1990) (noting that punishment falls short of societal expectations because “we have tried to convert a deeply social issue into a technical task for specialist institutions”). Thus, Dan Kahan and Martha Nussbaum endorsed a two-step approach to criminal procedure, distinguishing the legalistic conviction phase from the more appropriately equitable sentencing phase:

In determining an offender’s guilt or innocence . . . the law evaluates her actions, . . . and at that point, the law . . . is ordinarily unconcerned with how the defendant came to be the way she is. But during the sentencing process, the law *has* traditionally permitted the story of the defendant’s character-formation to come before the judge or jury in all its narrative complexity

Kahan & Nussbaum, *supra* note 76, at 368.

⁹⁸ On the possibility of plea juries, see Laura I Appleman, *The Plea Jury*, 85 *IND. L.J.* 731 (2010).

⁹⁹ MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 179 (1979). Similarly, Milton Heumann recorded verbatim the very kinds of cursory (yet consequential arguments) that a defense lawyer might make to a normative plea jury, particularly in

Next, there might even be possibilities for a normative bail jury. Bail proceedings are commonly both substantively meaningful and brief. When we ask how these proceedings can be both at once, we get to the equitable heart of the matter. It is because the practices of arguing for and against bail have less in common with trial advocacy than with the narrative form of short storytelling—a paradigmatic exercise of particularism.¹⁰⁰ The conventional bail argument entails an oral exercise that would be comprehensible to the layperson without much legal guidance for the simple reason that there is not much law to apply.

If nothing else, the use of a bail jury might reduce the frequency with which prosecutors ask for bail in borderline misdemeanor cases. This practice of setting so-called “nuisance” bail—typically, no more than a few hundred dollars—may be tantamount to remand for indigent defendants.¹⁰¹ In this way, a bail jury could be a procedural mechanism for effecting sorely needed substantive bail reform.¹⁰²

Finally, and perhaps most provocatively, we could create a Fourth Amendment jury. In a pair of recent articles, I have endorsed a qualitative conception of Fourth Amendment reasonableness, which would limit the authority of the state, at suppression hearings, from relying exclusively upon comparatively rule-like quantitative measures of guilt, like probable cause. Instead, defendants would be able to argue, at least in some circumstances, that a search or seizure—even if legally supported—was nevertheless equitably unreasonable (or “generally unreasonable”) and

a low-level case. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 40 (1977) (“[H]ere’s a nice kid . . . he’s a college kid.”); *id.* at 109 (“Now look. He’s an old guy. He’s sixty-two years old, how about six months?”); *id.* at 151 (“Army backgrounds, both with tremendous records in the service, all kinds of citations and everything else, fully employed, good family backgrounds, no criminal records These men shouldn’t have felony records for the rest of their lives.” (internal quotation marks omitted)); *see also* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008) (describing equitable plea negotiations); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 38 (2002) (“[T]he compromise outcome allows the prosecutor to respond to the equities in particular cases.” (internal quotation marks omitted)).

¹⁰⁰ *See* Bowers, *Normative Grand Juries*, *supra* note 2, at 347 (“[T]he bail determination relies on a holistic understanding of the contextualized factual circumstances of the alleged incident and the contextualized social circumstances of the alleged offender.”); *cf.* MARTHA C. NUSSBAUM, LOVE’S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 110–15 (1992) (describing the novelist as a particularist).

¹⁰¹ *See* Bowers, *Punishing the Innocent*, *supra* note 99, at 1135–36 (discussing the prevalence of nuisance bail and citing statistics).

¹⁰² For sources and resources on bail reform, *see* *Bail Reform: A Curated Collection of Links*, MARSHALL PROJECT (Mar. 30, 2017, 7:09 PM), <https://www.themarshallproject.org/records/1439-bail-reform#.IVConomrv> [<https://perma.cc/J7SJ-MMQX>].

therefore unconstitutional.¹⁰³ In this way, a court could use an evaluative standard to cultivate understanding of the unique perspective of the suspect or defendant—an affective form of meaningful understanding largely missing from prevailing doctrine. As Paul Robinson and I have examined, lay perspectives on reasonable police conduct tend to diverge—sometimes radically—from the professional perspectives of judges and justices.¹⁰⁴

There are exceptions, of course—cases in which judges may bring lay wisdom to bear. Justice Sonia Sotomayor’s thoughtful and probing dissent in *Utah v. Strieff* comes to mind.¹⁰⁵ Likewise, the Massachusetts Supreme Court recently sought to understand—with reference to a scathing ACLU report—innocent reasons why a young African-American man might run from Boston police in a high-crime neighborhood.¹⁰⁶ These judges strove to put aside their professional training, experiences, biases, and perspectives and do what laypeople do intuitively—to think and reason normatively. But these exceptions are rare. Most judges tend toward the professional approach—formalism over flexibility.

Rather than hope for the exceptional judge, it would be wiser to just let the unexceptional lay body do the equitable work. Thus, we should consider relocating the jury from its awkward home at trial to those procedural stages where laypeople might do the normative job more comfortably and less controversially.

CONCLUSION

My overarching objective—indeed, the animating notion behind my entire research agenda to date—is not to cultivate popular participation in

¹⁰³ Bowers, *Pointless Indignity*, *supra* note 12, at 1019; Bowers, *Annoy No Cop*, *supra* note 14. It would be fair to describe the immediate proposal as a form of “popular constitutionalism.” See generally LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (arguing for forms of popular constitutional review and enforcement).

¹⁰⁴ Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 226 (2012) (“Courts may endorse ostensible reasonable beliefs that the reasonable public does not, in fact, share—that the public, instead, perceives to be either too deferential to the criminal class or, conversely, insufficiently protective of [the privacy of] any citizen (save for the very paranoid).”); see also Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 *HARV. L. REV.* 837, 888 (2009).

¹⁰⁵ 136 S. Ct. 2056, 2069, 2071 (2016) (Sotomayor, J., dissenting) (“Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more . . . We must not pretend that the countless people who are routinely targeted by police are ‘isolated.’ They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere.”).

¹⁰⁶ *Commonwealth v. Warren*, 58 N.E.3d 333, 342 & n.13 (Mass. 2016). *Contra Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (holding that officers had reasonable suspicion where an individual fled “[h]eadlong” at the sight of police in a high-crime neighborhood).

criminal justice, but to reconceptualize what we think of as *guilt* in the first instance. *Legal guilt* is but one metric—the trial metric. *Normative guilt* is another. To my thinking, a wrongful normative penalty may be every bit as abhorrent as a wrongful legal conviction.¹⁰⁷ To minimize legal errors, I am content to leave convictions and acquittals to professional experts. To minimize normative errors, I invite reforms designed to cultivate common sense and human flourishing—to let the layperson do what comes natural, which is the nontechnical business of equitable discretion.

¹⁰⁷ Bowers, *Annoy No Cop*, *supra* note 14 (manuscript at 66) (“The rule of lenity, the presumption of innocence, the Double Jeopardy clause—these and many other procedural protections—are all liberal devices designed to correct (and even overcorrect) for potentially arbitrary errors that could harm the individual. And the costs of error extend likewise to moral arbitrariness.” (footnote omitted)); *cf.* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1018 (1980) (discussing the liberal principle that “it is ultimately better to err in favor of nullification than against it”).