THE TRIAL LOTTERY

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Juries are the lifeblood of our criminal justice system. As the Framers clearly understood, and as the Supreme Court has consistently reaffirmed in recent years, their value goes far beyond accuracy in individual cases. Criminal juries are a democratic bulwark against overzealous state power; they keep prosecutors and police in check. Accordingly, the disappearance of traditional criminal trials is not just a problem for individual defendants. It is a problem for all of us.

In this Article, we propose a novel mechanism to (partly) restore the criminal jury to its rightful pride of place—a trial lottery. In short, a small percentage of cases that plead out should be randomly selected for jury trial notwithstanding the plea, using the plea's terms as an upper limit on punishment. Such a system of lottery trials would yield three systemic benefits. First, it would counteract asymmetries in plea negotiations, leading to a more level field of bargaining. Second, it would 'audit' the law enforcement process, revealing patterns and irregularities in how police investigate and how prosecutors charge. Third, it would revitalize the role of jurors, lawyers, and judges in criminal adjudication. A trial lottery could thus restore a measure of accountability and democratic spirit to criminal justice systems that increasingly feel distressingly void of both.

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I. INTRODUCTION

The criminal jury is undergoing a rhetorical renaissance. Just last term, Justice Gorsuch, writing for the Court in *Ramos v. Louisiana*,[1] reminded that the "right to a jury trial is fundamental to the American scheme of justice."[2] The term before that, he spoke soaringly of "the men and women who make up a jury of a defendant's peers [enjoying ultimate] constitutional authority to set the metes and bounds of . . . criminal punishments."[3] And in 2017's *Pena-Rodriguez v. Colorado*,[4] Justice Kennedy began the opinion of the Court with this paean to the American criminal jury:

> The jury is a central foundation of our justice system and our democracy. Whatever its imperfections in a particular case, the jury is a necessary check on governmental power. The jury, over the centuries, has been an inspired, trusted, and effective instrument for resolving factual disputes and determining ultimate questions of guilt or innocence in criminal cases. . . . The jury is a tangible implementation of the principle that the law comes from the people.[5]

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1. 140 S. Ct. 1390 (2020).
2. *Id.* at 1397 (quotation marks omitted).
3. United States v. Haymond, 139 S. Ct. 2369, 2378–79 (2019).
4. 137 S. Ct. 855 (2017).
5. *Id.* at 860. Such sentiment of course echoes the famous assessment of Alexis de Tocqueville:

> To look upon the jury as a mere judicial institution is to confine our attention to a very narrow view of it; for however great its influence may be upon the decisions of the law courts, that influence is very

These sentiments reflect a straightforward but critical proposition, one that was obvious in the late eighteenth century and should be just as obvious today: the criminal jury, a random assemblage of ordinary people tasked with determining the legitimacy of criminal enforcement, serves as a crucial check on state power.[6] A world in which police and prosecutors need to justify themselves before juries—and, thanks to *Ramos*, before *unanimous* juries[7]—is crucially different from a world in which they only need to

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> subordinate to the powerful effects which it produces on the destinies of the community at large. The jury is above all a political institution . . . . He who punishes infractions of the law is . . . the real master of society. Now the institution of the jury raises the people itself, or at least a class of citizens, to the bench of judicial authority. The institution of the jury consequently invests the people, or that class of citizens, with the direction of society. . . . It teaches men to practice equity, every man learns to judge his neighbor as he would himself be judged . . . . It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society. . . . I do not know whether the jury is useful to those who are in litigation; but I am certain it is highly beneficial to those who decide the litigation . . . .

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 312, 314–15 (Henry Reeve trans., 2002) (1835).

6. While we will not burden this Article with an extensive argument in favor of jury trial—tending rather to accept it as a constitutional aim—one could do far worse than note G. K. Chesterton's famous observations upon serving on a criminal jury:

> Never had I stood so close to pain; and never so far away from pessimism. Ordinarily, I should not have spoken of these dark emotions at all, for speech about them is too difficult; but I mention them now for a specific and particular reason . . . . [B]ecause out of the furnace of them there came a curious realisation . . . what a jury really is, and why we must never let it go. . . . [T]he more a man looks at a thing, the less he can see it, and the more a man learns a thing the less he knows it. . . . And the horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives, and policemen, is not that they are wicked (some of them are good), not that they are stupid (several of them are quite intelligent), it is simply that they have got used to it. Strictly they do not see the prisoner in the dock; all they see is the usual man in the usual place.

G. K. CHESTERTON, *The Twelve Men*, *in* TREMENDOUS TRIFLES 80, 82–83, 85–86 (1909). We highly recommend his entire short essay. One might also look to the arguments, pro and con, of Justice Harlan in *Duncan v. Louisiana*, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

7. *See Ramos*, 140 S. Ct. at 1397 ("There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally.").

convince judges, let alone one in which they bargain only behind closed doors.

In practice, however, the criminal jury has atrophied. Today, precious few convictions are the product of the "gold standard of American justice."[8] Rather, most consist entirely of backroom deals.

8. Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) (so terming the jury trial). Observers have been documenting the 'vanishing jury' for at least a century, yet, remarkably, the vanishing act continues to this day, with the rate of jury trials plunging into the range of only 2 percent. The first generation of plea bargaining studies documenting the paucity of criminal trials occurred in the 1920s. *See* CRIME COMM'N N.Y. STATE, REPORT TO THE COMMISSION OF THE SUB-COMMISSION ON STATISTICS 16–17 (1928); Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 97 (1928); Guy A. Thompson, *The Missouri Crime Survey*, 12 A.B.A. J. 626, 629 (1926); *see also* United States v. Kupa, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013) (placing jury trials on the metaphorical "endangered species" list). The literature in the intervening century is vast. *See, e.g.*, Kiel Brennan-Marquez & Stephen E. Henderson, *Artificial Intelligence and Role-Reversible Judgment*, 109 J. CRIM. L. & CRIMINOLOGY 137, 160–63 (2019) (gathering and commenting upon some of those sources). And the vanishing continues: in fiscal year 2017, 97.2 percent of federal criminal convictions occurred by guilty pleas, while only 2.8 percent of prosecutions led to a bench or jury trial. ADMIN. OFF. U.S. COURTS, CRIMINAL FEDERAL JUDICIAL CASELOAD STATISTICS (MARCH 31, 2018) tbl.D-4 (2018) [hereinafter "2018 CASELOAD STATISTICS"] (criminal trials), https://www.uscourts.gov/statistics/table/d-4/federal-judicial-caseload-statistics/2018/03/31. By another measure for the same year that excludes dismissed charges, 97.1 percent of federal criminal cases ended in guilty pleas, while 2.9 percent went to trial. U.S. SENT'G COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.10 (22d ed. 2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2017/2017SB_Full.pdf. Data from state justice systems for the same year show trial rates that are, in many states and on average, even lower: of twenty-one states (and Washington, D.C.) reporting data on criminal jury trials in general jurisdiction courts in 2017, all had jury trial rates below 3 percent, sixteen had rates below 1.5 percent, and six rates were below 1 percent. *See* NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, 2017 GEN. JURISDICTION CRIMINAL JURY TRIALS AND RATES, http://data2.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa-1&name=Temp/fcae2b45ad494c938c2d62aae9bf027a.html. Of twenty-two states (and Washington, D.C.) reporting bench trial data for general jurisdiction courts in 2017, fifteen had bench trial rates below 1 percent and nineteen had rates below 2 percent. *See* NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, 2017 GEN. JURISDICTION CRIMINAL BENCH TRIALS AND RATES, http://data2.ncsc.org/QvAjaxZfc/QvsViewClient.aspx?public=only&size=long&host=QVS%40qlikviewisa-1&name=Temp/24a7957a50c5409db6a6faff4e05b881.html [hereinafter CRIMINAL BENCH TRIALS AND RATES]. Finally, while the exclusive scope of this Article is American criminal justice, we should note that plea bargaining is spreading throughout the world. *See generally* Máximo Langer, *Plea Bargaining, Trial-Avoiding Conviction Mechanisms and the Global Administratization of Criminal Convictions*, 4 ANN. REV. CRIMINOLOGY 377 (2021); Rebecca Shaeffer, *The Trial Penalty: An International Perspective*, 31 FED. SENT'G REP. 321 (2019). For specific data on the diminution of jury trials over time, *see infra* Part II.

"[P]lea bargaining," the Supreme Court conceded in 2012, "is not some adjunct to the criminal justice system; it *is* the criminal justice system."[9]

Few seem happy about this.[10] Certainly the Framers would have been less than sanguine.[11] In what follows, we propose a partial—but

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9. Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

10. The literature critical of plea bargaining is vast and deep, and it would unduly bloat this article to attempt any serious bibliography. But any interested reader can dive in by considering the following, which are organized alphabetically (and, within that, chronologically). *See* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) (arguing that plea bargaining ought to be abolished); Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1298 (1975) (arguing that to "deny the coercive character of the system" is to "magnify its injustice"); Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COLUM. L. REV. 1059 (1976) (arguing that judicial bargaining is as coercive as prosecutorial bargaining); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 652 (1981) (arguing that "plea bargaining remains an inherently unfair and irrational process"); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 934 (1983) (again arguing for abolition of plea bargaining because it has "undercut the goals of legal doctrines"); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CALIF. L. REV. 1585 (2005) (arguing that the plea bargaining process favors conflict resolution over truth-finding and accuracy); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004) (arguing that structural influences and psychological factors cause plea bargaining to deviate substantially from any ideal); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978) (equating the pressures that caused a European move to torture with those that caused our move to plea bargaining); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1979 (1992) (arguing that plea bargaining "seriously impairs the public interest in effective punishment of crime and in accurate separation of the guilty from the innocent"); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004) (arguing that prosecutors, not substantive criminal laws, dictate the terms of plea bargaining).

11. *See* United States v. Haymond, 139 S. Ct. 2369, 2375, 2380 (2019) (plurality opinion) (quoting Letter from Clarendon to W. Pym (Jan. 27, 1766), *in* 1 PAPERS OF JOHN ADAMS 169 (R. Taylor ed., 1977) (describing "the right to trial by jury [as] 'the heart and lungs, the mainspring and the center wheel' of our liberties") and Blakely v. Washington, 542 U.S. 296, 306 (2004) (describing the jury as the "circuitbreaker in the State's machinery of [criminal] justice")). Well into the twentieth century, some courts would refuse to permit felony bench trials. *See, e.g.*, Harris v. People, 21 N.E. 563, 564 (Ill. 1889), *overruled by* People ex rel. Swanson v. Fisher, 172 N.E. 722 (Ill. 1930).

> A jury of 12 men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that, in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a

powerful—remedy: a lottery, whereby a small number of cases headed for guilty pleas are selected randomly for trial adjudication. The lottery would include some manner of quota to ensure that a minimum share of criminal cases in each jurisdiction—maybe 5 or 10 percent—were decided by juries. The charges would be those to which the defendant was willing to enter a guilty plea that the trial judge was prepared to accept, thus excluding any charges that prosecutors voluntarily dismissed or for which defendants or prosecutors demanded a trial during plea negotiations. Defendants would face no "trial penalty," because the maximum punishment for any lottery trial conviction would be capped by the proffered guilty plea or plea agreement.

We recognize—as has the Supreme Court—that "[j]ury trials are inconvenient for the government."[12] However, "like much else in our Constitution, the jury system isn't designed to promote efficiency but to protect liberty."[13] Still, efficiency matters, and a lottery would promote the systemic benefits of criminal trials while simultaneously minimizing their costs. Lotteries are generally a fair mechanism of scarce resource allocation,[14] and, in this particular context, a lottery

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> substitute for a jury, and perform their functions in such cases, and, if he attempts to do so, his act must be regarded as nugatory. Especially must this be true where the jury are not only the judges of the facts as at common law, but are also the judges of the law as provided by our statute.

Id.

12. *Haymond*, 139 S. Ct. at 2384.

13. *Id.*

14. *See, e.g.*, NEIL DUXBURY, RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING 3 (Oxford Univ. Press 1999) ("The lottery offers a fair way of dealing with many uncomfortable, or even inherently unfair, dilemmas."); Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 27 SOC. SCI. INFO. 483, 510 (1988) (developing an argument that "[l]otteries are just when and because they offer the possibility of sanitary, neutral and equal allocations of social goods under circumstances where these egalitarian virtues are otherwise unavailable"); Peter Stone, *Why Lotteries Are Just*, 15 J. POL. PHIL. 276, 292 (2007) (articulating a contractarian account of just lotteries); *see also* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 933 (2011) (arguing for randomized trials of some laws and regulations as is commonplace in medicine); Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 708–10 (2018) (arguing for a lottery docket in the United States Supreme Court); David P. Farrington & Brandon C. Welsh, *A Half Century of Randomized Experiments on Crime and Justice*, 34 CRIME & JUST. 55, 55–56 (2006) (chronicling randomized experiments in policing and criminal justice between 1957 and 2004 and urging more of the same); Ronen Perry & Tal Z. Zarsky, *"May the Odds Be Ever in Your Favor": Lotteries in Law*, 66 ALA. L. REV. 1035, 1037 (2015) (developing a multidisciplinary framework to encourage appropriate randomizations). Some have persuasively argued that, on the margins, even merits decisions ought to be randomized. *See* JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE

would yield numerous systemic benefits. The lottery would reconfigure prosecutorial incentives during plea bargaining. Prosecutors—as agents of a repeat player armed with coercive power—enjoy a number of structural advantages in the bargaining process which the specter of trial by lottery would work to counteract. The lottery would also function as a randomized audit of the criminal justice system, ferreting out abuse and producing information relevant to democratic governance. Finally, the lottery could help revitalize the civic participation at the heart of the Founding-Era vision.

Our argument proceeds as follows. In Part II, we survey the grim reality that all across the United States criminal trial rates are absurdly low, with little prospect for change. Next, in Part III, we theorize the benefits of a trial lottery in principle. Finally, we close in Part IV by exploring a litany of implementation questions. Although we hardly purport to answer these questions definitively, we end on a note of muted but sincere optimism. We are not claiming a trial lottery could cure all criminal justice woes—far from it—nor that its implementation will be simple or obvious. But the right and principle of trial by jury—and the self-governance it ultimately serves—are too important not to try.

II. THE CURRENT REALITY

Despite the continued veneration of the jury trial in the American political order and criminal procedure jurisprudence,[15] such trials are rare. In the two years from March 2017 through March 2019, only 2 percent of federal defendants had jury trials, and only 2 percent of federal criminal convictions resulted from jury verdicts.[16] Federal

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LIMITATIONS OF RATIONALITY 99–101 (1989) (urging that as a matter of epistemic humility, it might be entirely proper to decide a merits decision by coin flip); Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 6–8 (2009) (same); DUXBURY, *supra*, at 122–31, 139 (same). Socrates of course famously posited (as always, according to Plato) that a critical criterion for wisdom is a realization of what one does not—and perhaps cannot—know. *See* Plato, *The Apology of Socrates*, *in* APOLOGY, CRITO AND PHADO OF SOCRATES 13–48 (Henry Cary trans., David McKay ed., 1897). We would not, however, go so far as Bernard Harcourt, who would randomize a great deal of criminal justice merits decisions. *See* Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtue of Randomization*, *in* CRIMINAL LAW CONVERSATIONS 163, 167–72 (Paul H. Robinson et al. eds., 2009). Harcourt employs rather *too much* epistemic humility for our taste, but his arguments are intriguing.

15. *See supra* notes 1–5 and accompanying text.

16. *See* ADMIN. OFF. U.S. CTS., CRIMINAL FEDERAL JUDICIAL CASELOAD STATISTICS (MARCH 31, 2019) tbl.D-4 (2019) [hereinafter "2019 CASELOAD STATISTICS"]; 2018 CASELOAD STATISTICS, *supra* note 8, tbl.D-4. Accounting for bench trials increases the total trial rates in federal courts to 2.3 percent in 2018

bench trials were even scarcer.[17] Rates of jury trials vary somewhat across state criminal courts and data is spotty, but they seem low everywhere. In all twenty-two states that reported data in 2017, the percentage of jury trials in courts of general jurisdiction was below 3 percent; in most, it was below the 2 percent rate in the federal courts.[18] Looking solely at felony trials, jury trial rates exceed 3 percent of all dispositions in only three of twenty-four states.[19]

This is a familiar story. While plea bargaining was allegedly nonexistent at common law,[20] historians have found evidence that it occurred in some courts by the early to mid-nineteenth century.[21] Negotiated guilty pleas soon became so common that by the 1920s, scholars, bar associations, and government commissions took to documenting—and lamenting—low rates of jury trials, a refrain that continued for decades.[22] And while the focus of this Article is on the *criminal* jury, civil jury trials have long been on the decline as well.

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and 2.2 percent in 2019. *See* 2019 CASELOAD STATISTICS, *supra*, tbl.D-4; 2018 CASELOAD STATISTICS, *supra* note 8, tbl.D-4. By another measure that excludes dismissed charges, 97.4 percent of federal criminal convictions occurred by guilty pleas in 2017–18, while 2.6 percent resulted from jury verdicts. *See* U.S. SENT'G COMM'N, *supra* note 8, tbl.11.

17. *See* 2019 CASELOAD STATISTICS, *supra* note 16, tbl.D-4; 2018 CASELOAD STATISTICS, *supra* note 8, tbl.D-4.

18. Of twenty-two states reporting data on criminal jury trials in general jurisdiction courts in 2017, all had jury trial rates (as a percentage of criminal case dispositions) below 3 percent, sixteen had rates below 1.5 percent, and six rates were below 1 percent. CRIMINAL JURY TRIALS AND RATES, *supra* note 8 (combining felony and misdemeanor numbers). Of twenty-three states reporting bench trial data for general jurisdiction courts in 2017, nineteen had bench trial rates below 2 percent and fifteen had rates below 1 percent. CRIMINAL BENCH TRIALS AND RATES, *supra* note 8.

19. NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, 2017 CRIMINAL CASELOADS–TRIAL COURTS, http://www.courtstatistics.org/ncsc-analysis/criminal. In 2017, Minnesota and Washington, D.C. reported felony jury trial rates of 4.4 percent and 4.3 percent, respectively; New York reported juries for 3.1 percent of felony cases; all others had rates below 3 percent, with most under 2 percent. *See id.*

20. *See* J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660–1800, 336–37 (1986). Even if a bit overstated, the relative change is dramatic.

21. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2004) (documenting plea bargaining in early nineteenth century Massachusetts courts); Mary E. Vogel, *The Social Origins of Plea Bargaining: An Approach to the Empirical Study of Discretionary Leniency*, 35 J.L. & SOC'Y 201 (2008).

22. *See* CRIME COMM'N N.Y. STATE, *supra* note 8, at 16–17; Moley, *supra* note 8, at 97–99; Thompson, *supra* note 8, at 629; Brennan-Marquez & Henderson, *supra* note 8, at 160–61 n.69 (gathering sources).

Indeed, federal civil rates are lower even than their criminal counterparts.[23]

Why are trials vanishing? For at least forty years, the Supreme Court has stressed simple numbers: large caseloads make high rates of guilty pleas necessary and substantial trial rates prohibitive.[24] But while caseloads surely play a role, there is reason to think they are far from the entire story. For example, as criminal caseloads declined in the last decade, relieving pressure on many courts, trial rates in most jurisdictions also continued to decline.[25] In addition, studies of state courts in earlier decades found little evidence that caseloads were a key factor in trial rates.[26] Scholars thus suggest an additional cause: the self-interest of the core professional players in avoiding trials.[27] Plea bargains mean less work for lawyers and judges, they

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23. *See* John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 524 (2012) (summarizing decline in civil trial rates). In 2018–19, 0.8 percent of federal civil cases reached a jury. *See* 2019 CASELOAD STATISTICS, *supra* note 16, tbl.C-4.

24. *See, e.g.*, Corbitt v. New Jersey, 439 U.S. 212, 219 n.9 (1978) (approving a state "system [that] discouraged the assertion of the right to a jury trial by imposing harsher sentences upon those that exercised that right" in light of "the interest of the State in efficient criminal procedure"); Santobello v. New York, 404 U.S. 257, 260 (1971) ("'[P]lea bargaining,' is an essential component of the administration of justice," without which "the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (stating that without plea bargaining "our system of criminal justice would grind to a halt"); Bordenkircher v. Hayes, 434 U.S. 357, 372 (1978) (Powell, J., dissenting) ("The plea-bargaining process . . . is essential to the functioning of the criminal-justice system.").

25. *See* NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, EXAMINING THE WORK OF STATE COURTS: AN OVERVIEW OF 2013 STATE COURT CASELOADS 3 (2013) (documenting a 15 percent decline in total state court caseloads from 2008–13). The National Center for State Court's ("NCSC") Court Statistics Project has both criminal caseload and criminal trial rate data for seventeen states' general jurisdiction courts for the years 2012–2017. *See* NAT'L CTR. FOR STATE CTS., CT. STATS. PROJECT, *supra* note 8. In ten of those seventeen states during that six-year period, both criminal caseloads *and* criminal trial rates declined, suggesting that—at least at the margins—caseload pressure was not a key factor in further reducing already low trial rates. *See id.*

26. For state court studies finding little relation between caseloads and trial rates, see MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 244–66 (1979); MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 27–33 (1978); and compare Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 519 (2004), for a summary of data showing that federal courts formerly resolved more civil cases through trial in periods when they had proportionately fewer judges and resources.

27. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 30–34 (2012); HEUMANN, *supra* note 26, at 69, 90, 148–54 (1979).

provide certainty of outcome to both parties, and they help judges prevent backlogged court dockets.[28] Other contributing causes include prosecutors' increased power, notably from mandatory sentencing laws,[29] and the advent of evidence-gathering techniques and discovery rules that displaced the trial as a means of *discovering* evidence (e.g., via witness testimony), relegating it to a forum for *presenting* evidence with which the parties are already familiar.[30]

Another contributing explanation is an ideological shift regarding plea bargaining. Negotiating for guilty pleas was once a slightly disreputable—if widespread—practice; one that courts rarely mentioned and procedural rules did not address.[31] As recently as the 1960s and '70s, disapproval was sufficiently widespread and mainstream that national criminal justice commissions and bodies such as the American Bar Association criticized plea bargaining and even urged its prohibition.[32] At least among courts and practicing

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28. Thus, it is not surprising to hear reports such as this: "Wayne County judges rarely reject plea agreements." Byrd v. Skipper, 940 F.3d 248, 252 (6th Cir. 2019). And while there is very little empirical evidence, what evidence does exist indicates that judges typically spend relatively little time considering bargains. *See generally* HERBERT S. MILLER ET AL., PLEA BARGAINING IN THE UNITED STATES (Inter-university Consortium for Pol. and Soc. Rsch. 1980) (copy on file with authors) (reporting on 1978 study); Allen F. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL'Y 39, 45–47 (1989) (reporting on 1986 study); John Paul Ryan & James J. Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479, 483–89 (1979) (reporting on 1977 study). *Cf.* Nancy J. King & Ronald F. Wright, *The Invisible Revolution in Plea Bargaining: Managerial Judging and Judicial Participation in Negotiations*, 95 TEX. L. REV. 325, 325 (2016) (claiming a "stunning array of new procedures that involve judges routinely in the settlement of criminal cases"). As usual, it is not *all* bad news.

29. *See* NAT'L ASS'N CRIM. DEF. LAWS., THE TRIAL PENALTY: THE SIXTH AMENDMENT RIGHT TO TRIAL ON THE VERGE OF EXTINCTION AND HOW TO SAVE IT 6–7, 11–12 (2018), https://www.nacdl.org/Document/TrialPenaltySixthAmendment RighttoTrialNearExtinct; *see also* Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313, 313 (2019) (surveying the empirical literature and finding the "trial tax" "typically involves a two- to six-times increase in the odds of imprisonment and a 15–60 percent increase in average sentence length").

30. *See* Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 155–56 (2018); Langbein, *supra* note 23, at 522, 526 (arguing civil discovery rules replaced the need for trial as an evidence generating forum).

31. *See* William Ortman, *When Plea Bargaining Became Normal*, 100 B.U. L. REV. 1435, 1461–63 (2020).

32. *See* TASK FORCE ON THE ADMIN. OF JUST., PRESIDENT'S COMM'N ON LAW ENF'T & ADMIN. OF JUST., TASK FORCE REPORT: THE COURTS 8–13 (1967) (criticizing plea bargaining); NAT'L ADVISORY COMM'N ON CRIM. JUST. STANDARDS

lawyers, that view seems long gone. Beginning in the 1970s, the Supreme Court not only took to approving plea bargaining but to describing it as a wholly legitimate practice that provides benefits to prosecutors, courts, and defendants alike.[33] Somehow, trials are now viewed as events to be avoided.[34]

Two developments are critical in this sharp change in perspective. One is quasi-instrumental and relates foremost to judges; the other is a normative shift in prosecutorial practice. First, a heightened focus on efficiency in adjudication was operationalized—and institutionalized—by new technologies that record, measure, and analyze judges' caseloads and disposition rates.[35] Today, judicial

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& GOALS, REPORT ON COURTS 46 (1973) (calling for nationwide abolition of plea bargaining "[a]s soon as possible, but in no event later than 1978," and urging that "[a] plea of guilty should not be considered by the court in determining the sentence to be imposed"); *id.* at 48 (noting that reform rather than abolition of plea negotiations was recommended by the ABA House of Delegates). However, in an excellent intellectual history of plea bargaining, William Ortman documents widespread acceptance of bargaining among many lawyers and judges by the 1950s. *See* Ortman, *supra* note 31. Supreme Court opinions continue, occasionally, to suggest plea bargaining is disfavored, despite the Court's explicit approval of the practice. *See* Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) ("[W]e have plea bargaining aplenty, but until today it has been regarded as a necessary evil.").

33. *See* United States v. Mezzanatto, 513 U.S. 196, 208 (1995) (praising "mutual settlement" through unregulated plea bargaining); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[T]he prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); Corbitt v. New Jersey, 439 U.S. 212, 218–19 (1978) ("We have squarely held that a State may encourage a guilty plea by offering substantial benefits in return for the plea."); *id.* at 222 ("[P]lea bargaining [is] a process mutually beneficial to both the defendant and the State"); Brady v. United States, 397 U.S. 742, 752–53 (1970) (finding that plea bargaining provides "mutuality of advantage" to parties); *cf.* United States v. Ruiz, 536 U.S. 622, 631 (2002) ("[T]he Government's interest [is] in securing . . . guilty pleas").

34. Nonetheless, in contexts that do not implicate plea bargaining, the Court somewhat inconsistently continues to valorize jury trials, notably in its *Apprendi* line of decisions. *See, e.g.*, United States v. Haymond, 139 S. Ct. 2369, 2373 (2019) ("Only a jury, acting on proof beyond a reasonable doubt, may take a person's liberty. That promise stands as one of the Constitution's most vital protections against arbitrary government."); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) ("'[T]o guard against a spirit of oppression and tyranny on the part of rulers,' and 'as the great bulwark of [our] civil and political liberties,' . . . trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours . . . .'" (alteration in original) (citations omitted)).

35. *See* Galanter, *supra* note 26, at 502, 505; King & Wright, *supra* note 28, at 356–64; Ortman, *supra* note 31, at 1481, 1484 ("[P]lea bargaining's efficiency

"performance" is easily assessed using data from case management software and electronic court records.[36] The availability of such information makes it easier to monitor how well judges fulfill their managerial obligation to process their dockets efficiently.[37] In this context, the more dispositions without trial, the better.

At the same time, plea bargaining's legitimacy has been buttressed by a gradual but clear shift in how prosecutors pursue just dispositions, meaning convictions and sentences that they sincerely view as fair and appropriate. One criticism of plea bargains is that they muddle assessments of whether offenders are getting the right punishment. Is a plea bargain a discount from the 'just' sentence that would follow conviction at trial, or is a post-trial sentence a penalty for refusing to plead guilty and accept an offered, just sentence?[38] The answer may vary for any particular case, but, in the aggregate, it now seems clear that plea bargain dispositions are what prosecutors usually deem appropriate for an offender,[39] while post-trial sentences are unduly harsh. We can make at least an anecdotal case for this claim.

In 2012, federal prosecutors charged Aaron Swartz, a 26-year-old internet activist, with thirteen felonies for allegedly downloading millions of academic articles without authorization.[40] The charges carried a potential maximum sentence of thirty-five years in prison.[41] Yet prosecutors offered Swartz at least two potential plea agreements

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loomed large in the pragmatic Realist mind. . . . Having slayed the formalist objections to plea bargaining, it was uncomplicated for Realists to embrace its sheer efficiency.").

36. *See* King & Wright, *supra* note 28, at 356–64 (describing the adoption and effects of case management software in state criminal courts).

37. *See* Galanter, *supra* note 26, at 519–20. The seminal exploration of this managerial judging, in the context of federal civil litigation, is Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

38. *See, e.g.*, Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1509–16 (2016) (arguing that plea bargaining necessarily fails to satisfy a retributivist).

39. This holds aside cases in which prosecutors agree to what they consider unduly light dispositions (or immunity) for some offenders in order to obtain their cooperation in building other cases, or when they are convinced of an offender's greater liability but lack admissible evidence to prove it. *See id.*

40. *See* Indictment at 10–14, United States v. Swartz, Crim. No. 11-CR-10260-NMG (D. Mass. Sept. 12, 2012), https://ia800309.us.archive.org/1/items/UsaV.AaronSwartz-CriminalDocument53/UsaV.AaronSwartz-CriminalDocument53.pdf.

41. Lincoln Caplan, *Aaron Swartz and Prosecutorial Discretion*, N.Y. TIMES: TAKING NOTE (Jan. 18, 2013, 10:06 AM), https://takingnote.blogs.nytimes.com/2013/01/18/aaron-swartz-and-prosecutorial-discretion/. We recognize, of course, that sentencing guidelines would surely result in a much lower sentence.

that would result in no more than six months in jail.[42] This approach—a massive plea discount—was in line with typical federal prosecution practice.[43] Indeed, in later defending the prosecution in the wake of Swartz's suicide, Attorney General Eric Holder insisted that the initial charges were not disproportionate or otherwise inappropriate *because* prosecutors had made a just disposition available to Swartz; all he had to do was accept the proffered plea agreement.[44] In effect, Holder argued, any disproportionality in the harsh initial charges and the sanctions they carried did not matter because prosecutors sought and expected to achieve a fair outcome by his guilty plea.[45] Similar developments in other federal prosecutions confirm this view.[46]

The point here is not the stark disparity between plea discounts and trial penalties in individual cases, but rather that modern prosecutors in *most* cases see negotiated guilty pleas as both the appropriate mode of disposition and the way to achieve a fair

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42. Amy Chozick & Charlie Savage, *Hacker Case Leads to Calls for Better Law*, N.Y. TIMES (Mar. 17, 2013), http://www.nytimes.com/2013/03/18/technology/outcry-over-computer-crime-indictment-of-matthew-keys.html; Josh Gerstein, *Holder Defends Alleged Hacker's Prosecution*, POLITICO: UNDER THE RADAR (Mar. 6, 2013, 2:43 PM), https://www.politico.com/blogs/under-the-radar/2013/03/holder-defends-alleged-hackers-prosecution-158655; Brendan Sasso, *Holder Defends Prosecution of Activist Swartz*, THE HILL (Mar. 6, 2013, 5:49 PM), http://thehill.com/policy/technology/286547-holder-defends-prosecution-of-web-activist-swartz; Caplan, *supra* note 41.

43. *See generally* HUM. RTS. WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead# (discussing examples of federal prosecutors using plea deals to encourage guilty pleas); *see also* United States v. Kupa, 976 F. Supp. 2d 417, 432–41 (E.D.N.Y. 2013) (providing many examples).

44. *See* Chozick & Savage, *supra* note 42; Gerstein, *supra* note 42.

45. *See* Gerstein, *supra* note 42.

46. *See, e.g.*, *Kupa*, 976 F. Supp. 2d at 432–41, 459–60 (collecting and quoting examples, and recounting prosecutors' explanations about their need to press harsher charges at trial when defendants decline plea offers so that prosecutors can maintain credibility in plea negotiations); NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 29, at 25–26 (chronicling the plea history of the wife of Enron's CFO, in which temporarily stymied prosecutors substituted very different charges to achieve their desired, lesser-penalty outcome); *see also* United States v. Young, 960 F. Supp. 2d 881, 905–08 (N.D. Iowa 2013) (offering judicial criticism of prosecutors' charging and plea negotiation decisions); United States v. Angelos, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006) (characterizing Angelos' mandatory fifty-five-year sentence as "unjust, cruel, and irrational"); Lawrence J. Leiser, *Mr. Angelos is Responsible for his Sentence*, WASH. POST (Dec. 28, 2015), https://www.washingtonpost.com/opinions/mr-angelos-is-responsible-for-his-sentence/2015/12/28/001ca872-acb7-11e5-b281-43c0b56f61fa_story.html (quoting the assistant U.S. Attorney, arguing that the defendant, "by rejecting a reasonable and fair plea offer, has no one to blame for his . . . conviction and sentence" of fifty-five years on drug charges).

resolution. Guilty pleas have not overwhelmed trials simply because courts lack resources to hold trials for most cases or because litigants prefer to avoid the uncertainty of trial outcomes and the burdens placed on witnesses. Instead, some part of the explanation is that prosecutors have come to see negotiated guilty pleas as *better than trials* for achieving the 'right' outcomes for the vast majority of cases.[47]

Judges and juries might or might not agree; they don't see the evidence that would have been produced at trial. In some cases, defendants and their attorneys do, but perhaps not when it matters most—when prosecutors have relatively weak cases.[48] Yet defendants accede to plea bargains not merely because of strong state evidence or the pressure of prosecutors' threatened trial penalties. In some circumstances, defendants would prefer negotiated guilty pleas even if trial posed little risk of a worse outcome. Speedier resolutions through guilty pleas can benefit some defendants enormously—even innocent ones[49]—especially if conviction means the end of detention and the chance to return to family and employment. And speedier resolution is, unfortunately, critically important to many defense attorneys whose fees are explicitly or effectively capped.[50] Other defendants simply want to avoid a public trial, especially if family or friends would be called as witnesses. And in some circumstances, the goal is to avoid collateral consequences. Indeed, sometimes both the prosecution and defense agree to "fictional pleas"—pleas to charges that do not accurately describe the defendant's conduct but are designed to avoid consequences that both parties perceive as unjust.[51]

47. Notably, in the view of many prosecutors, negotiations can be a fair procedural substitute for trials when they are substantial, evidence-heavy discussions with defense counsel. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2125–27, 2129 (1998) (arguing that, in federal practice, an informal adversarial process occurs in pretrial discussions between prosecutors and defense attorneys, conducted in prosecutors' offices).

48. *See* John G. Douglass, *Balancing Hearsay and Criminal Discovery*, 68 FORDHAM L. REV. 2097, 2141 (2000) (former federal prosecutor conceding that prosecutors are less inclined to share evidence in weaker cases).

49. *See* Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1170, 1173–74 (2008) (explaining the benefits that innocent defendants can reap from "false pleas").

50. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1281 (2002).

51. *See* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 860, 864 (2019) (describing and providing examples of fictional pleas). Johnson distinguishes "factual fictions" from guilty pleas to "nonexistent crimes," which several courts have upheld. *See id.* at 863–64; *see, e.g.*, People v. Myrieckes, 734 N.E.2d 188, 194 (2000) ("[I]t is not unlawful for the State and a defendant to bargain for a plea of guilty to even a nonexistent crime if the defendant receives a benefit.").

In sum, for numerous reasons, negotiated guilty pleas have made the criminal jury trial a rare, exceptional mode of adjudication. The era in which presidential commissions, bar associations, attorneys general, and local court systems would argue for the abolition of plea bargaining is long gone. Nor are there any changes on the horizon that might lead to more frequent trials—no plunging criminal caseloads, no sharp budget increases for judiciaries and publicly funded lawyers, and no dramatic reforms to speed up the trial process. Yet the jury trial's current marginal role hardly accords with the constitutional purposes guaranteed in Article III[52] and the Sixth Amendment,[53] nor even with more contemporary political ideals.[54] The challenge, then, is how to restore a somewhat more meaningful role for the American criminal jury.

III. THE BENEFITS OF A TRIAL LOTTERY

Enter our proposal: a "trial lottery," whereby a small percentage of cases that plead out are sent to trial anyway, with the terms of the plea deal setting the upper bound of penal exposure for the defendant. In other words, the lottery would select a small handful of cases in which the state would be put to its burden of proving guilt beyond a reasonable doubt. If it could do so to the satisfaction of a jury, the case would default to the terms fashioned in the plea agreement. If not, the defendant would receive either (1) a lesser conviction or (2) an acquittal, depending on the trial outcome.

In Part IV below, we explore the implementation of such a lottery. Before getting into those details, however, we explain how such a mechanism could make headway on several pathologies caused by the disappearance of the criminal jury. First, the vanishing of the jury has distorted the dynamics of plea bargaining. Second, it has deprived courts, legislators, and members of the public of an important source of information about police and prosecutorial conduct. Third, it has caused the trial readiness of institutional actors in the criminal justice system—from judges and lawyers to court administrators and support staff—to atrophy. Fourth, it has all but eviscerated the democratic "checking" function of juries.

A. Leveling the Playing Field

Plea bargaining is not a level playing field.[55] Even setting aside the myriad forms of practical unfairness that defendants commonly

52. *See* U.S. CONST. art. III, § 2, cl. 3.

53. *See* U.S. CONST. amend. VI.

54. Again, criticism of plea bargaining is legion. *See supra* note 10.

55. *See generally* Bibas, *supra* note 10, at 2464–68 (arguing that both structural and psychological biases skew bargains away from their "trial expected and then discounted" terms). For a useful overview of the "bargaining in the

face—such as low-quality lawyering, language barriers, lack of institutional sophistication, and draconian levels of authorized punishment—the state also enjoys two major *structural* advantages in the process.

First, as repeat players on a large scale, prosecutors are able to spread the risk of uncertainty across cases; they enjoy a "portfolio" advantage when they sit down at the bargaining table.[56] Because the prosecutor has many cases to manage, she can play the margin, taking a detached, rational, cost-minimizing approach to the process.[57] As cold as it seems to make the comparison, the game of poker offers a good analogy. If you are going to play five thousand hands of poker, you strike a very different orientation to the game than if you were going to play five hands. Economists have formalized this insight,[58] but the point is intuitive: when pricing risk across cases one becomes less invested in the individual case, leading to greater tolerance for case-to-case volatility.

Second, the state has the option of dismissing charges up until the moment of a verdict, no matter how far along a case has developed.[59] This observation may seem so obvious as to hardly bear

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shadow of the trial" literature, see Daniel D. Bonneau & Bryan C. McCannon, *Bargaining in the Shadow of the Trial? Deaths of Law Enforcement Officials and the Plea Bargaining Process*, 1, 2–4 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457809.

56. For background on this concept, see Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 70 (2010).

57. This highlights an important issue: namely, an individual prosecutor's structural advantage is not due to the fact that *she* is a repeat player (though that may also be true) but rather to the fact that *the state* is a repeat player. There are, after all, many defense lawyers who are repeat players in the former sense (number of trials, and so forth); the point is that their *clients* are not repeat players, and are less willing, accordingly, to take a rational, minimax approach to negotiation. *See* Bibas, *supra* note 10, at 2497–99, 2519 (describing that criminal defendants often have biases that skew their perceptions of their own trial prospects, which often require defense counsel to attempt to "debias" their clients, who are otherwise not willing to take a rational plea deal); *see also* Anthony O'Rourke, *The Political Economy of Criminal Procedure Litigation*, 45 GA. L. REV. 721, 733, 776 (2011) (exploring the pathologies that accompany a "managerial" orientation toward criminal justice on the part of defense attorneys).

58. *See* Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1517–20 (2006); *see also* Peter Gärdenfors & Nils-Eric Sahlin, *Unreliable Probabilities, Risk Taking, and Decision Making*, 53 SYNTHESE 361, 361–63 (1982) (exploring the distinction between first-order probability and second-order reliability or "resilience," as factors that rationally contribute to decision-making).

59. Technically—and importantly—this may require court and/or defendant consent. *See, e.g.*, FED. R. CRIM. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may

mention. But its structural implications are profound. If the state—practically speaking—has the unilateral capacity to drop cases, the initiation of a prosecution effectively conscripts the defendant into writing an option contract.[60] Translating back to the poker analogy, this means that the state may "bluff" at significantly reduced cost; if called on the bluff, it can fold with little consequence. But the same is emphatically *not* true of defendants, who must bear the cost of a called bluff. Thus, plea bargaining's dynamics are fundamentally skewed.[61]

We can develop the point as follows: suppose Connor and Sarah enter into a put contract for Stock X—say, a contract that guarantees Connor a sale price of $10. By entering into this agreement, Connor is hedging against the risk that Stock X will dip below $10, and Sarah

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not dismiss the prosecution during trial without the defendant's consent."). But since the only interest contrary to such dismissal would typically be a very nebulous public one, and with a particular defendant's interest in removing even the possibility of conviction so strong and a particular judge's interest in clearing her courtroom calendar so significant, such consent would ordinarily be readily forthcoming. Indeed, in at least the federal system, the Supreme Court has thus made such "leave of the court" a mere ministerial function, as demonstrated by the 2020 opinion by a panel of the District of Columbia Circuit ordering dismissal of the charges against former National Security Advisor Michael Flynn. *See In re* Flynn, 961 F.3d 1215, 1220 (D.C. Cir. 2020), *vacated on reh'g en banc*, 973 F.3d 74 (D.C. Cir. 2020) ("Although Rule 48 requires 'leave of court' before dismissing charges, 'decisions to dismiss pending criminal charges—no less than decisions to initiate charges and to identify which charges to bring—lie squarely within the ken of prosecutorial discretion.'" (quoting United States v. Fokker Servs. B.V., 818 F.3d 733, 742 (D.C. Cir. 2016))). Furthermore, the prosecution can offer such a generous plea bargain that it *effectively* all but dismisses the case, providing similar leverage. *See, e.g.*, STEVE BOGIRA, COURTROOM 302, 326–36 (2005) (chronicling a probably-innocent defendant accepting a plea to misdemeanor probation when the original threat was attempted murder). In the words of a codefendant's attorney, "Can you believe it? He was charged with attempted murder! He gets probation! Couldn't turn *that* down." *Id.* at 309.

60. *See* Bradford Cornell, *The Incentive to Sue: An Option-Pricing Approach*, 19 J. LEGAL STUD. 173, 173–75 (1990) (tracing the analogous dynamic in the civil setting).

61. In the words of Branden Bell, also making a poker analogy:

> Plea bargaining is a rigged game of poker. Consider the chips. The prosecutor risks little: her chips are prosecutorial resources and the professional cost of possibly losing a trial. The defendant risks much more: her freedom meaning, concretely, years spent in prison, missing a daughter's high-school graduation; a son's tenth birthday; a father's funeral. The prosecutor, moreover, has the ability and expertise to bluff, hiding her bad cards while, in virtually every case, freely examining the defendant's entire hand. And the prosecutor can change the bet anytime she likes—forcing a defendant with a winning hand to cut her losses before losing everything.

Branden A. Bell, *Not for Human Consumption: Vague Laws, Uninformed Plea Bargains, and the Trial Penalty*, 31 FED. SENT'G REP. 226, 231–32 (2019).

is betting that Stock X will not dip below $10. Normally, Connor is going to have to pay Sarah for taking on this risk; Sarah is effectively insuring Connor, and, like all insurance, it will cost something.

Now suppose the object of bargaining is not a stock (which, at a minimum, is worth $0) but something that can have negative value, like a poker hand. If Connor and Sarah are playing poker, both face simultaneous upside-possibility and downside-risk; they can win money, or they can lose money. Accordingly, we can imagine a world—contrary to the conventions of typical poker, but conceivable in principle—in which Connor and Sarah could arrange for a side bet of sorts in the form of an option contract. Connor could say to Sarah, "Gosh, I'm nervous about this hand; how much would I have to pay for you to let me walk away with my money (but of course none of yours) up until the moment that we reveal our hands?" Then Sarah could name a price, they could haggle, and an option contract would form.[62] So far, so good.

But what if one party could *unilaterally* enter into an option-style arrangement? What if, due to a structural inequality in the game, Connor has the option to walk away from the hand with his money where Sarah does not? In that case, it is as though Sarah has written an option contract for free (or at least for considerably less than market value), which will clearly affect how both are oriented toward the hand. This stylized shorthand—being able to "walk away from the hand with one's money"—is equivalent to the prosecution's orientation toward acquittal. Acquittal becomes an abstract risk that in practice can virtually always be avoided, distorting the dynamics of negotiation.[63]

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So, again, plea bargaining is not a level playing field. But the point gets even sharper. These two structural advantages—the

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62. *See* RESTATEMENT (SECOND) OF CONTRACTS § 25 (AM. L. INST. 1981); U.C.C. § 2-205 (AM. L. INST. & UNIF. L. COMM'N 1951).

63. For a real-world example of such distortion—prosecutors using criminal charges as a tool of informational leverage—see Frederick P. Hafetz, *The "Virtual Extinction" of Criminal Trials: A Lawyer's View from the Well of the Court*, 31 FED. SENT'G REP. 248 (2019). Hafetz explains as follows:

> This deeply troubling scenario is demonstrated by the experience of veteran Manhattan Federal Defender attorney Julia Gatto in her representation of persons accused of low-level drug offenses. She frequently finds that often mid-investigation, the prosecutor makes the decision to arrest a person without sufficient evidence to convict. Prosecutors do so because they are confident that the defendant will not challenge the case but plead guilty and cooperate to further the investigation. Gatto believes that some of those arrested may be innocent or that the prosecutor would not be able [to] obtain sufficient evidence to convict at trial. Nonetheless, to avoid a mandatory sentence of five years or more for drug offenses, the defendant pleads guilty.

Id. at 251 (footnote omitted).

portfolio advantage and the bluffing advantage—are mutually compounding because both have the same upshot: they allow the state to discount the cost of an adverse outcome. This enhances the state's bargaining position, because—and this is the key point—as the cost of a failed bargain to one party goes down, the more aggressively that party can approach the bargaining process. Put the other way around, if the state could not engage in discounting, it would internalize the cost of acquittals by being more risk-averse in the plea bargain process.[64] Moreover, even if the state did not fully internalize the cost of acquittals—even if some discounting continued to occur—marginal increases in the risk of acquittals would tend to marginally counteract the state's bargaining advantage.

And that, in short, is just what a trial lottery mechanism would do: counteract the state's bargaining advantage by increasing the likelihood, and thus raising the cost, of an acquittal in any given case.[65]

B. Auditing the Enforcement Process

Beyond its structural benefits, a trial lottery would also have a disciplining effect on the law enforcement process: it would operate as a randomized "audit," so to speak, of police and prosecutors. As with financial audits, the auditing efficacy of lottery trials would not require high frequency. Nor would it require that trials expose wrongdoing most of the time.[66] The point is simpler. In a world where

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64. This is simply the flipside of the "ambiguity-aversion" dynamic traced above. To the same extent that defendants in the status quo world can be expected (in the aggregate) to internalize the costs of uncertainty in plea bargaining, so too would the state—at least to a greater extent—in a world constrained by a trial lottery or similar mechanisms. *See* Gärdenfors & Sahlin, *supra* note 58, at 361–63; Segal & Stein, *supra* note 58, at 1517–20.

65. Note that this would hold true *even if* the state could drop the charges upon lottery selection because—assuming there would be stark reputational damage in dropping charges in *every* lottery instance—the overall likelihood of acquittal in the average case would still increase. Furthermore, even cases in which the state's position is so weak (for whatever reason) that having the case called to trial would just result in an immediate fold, the mere existence of two states of the world that prompt the state to fold—(1) having the defendant calling the state's bluff during plea negotiations, and (2) having the case getting called to trial by lottery—would increase the cost as such, at least assuming the cost of folding is nonzero (which it always would be in practice).

66. The literature on tax audits is vast, complicated, and sometimes at least facially conflicting. *See, e.g.*, Marcelo Bergman & Armando Nevarez, *Do Audits Enhance Compliance? An Empirical Assessment of VAT Enforcement*, 59 NAT. TAX J. 817 (2006) (reporting on a study finding that audits negatively deter determined cheaters); Juan P. Mendoza et al., *The Backfiring Effect of Auditing on Tax Compliance*, 62 J. ECON. PSYCH. 284 (2017) (reporting on a study finding moderate audit rates increase tax compliance but higher rates decrease it); Luigi

police officers and prosecutors operate largely beyond public view, trials are an important site of transparency—a window into the process.[67] A trial lottery, then, would work in conjunction with other transparency reforms being urged by *Black Lives Matter* and similar reform movements.[68]

In the course of trying a case, a prosecutor seeks to convince a jury of the legitimacy of her own decision-making process: Why does this particular defendant deserve to have the blunt machinery of the criminal law—and this particular criminal law—mobilized against him?[69] Trial often requires police officers to explain where and how they obtained evidence, sometimes in the face of contradictory accounts.[70] Without a trial, even the defendant will not receive much

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Mittone et al., *The Bomb-Crater Effect of Tax Audits: Beyond the Misperception of Chance*, 61 J. ECON. PSYCH. 225 (2017) (examining the "bomb-crater effect" in which audits seem to decrease tax compliance); Sebastian Beer et al., *Do Audits Deter or Provoke Future Tax Noncompliance? Evidence on Self-Employed Taxpayers* (Int'l Monetary Fund, Working Paper No. 19/223, 2019) (reporting on a recent study finding strong specific deterrence when an audit leads to a greater assessment but negative deterrence when an audit does not); *cf.* J.T. Manhire, *There Is No Spoon: Reconsidering the Tax Compliance Puzzle*, 17 FLA. TAX REV. 623, 630–31 (2015) (reviewing compliance literature and arguing there is actually no "tax compliance puzzle"). The same is true of audits in other areas. *See, e.g.*, Deniz Okat, *Deterring Fraud by Looking Away*, 47 RAND J. ECON. 734, 734 (2016) (arguing for the need to randomize audit methods to avoid subject learning); Charles D. Shaw, *Acceptability of Audit*, 280 BRITISH MED. J. 1443, 1443 (1980) (recognizing debate regarding the utility of medical audits). We do not mean to ignore that complication and merely make the very minor point that properly designed audits have the potential to improve the functioning of the audited system. We find anecdotal evidence for this in our own experience: as professors who have taught for decades, we have seen that the potential to be randomly called upon in class causes better class preparation in many students.

67. *See generally* Andrea Kupfer Schneider & Cynthia Alkon, *Bargaining in the Dark: The Need for Transparency and Data in Plea Bargaining*, 22 NEW CRIM. L. REV. 434 (2019) (developing how little we know about plea bargaining and why that matters to negotiation theory); Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2193 (2014) (arguing that in a world of the vanished jury, we need to meaningfully open nontrial aspects of the prosecution to public—primarily meaning defendants' family and friends—observation).

68. *See, e.g.*, Arian Campo-Flores & Joshua Jamerson, *Black Lives Matter's Years of Pressure Paved Way for Sudden Police Overhaul*, WALL ST. J. (June 18, 2020, 5:40 PM), https://www.wsj.com/articles/black-lives-matters-years-of-pressure-paved-way-for-sudden-police-overhaul-11592516422 (chronicling attempts and successes in improving police transparency).

69. It is true that this function can be more or less robust as courts, for example, permit or restrict argument on nullification. We leave those particulars, however, to other work.

70. For a particularly illuminating example, see *Ruiz v. Florida*, 50 So. 3d 1229, 1230–31 (Fla. Dist. Ct. App. 2011) (differing in accounts regarding the initial encounter and permission to enter, among other issues).

of this information.[71] Again, the aim is not necessarily to smoke out wrongdoing or errors in judgment, though that will certainly be welcome when it occurs. The aim is to produce information: highlighting aspects of the enforcement process, or generating data about the process, that otherwise elude public view.

Over time, for example, a randomized trial audit could refine our understanding of case strength. It might help us determine which variables—severity of charged crimes, likely penalties and collateral consequences, types of evidence driving the case-in-chief, or background features of the criminal-statutory environment—correlate to convictions versus acquittals. Such insight would serve multiple purposes. It would facilitate democratic oversight of the criminal justice system.[72] It would filter back into the plea bargain process, giving defendants—who, per above, are not meaningfully repeat players—a richer view of the probability-space of their particular case. It would be useful for law enforcement officials themselves; although police administrators and prosecutors may theoretically have access to some of this information, underutilization is common.[73] And making the information (even marginally more) public would allow other observers—academics, advocates, data scientists, and the like—to perform analyses and offer recommendations in the service of more refined law enforcement.[74]

Of course, when a lottery trial *did* uncover objectionable law enforcement practice, that would also be beneficial. Part of the theory behind randomized auditing, after all, is that it can help identify "bad apples,"[75] and in the criminal justice context, each bad apple tends to

71. *See* Bell, *supra* note 61, at 226–27, 229–31 (2019) (explaining the discovery that will typically not occur when there is a guilty plea and describing a particular "no look" deal); NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 29, at 28–29 (explaining plea bargains requiring the waiver of other rights).

72. *See* Kiel Brennan-Marquez, *"Plausible Cause": Explanatory Standards in the Age of Powerful Machines*, 70 VAND. L. REV. 1249, 1249–50, 1295–97 (2017) (explaining that reliable information about the criminal justice system is a necessary ingredient for democratic oversight). *See generally* FRANK PASQUALE, THE BLACK BOX SOCIETY 2–8 (2015) (exploring the importance of transparency as a precondition of meaningful regulation).

73. *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2108–12 (2016) (exploring data collection and siloing dynamics within criminal justice institutions).

74. *See* Brennan-Marquez, *supra* note 72, at 1296–97 (discussing the "reinvestment" benefits of greater information about the law enforcement system).

75. Roughly speaking, audits can operate at two levels, or with different targets in mind: the individual case or outcome, and the larger system or process. In the first, the object is to confirm whether an individual outcome or conclusion was correct, as when an Internal Revenue Service ("IRS") audit of an individual tax return either verifies the return or finds errors therein. The second aims to

result in a life destroyed. Perhaps more likely, the trial audit can encourage other actors—like departmental supervisors—to proactively identify bad apples, exerting discipline over the system as a whole. To paraphrase Justice Brandeis, nothing disinfects quite so well as sunlight.[76] Or, in many cases, even the mere threat of sunlight.[77]

C. Revitalizing Participation

Last but hardly least, a trial lottery would help rehabituate all actors—judges, lawyers, jurors, and other citizens—to the trial process. At present, we simply lack a 'trial-ready' populace, bench, and bar.

To begin, consider the effects of plea bargain dominance on both prosecutors and defense counsel. In the words of attorney Frederick Hafetz,

> Observing, as I did in my early years as a prosecutor, the credibility of my witnesses getting pummeled at trial was an invaluable lesson providing critical perspective. Prosecutors, knowing that they were going to be challenged by a trial, would look at cases a different way.
>
> . . .
>
> [Today's reality is that many defense attorneys] try[] no more than a few trials . . . in their career. Just as the prosecutor overconfident from lack of trial experience lacks the ability to assess realistically the strength of his case, the trial-inexperienced defense attorney lacks the skill set to evaluate

assess whether a process is producing sound outcomes over time or multiple iterations, and this too can be learned from many such taxpayer (or other) audits. *See* RISK-LIMITING AUDITS WORKING GRP., RISK-LIMITING POST-ELECTION AUDITS: WHY AND HOW 5 (Jennie Bretschneider et al., eds., 2012), https://www.stat.berkeley.edu/~stark/Preprints/RLAwhitepaper12.pdf (explaining risk-limiting audits in public elections). Audits are used to deter—not merely to detect—unwanted behaviors. *See* DUXBURY, *supra* note 14, at 81–83 (discussing examples of tax audits, sobriety checkpoints, food and hygiene inspections, and athlete drug testing).

76. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

77. This of course hales back to Bentham's famous panoptic effect. *See* JEREMY BENTHAM, THE PANOPTICON WRITINGS 29–95 (Miran Bozoic ed., Verso 1995) (1787).

> realistically the strength of the government case. And, lacking trial experience, he lacks the confidence to challenge it at trial.[78]

In short, the technical skill—not to mention the art—of trial lawyering is disappearing from the legal profession. In addition to marking the twilight of something old and venerable,[79] this deficit has serious repercussions for the administration of criminal justice because every defense attorney must understand trial in order to negotiate a fair plea. There are, of course, plenty of criminal defense lawyers who serve indigent clients at the highest caliber. Working as a federal defender in a major jurisdiction, for instance, is among the most competitive jobs in the legal profession, and relatively often involves courtroom argument. Within such populations, the art of trial lawyering is unlikely to disappear anytime soon. The problem, however, is that there are many criminal defense lawyers who—for understandable reasons—take more of an assembly line approach to their docket. In a world where, as the Court put it, "plea bargaining . . . [effectively] *is* the criminal justice system,"[80] it should hardly surprise that many defense lawyers will spend little time honing their trial skills. But externalities abound. To begin, the trial process itself becomes more wasteful and error prone. For example, when judges and advocates are not in the habit of navigating complex evidence issues, the likelihood of delays, redundancies, and mistakes goes up.[81] Moreover, these dynamics run the risk of producing

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78. Hafetz, *supra* note 63, at 252. Hafetz documents how federal prosecution has changed:

> [Contemporary prosecutors'] lack of trial experience contrasts sharply with that of federal prosecutors prior to enactment of the guidelines and mandatory minimum statutes in the 1980s. Federal prosecutors then frequently tried more than twenty cases in a three- or four-year time period. Since the advent of the guidelines and mandatory minimum sentencing, federal prosecutors frequently try no more than one case each year. There is no substitute for trial experience in the formation of prosecutorial judgment.

Id. at 251–52.

79. *See* ROBERT BRUSTEIN, *Introduction* to ANTON CHEKHOV, THE CHERRY ORCHARD 3–5 (Robert Brustein trans., Nicholas Ruddal & Bernard Sahlins eds., 1995) (1904) (exploring the melancholy that can result from the disintegration of longstanding social institutions).

80. Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

81. One study of the Southern and Eastern Districts of New York, for example, found that since 2010, the number of trials per active judge fell by roughly 20 percent, even given an already low baseline. *See* Jeffrey Q. Smith & Grant R. MacQueen, *Going, Going, But Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does it Matter?*, 101 JUDICATURE 26, 31 (2017) (finding that, from 2010 to 2016, the empaneled jury rate per judge in EDNY decreased from approximately ten to approximately eight per year, and

harmful, fault-irrelevant incentives: a defense attorney who has never been to trial has personal—not merely professional—reasons to plead her client guilty.[82]

Finally, and perhaps most critically, there is all of us—the would-be jurors. On this front, the benefits of a lottery would be twofold. First, just as for judges and lawyers, too few of us have recently served on a criminal jury. In fact, many of us are likely not even close associates of anyone who has recently served.[83] So we citizens are out of practice and hardly ready to take up the heady questions demanded by the criminal law.[84]

But it gets worse. Here, unlike in the case of judges and lawyers, the resultant deficit is not just one of skills; it is also, more importantly, one of democratic accountability.[85] When criminal justice proceeds by plea bargain, jurors play absolutely *no* role (unlike prosecutors, defense attorneys, and judges who play arguably stunted

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that the same rate per judge in SDNY fell from 6.5 to five per year—and what is more, both starting rates were significantly lower (by more than 50 percent in SDNY and roughly 33 percent in EDNY) since 1998). For further background on the diminution of trial rates across jurisdictions, see generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 462–67 (2004).

82. An incentive that unfortunately is already all too strong under common billing arrangements and realities.

83. According to data collected by the National Center for State Courts regarding jury service in 2007, in twelve states—Arizona, Arkansas, Connecticut, Delaware, Florida, Iowa, New York, Oklahoma, Tennessee, Utah, Vermont, and Wyoming—fewer than *half a percent* of eligible adults served on a jury during that calendar year. *See* "*Survey Results by State*," *State of the States Survey on Jury Improvement Efforts*, CTR. FOR JURY STUD. (2007), http://www.ncsc-jurystudies.org/state-of-the-states/state-of-states-survey/results-by-state. Furthermore, in some states the number of people called for jury service was more than twenty times the number of people actually empaneled to sit on a jury. *Id.* In terms of this disparity, the most pronounced were California with fifty-three times more people called than empaneled, Texas with fifty times more, and Connecticut 120 times. *Id.* Although this, by itself, does not affect the overall rate of jury service, it does supply prima facie evidence that, in addition to rarely serving on juries, many people likely think the jury process is more of a source of civic pain than an opportunity for civic engagement.

84. *See* ANDREW GUTHRIE FERGUSON, WHY JURY DUTY MATTERS: A CITIZEN'S GUIDE TO CONSTITUTIONAL ACTION 21 (2013) ("Participation in jury service teaches the skills required for democratic self-government. Being a juror lets you develop the habits and skills of citizenship. You develop by practice. You practice by participating."); Andrew Guthrie Ferguson, *Jury Instructions as Constitutional Education*, 84 U. COLO. L. REV. 233, 253 (2013) ("The theme of the 'jury as a public school' established to teach the lessons required for democratic self-rule can be traced from the Founding Era to the present day.").

85. *See* Andrew Guthrie Ferguson, *The Jury as Constitutional Identity*, 47 U.C. DAVIS L. REV. 1105, 1137–38 (2014) ("The jury existed as a check against government power (both the prosecution and the courts). In addition, it reflected the democratic, participatory ideals of the new constitutional structure.").

ones).[86] This is anathema to our Founding vision, in which jury service would not only be a civic duty but a regularized hedge against tyranny—a routine and democratic check on our institutions of law enforcement. As the Supreme Court explained just last term, the Framers wove jury trials into our constitutional fabric for a clear reason: to give "the people at large—the men and women who make up a jury of a defendant's peers— . . . [ultimate] authority to set the metes and bounds of judicially administered criminal punishments."[87] As a populace, we are falling far short of that ideal. Even if the overall increase in trials is marginal, every lottery trial is one more jury trial, and thus a step in the right direction for democratically animated criminal justice.

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Thus, by slightly increasing the rate of criminal jury trials—and in a manner of selection not subject to party manipulation—a trial lottery could push against the unlevel playing field of the plea bargain, could perform an auditing function of that—and other—law enforcement process, and could provide training and participatory benefits. In selecting these three points, we hardly mean to claim these would be the only—or even necessarily the predominant—benefits of a modestly higher trial rate. There may be scores of reasons to bemoan the vanishing jury, and much ink has been spilt on that topic. But as legal scholars, we tend to think of plea bargaining as operating within the shadow of the jury trial.[88] While

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86. Of course, some jurisdictions use a grand jury to indict, but that has become a practical nonevent. *See* Andrew E. Taslitz & Stephen E. Henderson, *Reforming the Grand Jury to Protect Privacy in Third Party Records*, 64 AM. U. L. REV. 195, 226, 227–228 tbl.1 (2014) (chronicling absurd rates of indictment).

87. United States v. Haymond, 139 S. Ct. 2369, 2378–79 (2019) (quotations omitted). For a scholarly take on the same theme, see Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829–30 (2015). For a popular press take, see Raymond J. Brassard, *Juries Help Keep Our Democracy Working*, BOS. GLOBE, May 1, 2003, at A19 ("[J]urors seek consensus on the basis of evidence and arguments that persuade across the lines of race, gender, religion, and background.").

88. In this vein, it is worth noting that prosecutors—the ostensible "losers" of a trial lottery system—could plausibly welcome its adoption, insofar as it helps realign the ideal dynamics of deliberation and bargaining in a normative sense. It strikes us as nonfacetious to imagine a conscientious prosecutor thinking something like the following:

> I love the fact that a few plea bargains go to trial. I've won most every one, giving me confidence that in my day-to-day bargaining I'm acting consistent with the people's will, which is always my goal. And when I lose—which is rare but does happen—it provides a great source of self-reflection. So far, those few losses seem more random than anything else. But if that ever changes, then I'll know to change that aspect of how I approach a plea.

there is good reason to question how well this operates,[89] a nonmanipulable increase in the rate of jury trials will function better than today's entirely insufficient and idiosyncratic status quo.[90]

IV. LOTTERY DETAILS

Having presented the argument for a trial lottery in principle, we now turn to brass tacks. How would the system actually work? There are many ways to implement a lottery that would vindicate the purposes explored in Part III, and different jurisdictions would have reason to favor different variants. But ideally, any trial lottery system would (1) be implemented by legislation rather than judicial policy; (2) involve random case selection (both technically and administratively); (3) harmonize with existing criminal procedure; and (4) use the terms of the accepted plea as an upper bound on penal exposure for each defendant. Implementation would further have to address several practical questions, such as whether—and, if so, when—a lottery selection could be overridden, how to think about pretrial release, and who pays the defense trial bill. Some of those answers would likely vary across jurisdictions, whereas others would be uniform. Before digging in, here's an overview in the form of an imagined judicial colloquy:

> *Okay, having heard the stipulations made here today and memorialized in this writing, and being aware of the entire record in this matter and having made certain this defendant wishes to make a knowing and voluntary guilty plea, and that there is an adequate factual basis therefore, I accept this plea agreement.*

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89. *See* Bibas, *supra* note 10, at 2464 (arguing that both structural and psychological biases skew bargains away from their 'trial expected and then discounted' terms); Shawn D. Bushway & Allison D. Redlich, *Is Plea Bargaining in the 'Shadow of the Trial' a Mirage?*, 28 J. QUANT. CRIMINOLOGY 437, 440–41 (2011) ("We find . . . little support for the claim that strength of evidence predicts the plea discount for those who pled guilty."); *cf.* Bonneau & McCannon, *supra* note 55, at 1 ("[W]e provide strong evidence that plea bargaining occurs in the shadow of the trial.").

90. *See supra* Part II. Trial distributions across crimes are quite inequal. For example, in federal courts in 2018, only 0.3 percent of immigration charges went to trial, while almost 7 percent of charges of violence went to trial. *See* John Gramlich, *Only 2% of Federal Criminal Defendants Go to Trial, and Most Who Do Are Found Guilty*, PEW RES. CENTER (June 11, 2019), https://www.pewresearch.org/fact-tank/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/ (citing ADMIN. OFF. U.S. COURTS, U.S. DISTRICT COURTS–CRIMINAL DEFENDANTS DISPOSED OF, BY TYPE OF DISPOSITION AND OFFENSE, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2018 tbl.D-4, https://www.uscourts.gov/sites/default/files/data_tables/jb_d4_0930.2018.pdf).

Before entering judgment, as per House Bill 42, I'll now check for lottery selection.

[The judge executes the lottery tool on her computer.]

Alright, the matter indeed <u>has</u> been selected for trial.

So, a few items of businesses—first, the transcript of this hearing and the plea agreement just accepted will hereby be sealed until conclusion of trial. Second, let the record reflect that we do <u>not</u> need to schedule a special pretrial release hearing, because the defendant is already free on bail pending resolution of this matter.

Defense Counsel, have you explained this eventuality to the defendant? And the ramifications thereof?

"Yes I have, your Honor."

Good. So, this plea agreement has been accepted and will be entered into the record accordingly. Do the parties have any objection to proceeding to trial? Defense?

"No objection, your Honor. We are happy to go to trial on this matter. To be clear, Judge, because this is my first lottery case, I will remain as counsel and the only charges will be those in the accepted plea. Do I have that right?"

Absolutely, Counselor. The charges are precisely those in the accepted plea, and, of course, your client cannot receive a greater sentence than reflected in that plea. Fortunately, because that agreement is a sentencing agreement, we have a definite number: punishment will be <u>capped</u> at the agreed-upon fifteen months' imprisonment. And, of course, your client may be entirely or partially acquitted, lessening that punishment.

Does the State have any objection?

"Unfortunately, we do, your Honor. As we have already argued in motions in limine, some of the matters raised in this trial are extremely personal to victims and witnesses, and we strongly urge that they not be dragged through a public trial when the parties have come to plea resolution."

Thank you, Counselor. I understand and appreciate that. But for much the same reasons as I have already rejected your arguments in those motions, I'm going to have to overrule your objection. I am only permitted to negate a lottery selection upon the strongest showing of extreme or unusual prejudice, and I don't think what you have alleged is unique to this case. It's

> *simply an unfortunate cost of our intended system of criminal justice, which is founded upon public trial before a jury.*
>
> *So, my work in this case is now at an end. The court clerk will transfer the case to one of my colleagues for trial, and you will receive notice to proceed accordingly. If you don't hear from her within a week from today, please affirmatively reach out. Okay? Good. Then you are both excused. Next matter.*

A. Origin and Basic Administration

The Subparts below go into considerably more detail on lottery selection, but two points deserve special mention upfront. First, while some manner of trial lottery might be adopted by supervisory judicial authority, we prefer a legislative adoption both for reasons of democratic legitimacy and necessary functionality. For example, the lottery system requires a stay of judgment on proffered guilty pleas and plea agreements. That procedure probably merits legislative or rulemaking consideration. And some components—notably the payment of the defense trial bill and any penalty-cap override of otherwise statutory mandatory minima (both described below)—require legislative action.

Second, lottery selection ought to be automated, so that no individual judge—and certainly no individual prosecutor or defense attorney—controls or influences which cases are selected. As previously described in Part II, the system pressures causing the vanishing criminal jury trial are myriad, and they work on every institutional participant: judge, prosecutor, and defense attorney. Thus, just as the Internal Revenue Service ("IRS") has overly audited lower-income individuals and families because those audits are simpler and cheaper,[91] a prosecutor, judge, or fee-capped defense attorney auditing her system would be pressured to choose "easy" or "slam dunk" cases for the same reason.[92] (Judges are already accused of discouraging jury trials precisely for reasons of economic efficiency.[93]) Further, even without a system of lottery, *any* plea

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91. *See* Paul Kiel, *IRS: Sorry, but It's Just Easier and Cheaper to Audit the Poor*, PROPUBLICA (Oct. 2, 2019, 2:47 PM), https://www.propublica.org/article/irs-sorry-but-its-just-easier-and-cheaper-to-audit-the-poor (auditing low-income taxpayers who claim the earned income tax credit is "the most efficient use of available IRS examination resources").

92. While we attempt to deal with the problems of effectively or actually fee-capped defense attorneys in Subpart IV.H, *infra*, the history of jurisdictions adequately funding defense counsel does not inspire great confidence in this regard.

93. *See, e.g.*, BOGIRA, *supra* note 59, at 126. According to the observations of Bogira:

> Tying up a judge's courtroom with a jury trial in a mere burglary case is ordinarily a flagrant violation of protocol at 26th Street [Cook

bargain might fall apart and go to trial, providing *some* measure of system auditing. A key advantage of the trial lottery, then, is not merely that it increases the number of jury trials but that it does so in a manner not readily subject to party manipulation. It is through this objective selection that we ought to learn the most from a lottery's auditing function.

Thus, we envision an algorithm running on the court's computers. A judge need only press a button and proceed accordingly.

B. Case Selection

A system of trial lottery can be effective even if it only marginally increases the incidence of jury trials, and so precisely how *many* lottery trials ought to occur is an economic calculus for each jurisdiction. One could imagine a mandate that 5 to 10 percent of dispositions on the merits should occur by trial, which would be a modest but significant increase for most U.S. jurisdictions. This suggests a *results quota*, meaning a specific trial rate is the target, which might be achieved either by lottery selection or entirely by the parties' decisions to take particular cases to trial. We recommend, however, instead implementing a trial lottery with a *selection quota*, meaning that a certain percentage of cases must be designated for trial by lottery regardless of the jurisdiction's natural trial rate. In a regime consisting only of a results quota, prosecutors (or judges or public defenders) could effectively manipulate the system by themselves selecting enough "easy" cases—however defined—for trial, thus negating many of the lottery benefits. By contrast, if some small fraction of would-be plea bargains are selected, the system is less readily subject to party manipulation.[94] Still, any increase in jury

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> County, Illinois]. A private attorney might be able to get away with such an affront, if his client was acquitted by the jury and didn't have to face sentencing by the judge, and if the lawyer didn't have another case before the judge in the near future. Not so a public defender anchored to the courtroom, who had to work with the judge every day. The public defender might find the judge offering his other clients less favorable plea deals for a time, or issuing stiffer sentences after guilty verdicts, as a punishment for his impropriety.

Id. at 142.

94. For example, a set, small fraction of would-be-plea bargains might be selected for trial via lottery, and, over time, that fraction can be adjusted in order to aim towards a 10-percent-of-convictions result, with the caveat that lottery selection can never fall below some minimum percentage—in order that there will always be at least *some* lottery cases. An implementation might work something like this: (1) calculate, based on last year's numbers (or several preceding years' numbers in the aggregate), how many plea bargains would have needed to go to trial for jury verdicts to measure 10 percent of criminal convictions; (2) calculate what fraction of plea bargains that would have been; (3) implement the lottery with a slowly growing percentage aimed to hit that goal in,

trials has substantial benefits and so, again, any method of selection improves upon the status quo.

As with the precise number or rate of lottery cases, many effective options are possible when it comes to the manner of selecting those cases, rendering most particulars beyond the scope of this first, non-jurisdiction-specific exposition. However, a few points might profitably be made.

First, the lottery ought to aim for statistical—meaning equiprobable—randomness.[95] This is not to say, however, that a trial lottery could not be weighted towards certain outcomes. Indeed, we tend to favor a system ultimately time biased towards selecting an even distribution of the types of criminal prosecutions that occur, meaning there would be adequate representation both of misdemeanors and felonies, both of violent crimes and property crimes, and so on. Similarly, we think it wise to include crimes for which there is no federal constitutional jury trial right—so-called

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say, three years; (4) upon year three, and every year thereafter, recalibrate based upon last year's numbers, including setting a minimum percentage of lottery selections.

95. We recognize that truly equiprobable randomness may be only a mathematical ideal; historic lotteries that were intended as equiprobable—such as for military conscription or jury service—have certainly not always been equiprobable on account of defects in the selection procedures. *See* DUXBURY, *supra* note 14, at 65–68 (presenting examples). *See generally* State v. Long, 499 A.2d 264, 266–70 (N.J. Super. Ct. Law Div. 1985) (litigating an instance of jury selection). But equiprobable randomness aims to be a "process that affords equal probability to all outcomes within a given set. The set of possible outcomes must be chosen somehow, but once specified, any member of the outcome set must be equally likely to occur when the process is used." Samaha, *supra* note 14, at 9 (terming it "statistical randomness").

Equiprobable randomness can be distinguished from so-called "orthogonal randomness," which occurs anytime selection is unrelated to merit—as when police select every *N*th car traveling through a sobriety checkpoint. *See* Samaha, *supra* note 14, at 11 (defining orthogonal randomness as employing a "rule . . . unrelated to any normatively sound basis for decision"). This would be unacceptable for a trial lottery, as it is too subject to calendaring manipulation. There is also so-called "epistemic randomness" that employs a "process [that] generates outcomes that are equally probable as far as an observer can tell." *Id.* at 10; *see also* DUXBURY, *supra* note 14, at 69; ELSTER, *supra* note 14, at 43. For example, two persons looking to randomly decide which path to take might resolve to follow the next person to come along; that stranger's choice will almost surely be intentional, not random, but since that intention is "insulated from the information and control of the parties," it is epistemically random to them. ELSTER, *supra* note 14, at 44 (using an example from THOMAS GATAKER, ON THE NATURE OF USE OF LOTS 16 (1627)). A trial lottery could be epistemically random, then, if judges were aware the lottery favored certain cases but the public was kept in the dark. But, as Samaha recognizes, "epistemic randomness can present transparency issues regarding the propriety of keeping one class of people ignorant of the operative decision rule," Samaha, *supra* note 14, at 12, and those issues are sufficient reason to reject such randomness for the trial lottery.

"petty" offenses each threatening six months or less imprisonment—because misdemeanors are most subject to "cattle-call" justice leading to potentially inappropriate guilty pleas.[96]

Second, an ideal lottery might be sensitive to randomness as aesthetic.[97] Although an actually random process should reveal itself to be so over long stretches of time, it can appear very nonrandom over any short sample, especially to untrained eyes.[98] Imagine, for example, how it would appear if the first *X* lottery cases all concerned black defendants. Thus, in order to earn public legitimacy, the trial lottery may need to appear sufficiently random to the observer, including to one who is inherently skeptical of government processes.[99]

C. Timing

Just when would the judge press the button on her computer to determine whether the lottery will send the case to trial? We favor the trigger being a judge's acceptance of a guilty plea, at which point the matter will proceed either to ordinary judgment and plea sentencing or, if lottery selected, to trial.[100] In other words, we urge a plea-*acceptance* trigger rather than a plea-*sentence* one.

Concededly, the latter has at least two upsides: A plea-sentencing trigger—meaning lottery selection that would occur after guilty-plea sentencing—would provide increased information with which to compare plea and trial outcomes (better auditing), and it would make it considerably easier to ensure that a particular lottery defendant is not prejudiced in his ultimate sentence.[101] But a postsentencing trigger would also mean additional delay when the parties perhaps opted for a plea *because* it provides more immediate resolution, and

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96. *See* Duncan v. Louisiana, 391 U.S. 145, 159–60 (1968) (limiting the Sixth Amendment right to what was available by common law at the Founding, which is essentially when any single charged crime threatens over six months' imprisonment); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 3–5 (2018) (developing the injustice in our processing of lesser crimes).

97. *See* ELSTER, *supra* note 14, at 41–43; Samaha, *supra* note 14, at 17.

98. *See* DUXBURY, *supra* note 14, at 63–64; ELSTER, *supra* note 14, at 40–42.

99. For an example of forced nonrandomness within a random system, consider Norway's juries. Fourteen people are selected for each jury, but every jury must be gender balanced: seven random men and seven random women. *See* ELSTER, *supra* note 14, at 94–95. Such nonrandom selection can have powerful signaling effects.

100. The trigger cannot occur prior to judicial acceptance because any preacceptance bargain is merely, in essence, an executory contract. *See* Mabry v. Johnson, 467 U.S. 504, 507 (1984) ("A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest.").

101. For more on this latter point see *infra* Subpart IV.D.

when trial will already add potentially significant delay. Moreover, a postsentencing trigger would provide the prosecutor with potentially valuable information from the sentencing process itself (such as previously unknown details provided by the defendant or a presentencing report), which could prejudice the defendant at trial.[102]

Thus, we urge a plea-acceptance trigger. Just as jurisdictions use slightly different systems in their pretrial diversion programs,[103] slightly different systems could operate here. But in pretrial diversion there is a ready template for a judge, say, accepting a plea, checking for the lottery, and then—if lottery selected—staying the entry of judgment until after trial (just as in pretrial diversion a judge might accept a plea and then stay the entry of judgment pending—and ultimately dependent upon—defendant completion of agreed upon terms).[104]

So, the proceedings might look something like this:

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102. *See, e.g.*, Mitchell v. United States, 526 U.S. 314, 330 (1999) (recognizing "the determination of a lack of remorse" at sentencing). Any imposed sentence would also further prejudice any jury learning of it, even as the trial jury should of course learn nothing of the guilty plea. Similarly, a lottery system ought not allow a judge to sentence on the plea *after* selection but *before* lottery trial. In addition to the concerns noted already, judges too are meant to be subject to the auditing benefits of the lottery system, and judges would have incentives—at the very least unconscious incentives—to game a "predictive sentence."

103. *See Pretrial Diversion*, NAT'L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-diversion.aspx (last visited Mar. 16, 2020) (collecting variations from the fifty states, the District of Columbia, and several territories).

104. *See, e.g.*, OKLA. STAT. tit. 22 § 22-991c(A) ("Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings upon the specific conditions prescribed by the court not to exceed a seven-year period."). If a defendant successfully completes those requirements, the prosecution is dismissed. *See id.* § 22-991c(D) ("Upon completion of the conditions of the deferred judgment, and upon a finding by the court that the conditions have been met and all fines, fees, and monetary assessments have been paid as ordered, the defendant shall be discharged without a court judgment of guilt, and the court shall order the verdict or plea of guilty or plea of nolo contendere to be expunged from the record and the charge shall be dismissed with prejudice to any further action."). If the defendant fails in any regard, the court may enter judgment. *See id.* § 22-991c(G) ("Upon any violation of the deferred judgment, other than a technical violation, the court may enter a judgment of guilt."); ALASKA STAT. § 12.55.078(e) (2019) ("If the court finds that the person has violated the conditions of probation ordered by the court, the court may . . . enter judgment on the person's previous plea or maximum finding of guilt[.]"); DEL. CODE ANN. tit. 11, § 4218(f) (2020) (providing a similar arrangement); IOWA CODE §§ 907.3(1)(b), 908.5(1) (2020) (same); MD. CODE ANN., CRIM. PROC. § 6-220(b)(1)(f) (West 2020) (same); W. VA. CODE § 61-11-22a(e) (2020) (same).

> *Okay, having heard the stipulations made here today and memorialized in this writing, and being aware of the entire record in this matter and having made certain this defendant wishes to make a knowing and voluntary guilty plea, and that there is an adequate factual basis therefore, I accept this plea agreement.* [The judge executes the lottery tool on her computer.]
>
> [Option A:] *And this matter having not been selected for trial, entry of judgment and sentencing will be scheduled for . . . .*
>
> [Option B:] *This matter has been selected for trial. Therefore, we will be going to a jury trial on this matter, and I accordingly hereby seal this accepted plea agreement and the transcript of our hearing today.*[105] *Now, as to scheduling that trial . . . .*

D. Capping Penal Exposure

With regard to sentencing, it would certainly be possible for a lottery defendant to receive a lesser sentence than would be expected after his guilty plea. Even when the accepted plea agreement includes a sentencing agreement, meaning one that under local rules binds the accepting judge, it should provide only a ceiling on punishment after a lottery trial. The reasons for this are obvious when a defendant is convicted of fewer crimes at trial than he initially pleaded guilty to. Moreover, even as to counts of trial conviction, newly discovered facts might place those counts in a relatively lesser light.[106] But what if neither is true? Could a lottery trial ever lead to a greater-than-plea-expected sentence?

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105. To ensure the integrity of jury deliberations, the trial judge ought to seal the plea agreement (at least presumptively) during the pendency of the trial. *Cf.* FED. R. EVID. 410(a)(1) (rendering inadmissible such things as a guilty plea later withdrawn). Although there is no ironclad way to avoid contamination—the plea hearing is, after all, a public event, and information is leaky—keeping the agreement under wraps remains useful given the practical obscurity of most plea hearings. And, importantly, the risk of "leakiness" in this setting is no worse, in the abstract, than the general risk that attends to plea bargained outcomes at t_1 that later (for whatever reason) fall apart, resulting in trial at t_2. For example, consider an incarcerated defendant who successfully challenges her guilty plea for, say, ineffective assistance of plea counsel. Or, similarly, when a defendant successfully challenges a conditional plea, such as one retaining the right to appeal denial of a motion to suppress. Of course, we suspect that these most often result in a new deal, rather than a trial. But some proceed to trial, and some trial convictions are of course reversed upon appeal and lead to subsequent trial.

106. For a variety of reasons, it is possible that a defendant who had agreed to plead guilty will be acquitted of all charges after a lottery trial. Sometimes this would be on account of less than desirable reasons, such as the sudden unavailability of a key state witness. But other times it would be for a good reason that confirms the benefits of trial by lottery, such as the trial revealing

Technically, because no judgment was entered upon the plea agreement, it would seem legal to impose such a sentence following a jury conviction. Just as a defendant on pretrial diversion who fails to meet all imposed requirements might receive a harsh sentence, a defendant selected for lottery trial could receive a harsh sentence.[107] However, we advocate against such a possibility in the strongest of terms: *no lottery defendant should receive a greater-than-plea-expected sentence*. Such an outcome would too closely resemble the trial penalty, the practice—widely acknowledged, including by the Supreme Court[108]—of sentencing defendants more severely for trial convictions than guilty plea convictions. Whatever the fairness of that "typical" penalty, it at least links the greater sentence to the defendant's choice. By contrast, it would be patently unfair to require a lottery defendant to shoulder a sentencing burden when he has confirmed his willingness (and perhaps preference) to plead guilty. The lottery system is designed to better deliver systemic justice and is intended in significant part precisely to counteract the trial penalty's effect of pushing trial rates so low.[109] Thus, even if due process would permit it—and there are good arguments that it should not—any defendant selected for lottery trial should be guaranteed that he will not ultimately be sentenced more than he would have been upon the accepted plea agreement.

So, just what is that maximum sentence? Unfortunately, it will often involve some ambiguity. Only when the plea agreement was a sentencing agreement would a ready number be indisputable.[110]

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weakness in the state's evidence, controvertible conclusions about broad liability standards (e.g., whether payments were part of a *quid pro quo* exchange), or that an innocent defendant had agreed to plead guilty.

107. Of course, even this parallel claim highlights a most relevant distinction: the defendant on pretrial probation failed to play by its terms; the lottery defendant did just what the system asked of her—go to trial.

108. *See* Lafler v. Cooper, 566 U.S. 156, 175 (2012) (recognizing, much to the chagrin of a dissenting Justice Scalia, that a defendant *can* be prejudiced by receiving a trial); *see also* NAT'L ASS'N CRIM. DEF. LAWS., *supra* note 29, at 15 ("In 2015, in most primary offense categories, the average post-trial sentence was more than triple the average post-plea sentence.").

109. *See* Norman L. Reimer & Martin Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus That Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019) ("Every day, in virtually every criminal court throughout the nation, people plead guilty solely as a consequence of a prosecutor's threat that they will receive an exponentially greater post-trial sentence compared to the pre-trial offer."); *see also supra* Parts II (explaining current trial rates) and III (explaining the benefits of a lottery system).

110. With a trial lottery in place, we might expect a greater percentage of plea agreements to include this component precisely for this reason. At least such increase might occur in jurisdictions that authorize guilty pleas that are contingent on the judge accepting a sentence stipulated in the agreement. *See,*

When the plea agreement included a prosecutorial sentencing recommendation, at least an upper range can be inferred.[111] But in the remaining lottery cases, the best one can do is to employ a general standard (i.e., the sentence shall not exceed that which likely would have been imposed after a guilty plea) or some manner of algorithmic cap based on data from comparable convictions. After all, the Supreme Court has found no better solution in the similar context of a defendant who must be resentenced following a finding of ineffective assistance of counsel.[112] Thus, a jurisdiction could simply instruct its judges to sentence accordingly, subject to appellate review. Alternately, a jurisdiction with adequate data on representative cases could require a lottery judge to sentence no higher than the lesser of two measures: (1) any amount established by the plea agreement (including a sentencing agreement but also a prosecutorial recommendation), or (2) some established sentencing percentile at or below the median sentence for similarly situated defendants. The

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e.g., FED. R. CRIM. P. 11(c)(1)(C). Not all jurisdictions do. *See, e.g.*, WIS. STAT. § 971.08 (2020). Moreover, even where sentence agreements are permitted, whatever factors keep parties from reaching such agreements now—including judicial resistance to losing the sentencing role—would continue to exist in a lottery system.

111. Any such recommendation of course does not bind the plea-sentencing judge, but we think there are much stronger arguments that it *should* bind the post-trial lottery sentencing judge.

112. *See* Missouri v. Frye, 566 U.S. 134, 138, 148–51 (2012) (permitting claim of ineffective assistance based upon a would-have-been-better plea deal, but without any clear remedy); Lafler v. Cooper, 566 U.S. 156, 160, 174–75 (2012) (same result when the defendant in fact went to jury trial). In the case where a defendant turned down a sentencing recommendation or sentencing agreement, the *Lafler* Court offered this remedy: "[T]he court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Id.* at 171. In other words, it could be anything from the defendant's desired remedy to *no* remedy, all in the trial judge's discretion. And it gets no better where the plea was of a charge-dismissal variety:

> The correct remedy . . . is to order the State to reoffer the plea agreement. Presuming [defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.

Id. at 174. Again, anything from the defendant's desired remedy to no remedy is entirely in the trial judge's discretion. Justice Scalia was unimpressed: "[T]he remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard of and quite absurd for violation of a constitutional right." *Id.* at 176 (Scalia, J., dissenting).

more specific the restriction, the more is required of the calculating algorithm.

For our purposes, we are content stating the rather general proposition: a lottery defendant should never be sentenced above his plea-expected sentence.

E. Selecting Trial Charges

A question arises once a case is selected by the lottery mechanism: which charges should be included in the trial? Should it be only those in the plea agreement, all those originally filed, or a set of charges identified on other grounds? We believe the best model would be to try the defendant on only the charges in the plea agreement, or—absent an agreement—those charges for which a guilty plea was accepted.[113]

First, prosecutors sometimes drop charges because they no longer seem justified based on new information, and a defendant ought not be subjected to a trial on any charge a prosecutor currently believes unjustified. The charges in the plea agreement should be those that the prosecution considers justified. Second, this approach accords with the traditional deference—perhaps constitutionally required as a matter of separation of powers—that courts give to prosecutors' requests to *nolle pros* charges; rarely do any state or federal courts exercise their nominal authority to disapprove prosecutors' requests to dismiss previously filed charges.[114] Third, limiting the charges to those in the plea agreement makes it more natural to cap exposure at the plea-expected sentence.[115] Finally, such limitation recognizes that efficiency is a legitimate consideration in criminal justice: absent very strong reasons, we ought not force the personal, public, and administrative costs of trial for charges which the prosecutor and judge have agreed to dismiss.[116]

All that said, it is worth noting a couple of theoretical possibilities that, despite their impracticality, highlight some limitations in what a trial lottery can accomplish. In theory, the lottery might compel a trial on every charge that a prosecutor would be legally justified in bringing, even if those were never threatened to the defendant. On

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113. We note that setting all *filed* charges for trial offers the benefit of auditing all those charges. Nonetheless, reasons noted here for rejecting this approach outweigh any such benefit.

114. *See supra* note 59 (relating to Michael Flynn).

115. *See supra* Subpart IV.D.

116. In addition, this approach should foreclose fictional pleas ,*see* Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855, 857 (2019) (defining a fictional plea as "a plea bargain agreement in which the defendant pleads guilty to a crime he did not commit, with the consent and knowledge of multiple actors in the criminal justice system[,] to avoid the profound collateral consequences that would flow from a conviction on his initial charge"), and pleas based on less than adequate evidence.

this model, the only charge limitations would be: (1) the constitutional limitation of probable cause,[117] and (2) the American Bar Association's aspirational limitation of prosecutorial belief in admissible evidence that proves guilt beyond a reasonable doubt.[118] Anyone arguing in favor of this more expansive trial lottery could point out that pretrial investigation might reveal potential new charges. And since the federal Double Jeopardy Clause, as interpreted, provides only the weakest of "same offense" protections, even an entirely completed guilty plea and sentence would rarely prevent trial on new charges.[119] Still, this option raises several concerns sufficient to reject it.

First, who would make this charge determination? The same prosecutor who has perhaps opted not to bring, or even threaten, some of those charges? Second, it is unclear whether a legislature could require a prosecutor to bring undesired charges; that might raise questions of separation of powers.[120] Third, while it would be wonderful to audit and expose (and even better to temper) our world of draconian overcriminalization, it seems self-evident that the

117. *See* Woon v. Oregon, 229 U.S. 586, 587–90 (1913) (finding Oregon law permitting prosecution by prosecutor information constitutional).

118. *See* AM. BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (4th ed. 2017) ("A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice.").

119. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932) (defining a different offense so long as each contains an element the other does not); Gore v. United States, 357 U.S. 386, 392–93 (1958) (upholding the *Blockburger* rule as constitutional). Legislatures or state constitutions can, of course, grant greater protections.

120. Prosecutorial control of charging decisions is well established. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." (citing *inter alia* Confiscation Cases, 74 U.S. 454, 457 (1868))). Most statements of this principle, however, occur in the context of questions about *judicial* power to review or limit prosecutors' decisions. None speak to *legislative* power to regulate charging discretion by statute, because U.S. legislatures rarely enact laws that would give rise to such disputes. There is some evidence, however, that legislation could regulate prosecutorial discretion consistent with federal separation-of-powers law (which not all states replicate). *See, e.g.*, Confiscation Cases, 74 U.S. at 457 ("Public prosecutions . . . are within the exclusive direction of the district attorney . . . *except in cases where it is otherwise provided in some act of Congress*." (emphasis added)); *cf.* 18 U.S.C. § 1119(c)(1) (prohibiting Justice Department prosecution under federal criminal statute if a foreign country has previously prosecuted the suspect for the same conduct); Iran Ballistic Missile Prevention and Sanctions Act of 2016, H.R. 4342, 114th Cong. § 2(a) (2016) (enacted) (mandating that "[t]he President shall impose 5 or more of the sanctions" on Iran upon certain findings of fact).

criminal prosecution of individual defendants—even penalty-capped defendants—is not the best manner of doing so. After all, assuming the overcharging is normatively contestable but legal, the jury arguably ought to convict.[121] The public would likely rebel at spending money on a trial for charges that will ultimately be dismissed even if successfully proved.[122] So, for all these reasons, we reject a lottery system having no charging limitation.

A slightly less radical—but still infeasible—model would include in lottery trial every charge filed or threatened in the prosecution. On the upside, this approach would shed strong light upon the plea bargain process by auditing all threatened charges, which is arguably a key virtue of the trial lottery. Acquittal on any offense would be evidence of strategic overcharging—not only in this case, but by inference in similar cases not chosen by lottery.[123] Nonetheless, implementation hurdles are once again prohibitive, the foremost being the question of what constitutes a threatened charge and who ought to decide. Mini trials on that tangential matter would be inevitable. Moreover, a system in which courts compel the filing of charges that prosecutors merely threatened is a sharp departure from the tradition of prosecutorial charging discretion; it is normatively—and perhaps even constitutionally—suspect. Finally, in light of the proposed penalty cap, this model too would push the limits of tolerance for an "exclusionary rule" that effectively sets aside crimes proven to a jury beyond a reasonable doubt.[124]

F. Overrides

Once the lottery selects a case for trial, can the selection be overridden and judgment entered upon the plea (as though the case had been passed over)? If so, who should make that determination, and on what grounds?

A key advantage of a randomized trial lottery is that it is not subject to human manipulation. But that feature can be a disadvantage as well, running roughshod over relevant distinctions

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121. These fascinating questions of the proper role of jury nullification are left for future work.

122. *See supra* Subpart IV.D.

123. Overcharging can "turn off" a jury, and ancient Athens used a very clever procedure to discourage it in sentencing:

> [I]n any trial in which assessment . . . of a penalty or compensation was required . . . the successful prosecutor proposed a penalty, the unsuccessful defendant proposed another (naturally a lighter) penalty, and the jurors voted for one or the other; no compromise between the proposals was possible.

DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 253 (1978).

124. On the importance of collateral consequences to prosecutions and plea bargaining, see Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197, 1201 (2016).

that ought to matter. So, it is natural to ask whether it would be possible to enjoy most of the benefits of unpredictable and unmanipulable randomization while carving off what would be its most damaging edge cases. Yet we must be careful in permitting overrides, for we are all too aware of the casual, entirely unjustified move to "best two out of three."[125] Too often, randomization sounds wonderful until we find ourselves subject to its necessary effects.[126] Override, then, could effectively decimate the lottery rule.

The first, and most severe, option would be to make the lottery selection absolute: once the lottery selects a case, it will go to trial so long as there are still charges to pursue. Under this sort of regime, there would be no true overrides. The only functional equivalent would be a prosecutor choosing to *nolle pros* the case, entirely dismissing the prosecution.[127]

A second option would be to allow defendants to prevent lottery trial by entering a blind plea. Although there is no established federal constitutional or statutory right to enter a blind plea to all charges,[128]

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125. In the words of Neil Duxbury:

> Many of us, as children, have encountered . . . this problem when, in arguing about some choice or other with a friend or sibling, it is proposed that the matter be settled by the toss of a coin. Usually, the child who loses the toss will then either declare the lottery invalid or demand that it be altered (by, for example, insisting that the winner should be the person who gets the best of three or five or some other number of tosses).

DUXBURY, *supra* note 14, at 94.

126. Of course, there is also potentially an upside to being selected for a negative task by lot as compared to being selected by human volition. In the words of Neil Duxbury:

> [T]hat decisions by lot are attributable to chance rather than to human intent may sometimes make them more tolerable to those who are unlucky: to be rejected [or chosen for an uncomfortable task] by chance, after all, might be considered less of an affront . . . than would rejection [or choice] by others.

Id. at 13. For those not fond of jury service, for example, this salve might apply at least as to initial selection to the venire; more importantly, it might apply to the tremendous decision of who must serve in a military draft.

127. Why allow that prosecutorial option? Because basic justice demands it. If, say, the prosecution learns that another defendant has just confessed to the charged crime and that claim is substantiated by forensics, it would be plainly unjust (and absurd) to insist upon trial. Furthermore, there is little reason to fear this result, as it will so obviously cry out for justification that the lottery's auditing functions will have done their part.

128. The Supreme Court has never held that a trial court must accept even a blind plea, although we grant there might be substantial arguments therefore. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545, 561 (1977) ("[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial."); Santobello v. New York, 404 U.S. 257, 262 (1971) ("There is, of

legislation creating the lottery system could explicitly provide defendants this right. Indeed, defendants already have a blind plea right in at least a few states.[129] And if defense blind pleas occur after lottery selection with any regularity, that fact will itself beg for further investigation that could shine the necessary light on something perverse happening in plea bargaining.[130]

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course, no absolute right to have a guilty plea accepted. A court may reject a plea in exercise of sound judicial discretion." (citations omitted) (citing Lynch v. Overholser, 369 U.S. 705, 719 (1962) ("This does not mean, of course, that a criminal defendant has an absolute right to have his guilty plea accepted by the court[;] . . . the trial judge may refuse to accept such a plea and enter a plea of not guilty on behalf of the accused."))); North Carolina v. Alford, 400 U.S. 25, 34–35 (1970) ("The [*Lynch*] Court expressly refused to rule that Lynch had an absolute right to have his guilty plea accepted . . . ."); *id.* at 39 ("The States in their wisdom may . . . prohibit the practice of accepting pleas to lesser included offenses under any circumstances."); *see also* Singer v. United States, 380 U.S. 24, 26 (1965) ("There is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one."); United States v. Cohn, No. 19-CR-097 (GRB), 2020 WL 5050945 (E.D.N.Y. Aug. 26, 2020) (permitting a defendant's waiver of a jury trial over the prosecution's objection in the unique contexts of the case, including COVID-19).

129. Those states that grant a right to plead guilty seem to require defendants to plead to all counts in the indictment or charging document. In some, the right ends after arraignment; in at least one, it extends into the trial. *See, e.g.*, Righetti v. Eighth Jud. Dist. Ct., 388 P.3d 643, 647 (Nev. 2017) ("[D]efendant has a statutory right to tender a guilty plea" to all charges but no right "to plead guilty à la carte in order to avoid the State's charging decisions"); Eby v. Premo, 386 P.3d 224, 228 (Or. Ct. App. 2016) (stating that defendant generally has a right to plead guilty to a charged offense, "subject to the requirements that a plea be knowing, voluntary, and supported by a factual basis"; but trial court retains authority to grant prosecutor's request to dismiss charges despite defendant's request to plead guilty); Wilson v. Commonwealth, 617 S.E.2d 431, 440 n.8 (Va. Ct. App. 2005), *overruled on other grounds*, 630 S.E.2d 326 (Va. 2006) (noting that defendant has a state constitutional right to plead guilty to the entire indictment at any time before or during trial until the return of the jury's verdict, subject only to requirements that the plea is made voluntarily and knowingly); State v. Westwood, 448 P.3d 771, 777 (Wash. Ct. App. 2019) (stating that statutory right to plead guilty is "only unconditional (in that it can be exercised over the state's objection) at the time of arraignment").

130. After all, why wouldn't many penalty-capped defendants jump at the chance of full acquittal? The only real drawback of this option—given that even defendants highly averse to trial would be unlikely to roll the dice with a blind plea—is a risk of manipulation. The worry would be that prosecutors or judges might effectively coerce a defendant to exercise the only available mechanism (short of dismissal) for everyone to avoid a lottery designated trial. Although the likelihood of this dynamic is unknown, there is prima facie reason to think judges are motivated to prefer the efficiency of guilty pleas over trials. In 1885, a historian describing criminal justice in Cook County, Illinois, explained that a trial judge attempting "to decide every case exactly right and beyond cavil, is not

A third approach would be a good cause override, allowing defendants to explain to the presiding judge why, notwithstanding the lottery, they should not be required to proceed to trial. There are several reasons a defendant might seek such an override. To name but two, a defendant may not want to endure, or cause loved ones to endure, the ordeal of trial, or he may simply prioritize moving on with life, compared with the effort and anxiety of trial preparation. Whatever the exact motivations, at least some defendants will have reasons to avoid trial, even considering the possibility that trial could reduce punishment. A good cause regime would put the ultimate decision in the hands of the trial judge, who could weigh the benefits of proceeding with trial—holding the state to its burden and safeguarding the integrity of the lottery's auditing function—against the defendant's reasons for wanting to opt out. An equivalent mechanism could also be available for the state. That is, the prosecution could also be a given an opportunity to show cause for avoiding trial. This would presumably face a steeper climb, however, since law enforcement accountability—effectuated by trial—is central to the lottery's goal. Still, one can imagine situations, for instance in a case involving an especially vulnerable or traumatized victim, where the prosecution may be able to convince the trial judge that the equities, all things considered, counsel override.

A fourth approach—the least stringent—would be to allow the defendant and/or the prosecution to override the lottery selection no questions asked. This could be accomplished either by motion (after the selection is made) or by opting out before the fact, preempting the lottery mechanism entirely. This approach is unappealing as applied to the prosecution. Presumptive overrides would dampen, if not wholly vitiate, the structural realignment of bargaining incentives explored in Part III, and they would also impede the auditing function. As applied to defendants, however, the story is more checkered. Even if defendants enjoy no constitutional right to plead out, they certainly have an autonomy interest in stewarding their own cases,[131] making the prospect of forcing defendants to proceed to trial uncomfortable. And, as previously described, some defendants

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a good judge, nor well fitted for his position. . . . Business most go forward, or the courts will get immediately clogged." 2 A.T. ANDREAS, HISTORY OF CHICAGO. FROM THE EARLIEST PERIOD TO THE PRESENT TIME 457 (1885). In the more contemporary words of a Cook County courtroom deputy: "For the judges, it's the big dispo race. I don't think they really care whether the defendant is innocent or guilty—it's how many defendants they can get to plead out." BOGIRA, *supra* note 59, at 91; *see also* MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 123 (2015) (explaining multiple reasons why judges prefer plea bargains to trials).

131. *See, e.g.*, McCoy v. Louisiana, 138 S. Ct. 1500, 1512 (2018) (holding that the Sixth Amendment right to counsel entails the right to insist that one's lawyer put on a wildly implausible defense).

will have good reason to forgo their trial lottery right.[132] At the same time, part of the rationale for a truly randomized trial lottery is that it will produce (in the aggregate) a genuine cross slice of the criminal docket for auditing. Case-by-case overrides, even if pursued for legitimate personal reasons, may well frustrate this systemic goal.[133]

Finally, the ideal regime might include some different mix of the foregoing options. For example, lottery selection could be subject to no-questions-asked override by defendants, but only a good cause showing by the state. Or, as suggested above, even if the prosecution gets no opportunity for override, defendants still may have an opportunity to move for good cause override. And so forth. While options like these push against the modern norm of fairness as equivalence in criminal procedure,[134] they may also better account for the totality of interests in every particular case.

G. *Pretrial Detention*

One of the reasons some defendants are too willing to plead guilty is because it releases them from a sordid jail. Ironically and tragically, even "escaping" to a long period of incarceration can be preferable when it means a move to a penitentiary where the conditions are markedly better.[135] And when a guilty plea means release on probation, anyone can understand desiring freedom. Thus,

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132. For example, perhaps defendants who are compelled to remain in pretrial detention if their case is selected for trial should have the right to plead guilty in order to prevent the lottery from imposing that very substantial burden. To some extent, of course, worries like this one will find accommodation in a "good cause" regime. But that leaves everything to the discretionary judgment of the trial court, and there are bound to be cases that slip through the cracks. *See infra* Subpart IV.G.

133. Of course, the flipside of this goal is the risk that defendants forced to go to trial may end up "throwing" the case, simply to get things over with. This, we suspect, is not an outcome *anyone* wants, so its risk is likely worth hedging against.

134. *See* Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1536–41 (2015) (complaining of this equalizing tendency when it comes to, among other matters, jury peremptory challenges); Laurie Schipper & Beth Barnhill, *We're Victims' Rights Advocates, and We Opposed Marsy's Law*, ACLU (May 16, 2018, 10:45 AM), https://www.aclu.org/blog/criminal-law-reform/were-victims-rights-advocates-and-we-opposed-marsys-law (explaining objections to so-called "Marsy's Laws" that try to match victim "rights" to those of defendants); Jeanne Hruska, *'Victims' Rights' Proposals Like Marsy's Law Undermine Due Process*, ACLU (May 3, 2018, 10:00 AM), https://www.aclu.org/blog/criminal-law-reform/victims-rights-proposals-marsys-law-undermine-due-process (same).

135. *See, e.g.*, Abbie Vansickle & Manuel Villa, *California's Jails Are so Bad Some Inmates Beg to Go to Prison Instead*, L.A. TIMES (May 23, 2019, 3:00 AM), https://www.latimes.com/local/lanow/la-me-california-jails-inmates-20190523-story.html.

it is a serious issue when selection for lottery trial requires an unwilling defendant to remain incarcerated pending an unwanted jury trial.

We believe this is best addressed by (1) reforming systems of pretrial release, thereby reducing the detention population to *only* those defendants who present a genuine flight or safety risk;[136] and (2) markedly improving jailhouse conditions. Under such a system, most lottery trial defendants would already be released upon conditions,[137] and the rest would be at least somewhat less put upon. Still, pretrial release is of course always fluid, and so a lottery system ought to (1) provide any lottery trial defendant in detention automatic and prompt rehearing on release, and (2) provide lottery trials—especially those in which defendants remain in detention—some calendaring preference.

H. Who Pays, Litigates, and Presides

As we have stressed, the lottery system is intended to systemically improve criminal justice, and thus chosen defendants should not individually bear greater burdens than necessary.[138] Hence, the state ought to pay the trial bill of all defense counsel who litigate lottery trials. After all, this defendant tried to plead guilty. For publicly funded defense, this simply continues standard practice. But (relatively rare) privately retained counsel could now bill the state for the difference between the fee for a guilty plea disposition and the fee for going to trial. If there are statutory trial fees ordinarily borne by the defendant, or if trial requires defense experts, they are paid by the state.[139]

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136. Although critical work remains, it has been encouraging to see progress in the past few years. *See, e.g.*, *Bail Reform*, THE MARSHALL PROJECT, https://www.themarshallproject.org/records/1439-bail-reform (last updated Nov. 7, 2020, 8:50 AM) (gathering articles).

137. Most defendants are already released pending trial, and bail reform should increase the portion of defendants who avoid pretrial detention. In recent years, almost two-thirds of felony defendants in state courts are released prior to disposition; in federal courts, almost two-thirds are in pretrial detention. *See* THOMAS H. COHEN, BUREAU OF JUST. STAT., NCJ 239243, PRETRIAL RELEASE AND MISCONDUCT IN FEDERAL DISTRICT COURTS, 2008–2010 1–3 (2012) (in 2008–10, 36 percent of federal defendants were released before disposition); THOMAS H. COHEN & BRIAN A. REAVES, BUREAU OF JUST. STAT., NCJ 214994, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS 1 (2007) (between 1990–2004, 62 percent of felony state court defendants in the seventy-five largest counties were released before disposition).

138. *See, e.g.*, *supra* Subparts IV.D and IV.F.

139. Lest this seem too extreme a proposal, something on the order of 80 percent of defendants are indigent and thus are already entitled to such assistance. *See* Christopher Zoukis*, Indigent Defense in America: An Affront to Justice,* CRIM. LEGAL NEWS (Apr. 2018), https://www.criminallegalnews.org/

Ordinarily, we believe the same prosecution and defense attorneys ought to remain. That is both efficient and, more critically, conducive to a jury trial-ready bar, which is the lottery's training benefit.[140] Of course, a prosecutor or defense attorney might prefer to hand the trial to a more junior colleague with lesser trial experience, and nonindigent defendants are entitled to counsel of their choice.[141] In any case, these options have no direct bearing on a trial lottery system.

Finally, a lottery trial could be presided over by the plea bargain judge or by a different judge. Concerns of confirmation bias lead us to strongly favor the latter option, particularly because the lottery trial audits the judicial role. However, in jurisdictions with few judges, this may not be possible, and it is hardly unprecedented for judges to preside over trials after rejecting plea agreements or after a conviction based on a guilty plea is overturned. Since we are dealing with jury trials—in which a judge plays a critical but limited role—neither option renders the lottery system worse than the status quo.

V. CONCLUSION

Many have documented law's generally "uneasy relationship with chance."[142] On reflection, however, chance is (and has always been) "an integral, ineradicable feature of the legal process,"[143] just

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news/2018/mar/16/indigent-defense-america-affront-justice/; *see also* Ake v. Oklahoma, 470 U.S. 68, 74 (1985) ("We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.").

We note that a jurisdiction adopting a defendant "opt in" model of lottery (*cf. supra* Subpart IV.F, discussing an "opt out" model) could more appropriately require selected defendants to bear additional costs.

140. Concern that defense attorneys' performance at trial would be compromised by a version of confirmation bias—given that they know their client has pled guilty—seems minimal. Defense attorneys routinely must set aside any personal view about a client's guilt or innocence during representation.

141. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006) (recognizing the Sixth Amendment right to hire counsel of one's choice). Indigent defendants are not constitutionally entitled to choose their appointed counsel. Morris v. Slappy, 461 U.S. 1, 14–15 (1983) (holding that there is no Sixth Amendment guarantee to a "meaningful attorney-client relationship"). Few American jurisdictions permit otherwise. *But see* Lorelei Laird, *Defendant's Choice: Texas County Experiments with Allowing Indigent Clients to Choose Their Own Lawyers*, A.B.A. J. 18, 18–19 (2018) (describing a novel system of such choice in Comal County, Texas). If a nonindigent defendant wishes to change counsel, he probably cannot expect the state to pick up any resulting greater tab.

142. DUXBURY, *supra* note 14, at 6. *See generally* ELSTER, *supra* note 14, at 99–100; Samaha, *supra* note 14, at 1.

143. DUXBURY, *supra* note 14, at 10.

as it is in all of life. The question is how to make it "work to our advantage."[144]

That is our aim. At present, we have too few jury trials.[145] And we also have too few—and too ineffective—means of public oversight of the law enforcement process.[146] Not surprisingly, these phenomena are connected. As the Framers understood, public participation in criminal enforcement—operationalized through the jury trial—is central to our system of self-government.

Accordingly, we propose a straightforward, yet admittedly very novel, remedy: a lottery mechanism that marginally increases the number of trials and, in the same stroke, makes inroads toward a more publicly minded criminal justice system. The proposal is not a panacea;[147] nor would its implementation have to be uniform across jurisdictions (indeed, it likely would not be). But it would be an important step in the right direction, restoring a greater measure of accountability and democratic spirit to a system that increasingly feels distressingly void of both.

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144. *Id.* at 9.

145. In the telling, if rather extreme, words of John Adams, representative government and trial by jury are "the heart and lungs" of liberty, without which we have "no other fortification against . . . being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds." JOHN ADAMS, THE REVOLUTIONARY WRITINGS OF JOHN ADAMS 55 (C. Bradley Thompson ed., 2000).

146. Judges and prosecutors enjoy absolute immunity. *See, e.g.*, Woodworth v. Hulshof, 891 F.3d 1083, 1086 (8th Cir. 2018) (recognizing absolute judicial and prosecutorial immunity despite egregious due process violations). Law enforcement officers enjoy qualified immunity, which has come to protect "all but the plainly incompetent." District of Columbia v. Wesby, 138 S. Ct. 577, 589 (2018). And unlike in civil law jurisdictions, our appellate courts do not seriously reconsider facts—and certainly do not require additional evidence thereof. *See* MIRJAN R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 44–45 (1986) (articulating the divergence).

147. In the words of Epps and Ortman, "we proceed on the premise that incremental change is worthwhile. The perfect must not be the enemy of the good." Epps & Ortman, *supra* note 14, at 735. No set of trials—generated by lottery or otherwise—is going to resolve that perhaps police search black persons more than white ones, or more often use unnecessary force provoking charges of resisting arrest, or...any of the other myriad ways that law enforcement is inequitable distributed. So, the trial lottery does nothing about any of that, save to the (perhaps small) degree it uncovers that a few such cases have weak evidence, or provides a chance for an occasional jury nullification, or just informs the jurors and public about law enforcement. A trial lottery is hardly a panacea; it is merely, we claim, an improvement.