NOTE

THE HOUSE ALWAYS WINS: SYSTEMIC DISADVANTAGE FOR CRIMINAL DEFENDANTS AND THE CASE AGAINST THE PROSECUTORIAL VETO

Evan G. Hall†

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INTRODUCTION

In the Preface to the 44th Annual Review of Criminal Procedure, Judge Alex Kozinski levels a number of criticisms against the modern American criminal justice system.[1] Central among those criticisms is his assessment of the fundamental imbalance in criminal trials between the prosecution and the defense: "[W]e like to boast that our criminal justice system is heavily tilted in favor of criminal defendants because we'd rather that ten guilty men go free than an innocent man be convicted. There is reason to doubt it, because very few criminal defendants actually go free after trial."[2] Judge Kozinski's concern—that the system is rigged to some degree in favor of

† Brigham Young University, B.A. English, 2013; Cornell Law School, J.D. 2017; Editor, *Cornell Law Review*, Volume 102. I am grateful to my wife, Jenessa, for making any work I do both logistically possible and emotionally fulfilling. I am indebted to Professor Valerie Hans for fueling my interest in jury-related criminal procedures and for guiding my research on the prosecutorial veto. Finally, I am grateful for the staff of the *Cornell Law Review* for the enormous amount of work they did on my behalf in editing and publishing this work.

1 *See* Alex Kozinski, *Criminal Law 2.0*, *Preface* to 44 GEO. L.J. ANN. REV. CRIM. PROC. iii *passim* (2015).

2 *Id.* at iii (footnote omitted).

the prosecution—is a relatively common one among defense attorneys and criminal justice reform advocates.[3]

Less common, however, are the specific measures Judge Kozinski proposes to ameliorate the criminal justice system's flaws. One of his proposals that would work to rectify this imbalance centers on the right of the accused to receive a trial from his peers:

> Give criminal defendants the choice of a jury or bench trial . . . The prosecution has many institutional advantages, not the least being that they get to go first and thus have their theory of the case laid out before the defendant can present any evidence at all. I would think it fair to let the defendant get the choice of judge or jury.[4]

In many states, when a criminal defendant wants to waive the right to a jury trial in favor of a bench trial, the defendant must first obtain the consent of the prosecutor.[5] Scholars and practitioners frequently call the refusal of that consent the "prosecutorial veto,"[6] and what Judge Kozinski proposes is its complete elimination from criminal procedure.[7] The primary goal of this Note is to analyze the merits of that proposal. The Note will provide the relevant legal background to the issue, including the Supreme Court's jurisprudence on the prosecutorial veto in Part I, and the various federal and state statutory approaches to the issue in Part II. Then, in Part III, the Note will consider the merits of Judge Kozinski's proposal to eliminate the prosecutorial veto by exploring the policy arguments for it. Finally, in Part IV, the Note will make the case against the prosecutorial veto. The Note will conclude by

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3 *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/ [https://perma.cc/S6KS-GGKB].

4 Kozinski, *supra* note 1, at xlii–xliii (emphasis omitted) (footnote omitted).

5 *See, e.g.*, TEX. CODE CRIM. PROC. ANN. 1.13(a) (West 2016) ("The defendant in a criminal prosecution for any offense other than a capital felony case in which the state notifies the court and the defendant that it will seek the death penalty shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that, except as provided by Article 27.19, the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state. The consent and approval by the court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the state shall be in writing, signed by that attorney, and filed in the papers of the cause before the defendant enters the defendant's plea.").

6 Fred Anthony DeCicco, *Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the "Prosecutorial Veto,"* 51 FORDHAM L. REV. 1091, 1094 (1983).

7 *See* Kozinski, *supra* note 1, at xlii.

agreeing with Judge Kozinski's proposal and arguing for its adoption.

I
SUPREME COURT JURISPRUDENCE ON THE PROSECUTORIAL VETO

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[8] The Supreme Court has outlined the contours of the right to a jury trial through a series of cases that centers on which kind of crimes trigger the right. In *Duncan v. Louisiana*, the Court held that a misdemeanor case triggers the right to a jury trial where it carries a maximum sentence of two years.[9] In that case, the Court identified the constitutional purpose of the jury trial guarantee in criminal trials—a purpose that is particularly relevant in a discussion of the accused's ability to waive that right: "[p]roviding an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[10]

Two years later, the Supreme Court clarified its standard for when a criminal trial triggers the constitutional right to a jury trial.[11] In *Baldwin v. New York*, the Court held that any crime that is punishable with six or more months of imprisonment is a serious crime and triggers the Sixth Amendment right to a jury trial.[12]

The issue of the prosecutorial veto arises only in cases where the Sixth Amendment guarantees the defendant a right to jury trial.[13] Thus, in cases not within the *Baldwin* definition for a crime punishable with six or more months of imprisonment, the Sixth Amendment right to a jury trial is not triggered, and the defendant has no jury trial right to waive.

The question of whether the defendant in a federal trial could waive the jury right guaranteed in the Sixth Amendment

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8 U.S. CONST. amend. VI.

9 391 U.S. 145, 150 (1968).

10 *Id.* at 156.

11 *See* Baldwin v. New York, 399 U.S. 66, 73–74 (1970).

12 *See id.* ("We cannot, however, conclude that . . . administrative conveniences . . . can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment.").

13 *See* DeCicco, *supra* note 6, at 1094.

first came before the Court in *Patton v. United States*.[14] There, the defendants had not proactively attempted to waive their right to a jury in order to secure a more favorable outcome; rather, one juror had withdrawn from the jury for illness, and the trial court judge had continued the trial with the consent of the defendant and the prosecutor with only eleven jurors rather than the traditionally required[15] twelve jurors.[16] The Supreme Court in *Patton* held that this action was a waiver of the jury right by the defendant and that it was constitutional.[17] The Court then held that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."[18]

The issue again came before the Supreme Court in *Singer v. United States*, where a defendant, again in a federal district court trial, had attempted to waive his right to a jury without the consent of the prosecutor.[19] In *Singer*, unlike in *Patton*, the defendant wanted to waive his right to a jury trial in order to receive a bench trial and so requested on the first day of trial. The government refused to consent, and the jury convicted the defendant. On appeal, he argued that Rule 23(a) of the Federal Rules of Criminal Procedure, which requires the prosecutor to give consent in order to grant a defendant a waiver of the jury trial, was unconstitutional under the Sixth Amendment.[20] As the Notes of the Advisory Committee for Rule 23 say, federal courts generally required the defendant to obtain the consent of the prosecution even before the ruling of *Singer* or the promulgation of Rule 23(a).[21]

In a unanimous decision, the Supreme Court held that "the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone" and declined to find Rule 23(a) unconstitutional.[22] Writing for the Court, Chief Justice Earl Warren stated as the opinion's central rationale that "[t]he Constitution recognizes an adversary system as the proper method of determining guilt, and the Govern-

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14 281 U.S. 276, 287 (1930).

15 The Supreme Court later held that a jury does not need twelve members in order to meet the demands of the Sixth Amendment. *See* Williams v. Florida, 399 U.S. 78, 102–03 (1970).

16 *See Patton*, 281 U.S. at 286.

17 *See id.* at 312–13.

18 *Id.*

19 380 U.S. 24, 25 (1965).

20 *See id.* at 26.

21 *Advisory Committee's Note to Subdivision (a)* to FED. R. CRIM. P. 23.

22 *Singer*, 380 U.S. at 26.

ment, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[23] *Singer* was the last Supreme Court decision on the prosecutorial veto, and the rationale the *Singer* Court employed to validate the prosecutorial veto would become the conduit through which the prosecutorial veto established its place in modern American criminal law.

II
FEDERAL AND STATE STATUTORY APPROACHES TO THE PROSECUTORIAL VETO

Federal courts unilaterally require the government to provide its consent before a defendant can waive the right to a jury trial. Federal Rule of Criminal Procedure 23(a) says that "[i]f the defendant is entitled to a jury trial, the trial must be by jury unless: (1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves."[24]

State courts differ widely on which parties need to provide consent in order for the defendant to waive, but they generally divide into three groups. The first group tracks the federal law and requires consent from both the government and the court. California, a member of this first group, includes the following provision in its Constitution: "A jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel."[25] States with similar statutes include Indiana[26] and West Virginia.[27] The second group of states require only that the defendant obtain the court's approval; that is, each of these states has abolished the prosecutorial veto but still require judicial approval. States in this second group include Massachusetts[28] and Washington.[29] The third and final group of states have no

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23 *Id.* at 36.

24 FED. R. CRIM. P. 23(a).

25 CAL. CONST. art. I, § 16.

26 *See* IND. CODE § 35-37-1-2 (2016) ("The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court.").

27 *See* W. VA. R. CRIM. P. 23(a) ("Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the state.").

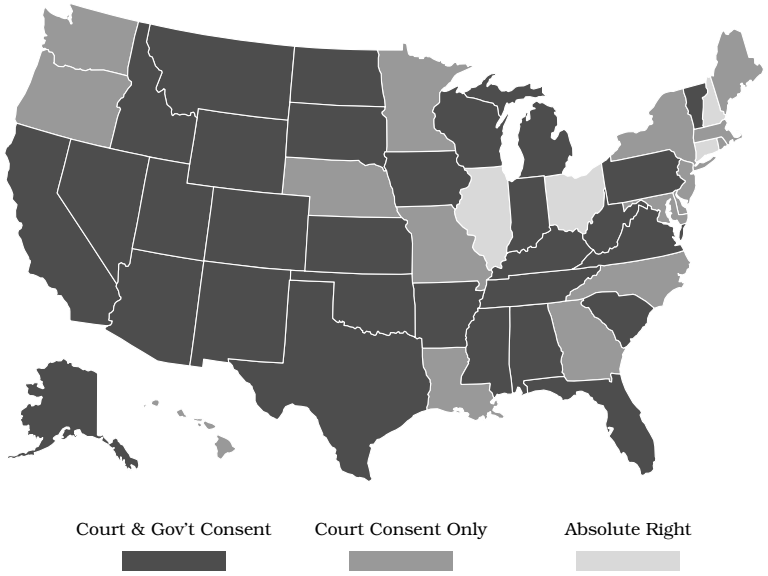
28 *See* MASS. R. CRIM. P. 19(a) ("A case in which the defendant has the right to be tried by a jury shall so be tried unless the defendant waives a jury trial in writing with the approval of the court and files the waiver with the clerk, in which instance he shall be tried by the court instead of by a jury.").

29 *See* WASH. REV. CODE § 10.01.060 (2016) ("No person informed against or indicted for a crime shall be convicted thereof, unless by . . . the verdict of a jury,

requirement that the defendant obtain consent of any party, and have, in effect, given the defendant an absolute right to waive the right to a jury trial. In this group are Connecticut[30] and Illinois.[31] This final group of states have enacted by statute a total elimination of the prosecutorial veto in criminal trials as Judge Kozinski proposed.[32]

The map below illustrates the disparity in approaches among states toward the right to jury trial waiver.[33] The most darkly shaded states are those states in the first group that require both the consent of the court and the consent of the government. The gray states are those states in the second group that require only consent of the court. The most lightly shaded colored states constitute the third group of states that have given the defendant an absolute right to waive the jury trial.

FIGURE 1



accepted and recorded by the court: PROVIDED HOWEVER . . . where the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.").

30 *See* CONN. GEN. STAT. § 54-82(a) (2015) ("In any criminal case, prosecution or proceeding, the accused may, if the accused so elects when called upon to plead, be tried by the court instead of by the jury . . . .").

31 *See* 725 ILL. COMP. STAT. 5/103-6 (2016) ("Every person accused of an offense shall have the right to a trial by jury unless . . . understandingly waived by defendant in open court . . . .").

32 *See supra* text accompanying notes 1–6.

33 For a complete list of citations of the state statutes and rules of criminal procedure from which this map was made, see APPENDIX of this Note.

As the map shows, a majority of the states (the most darkly shaded states) require both prosecutorial consent and court consent before a defendant may waive the right to a jury trial. There are thirty total states in this group. Sixteen states (the gray states) require only consent of the court, and only four states (the most lightly shaded states), a considerable minority, have given the defendant an absolute right to jury trial waiver. It should be noted that there is some gray area between these categorical distinctions. Some states, like Louisiana, only require consent of the court unless the defendant wishes to waive the right to a jury trial after a certain number of days before the commencement of the trial, at which point the defendant needs to obtain the consent of the prosecutor as well as the court.[34] Also, although Ohio grants the defendant an absolute right to waive the jury trial, that right expires at the commencement of the trial, at which point the defendant must obtain the prosecutor's and the court's consent in order to waive the jury trial right and proceed to a bench trial.[35] Ohio is also one of a number of states that separates "serious" offenses from "petty" offenses in determining the applicability of the jury trial right.[36] For trials of "petty offenses" where the defendant has a right to a jury trial, the defendant will receive a bench trial unless the defendant demands a jury trial.[37] In Ohio, a defendant's failure to do so constitutes a waiver of the jury trial right. Although all fifty states now have a governing legal rule allowing for some waiver of the jury right, North Carolina was the most recent to adopt one. Up until 2014, North Carolina did not allow, even with the consent of the prosecutor and the court, any waiver of the right to a jury trial.[38]

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34 *See* LA. CODE CRIM. PROC. ANN. art. 780(B)–(C) (2016) ("The waiver shall be by written motion filed in the district court not later than forty-five days prior to the date the case is set for trial. The motion shall be signed by the defendant and shall also be signed by defendant's counsel unless the defendant has waived his right to counsel. . . . With the consent of the district attorney the defendant may waive trial by jury within forty-five days prior to the commencement of trial.").

35 OHIO R. CRIM. P. 23(A) ("In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney.").

36 *Id.*

37 *See id.* ("In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto.").

38 *See Editor's Note* to N.C. CONST. art. I, § 24, *as reprinted in* N.C. RET. SYS. L. (2016), https://www.nctreasurer.com/2016Lawbook/nccarti/nccarti-24.htm

III
THE POLICY ARGUMENTS BEHIND THE PROSECUTORIAL VETO

The relative differences in the states' procedural approaches to the prosecutorial veto reveal the varied purposes served by the prosecutorial veto or by its absence. A jurisdiction, for instance, may require judicial consent before defendant may waive their right to a jury trial because the lawmakers believe the jury is the fact-finder most likely to achieve a fair and accurate outcome to any given trial.[39] The judge in that case acts as a representative of that interest and may decide whether a particular case would be more fairly treated in a bench trial.

Assuming the *Duncan* rationale for the jury right remains its central basis—that the right to a jury trial exists primarily to protect the defendant, and not to serve any other governmental or communal interests—there are significant dangers of granting a defendant an absolute right to a jury trial waiver.[40] One major criticism of a defendant's right to waive a jury trial is that a zealous prosecutor may actually benefit from a defendant's ability to waive the jury trial.[41] The prosecution may believe it is at a disadvantage in a jury trial or may otherwise be uncomfortable with the unpredictability of a jury and offer a defendant more amenable charges in exchange for the defendant waiving the jury trial. Critics of an absolute right to a jury trial waiver also worry that a defendant may waive when it is not actually in the defendant's best interest. By denying the defendant this choice, the Court ensures the defendant all of the constitutional protections that may benefit her.

[https://perma.cc/F7VA-2DCQ] ("Session Laws 2013-300, s. 3, provides: 'If a majority of the votes cast on the question are in favor of the amendment set out in Section 1 of this act, the State Board of Elections shall certify the amendment to the Secretary of State, who shall enroll the amendment so certified among the permanent records of that office. The amendment becomes effective December 1, 2014, and applies to criminal offenses arraigned in superior court on or after that date.'").

39 *See, e.g.*, WASH. REV. CODE § 10.01.060 (2016) ("[W]here the person informed against or indicted for a crime is represented by counsel, such person may, with the assent of the court, waive trial by jury and submit to trial by the court.").

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

41 For an op-ed written by a defense attorney espousing just this position, see James Payne, *Vote 'No' to Amendment to Waive Jury Trial*, STARNEWS ONLINE (Sept. 12, 2014, 4:00 PM), http://www.starnewsonline.com/opinion/20140912/james-payne—-vote-no-to-amendment-to-waive-jury-trial [https://perma.cc/8AU3-FLD2] ("[P]rosecutors may use the leverage of their charging authority to unduly influence a defendant to waive their right to a jury trial.").

While the Court has, as noted above, explicitly stated that the purpose of the Sixth Amendment and the right to the jury trial is to protect the accused from the "overzealous prosecutor" and the "eccentric judge,"[42] the prosecutorial veto serves another interest not expressly outlined in the Sixth Amendment. In an adversary system, both parties need to work from equal ground, and as the Court in *Singer* noted, the prosecutorial veto acts as a balance to the defendant's ability to waive the jury right.[43] Jurisdictions where the defendant must acquire the prosecution's consent to waive the right to jury trial afford to the prosecution the same right as the defendant to avoid the "eccentric judge."[44] Just as a defendant may wish to avoid the jury trial in particular cases, so might a prosecutor want to avoid trying her case before a particular judge. The prosecutorial veto to the defendant's waiver ensures that the prosecution has at its disposal the same tools as the defense.

The prosecutorial veto, then, acts as an additional mechanism through which the adversarial system balances the rights of each party. The Court in *Singer* reasons on the assumption that to satisfy the interests of the adversary system is to directly satisfy the interests of justice.[45] Rather than entrust the assessment of fairness to a judge, who acts as the mediator between the two parties, and who would ideally, in the case of a jury trial waiver, determine whether a fair adjudication would occur more likely with a bench trial or with a jury, the Court in *Singer* believes adversarial parties working on equal ground are more likely than any given judge to achieve the fairest outcome.

Beyond the interest in the adversarial system, though, the prosecutorial veto may serve the interest of a third party not directly involved in any criminal trial: the community. A growing body of research suggests that there are societal benefits that criminal jury trials provide—benefits that affect both the people who serve on the jury as well as the community in which they serve. In his book on the subject, John Gastil and his colleagues found, after interviewing thousands of jurors about their experiences, that "[p]articipating in the jury process can be an invigorating process for jurors that changes their understanding of themselves and their sense of political power and broader civic responsibilities."[46] Gastil and his colleagues ar-

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42 *Duncan*, 391 U.S. at 156.

43 *See* Singer v. United States, 380 U.S. 24, 36 (1965).

44 *Duncan*, 391 U.S. at 156.

45 *See Singer*, 380 U.S. at 36.

46 JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 4 (2010).

gue that jury trials perform a more expansive function than achieving a fair outcome or protecting criminal defendants against corrupt prosecutors and "eccentric judge[s]."[47] Gastil, with the help of data,[48] argues that juries play a crucial, even necessary role in a democracy:

> [M]embers of a democratic society need to connect not just with each other but also with the state in ways that are inspiring, empowering, educational, and habit forming. . . . This perspective provides a new appreciation of the unique position of the jury, through which a state institution brings private citizens together to deliberate on a public problem.[49]

This understanding of the role of the jury in American democracy offers another possible policy justification for the prosecutorial veto. If jury service is, by itself and regardless of its effect on any given criminal trial, an inherent positive for communities, then the prosecutorial veto serves the community's interest by rejecting any attempts to bypass the jury trial. When jury service increases a citizen's desire to participate in the political process by voting, for instance,[50] then the government has an interest in offering as many opportunities for a juror to serve as possible. The government, acting not only in its role as a party to the criminal trial but as a representative of the interests of the community, may use the prosecutorial veto to ensure that juries try cases as frequently as possible. In a jurisdiction that values highly the societal benefits derived from jury trials, lawmakers have an incentive to guard against any unnecessary bench trials.[51]

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47 *Duncan*, 391 U.S. at 156; *see* GASTIL, *supra* note 46, at 4.

48 Gastil on his methodology:

> We analyzed official county records of jury service (and voting history) from over ten thousand empanelled jurors from eight counties across the United States. With funding from the National Science Foundation, we then surveyed thousands of people called for jury service in King County, Washington. They filled out questionnaires . . . . Finally, we conducted in-depth interviews—face-to-face and by phone—with a smaller number of jurors.

GASTIL, *supra* note 46, at 4–5.

49 *Id.* at 9.

50 Gastil and his colleagues found that jurors who deliberated in criminal trials (but not civil trials) were more likely to have voted in subsequent years. *See id.* at 9–10.

51 In *United States v. Lewis*, one of the few federal court cases that upheld a court's decision to overrule the prosecutorial veto, Chief Judge Douglas Hillman offered yet another benefit that jury trials confer on society at large: "As the lid of a tea kettle releases steam, jury trials in criminal cases allow peaceful expression of community outrage at arbitrary government or vicious criminal acts." 638 F. Supp. 573, 580 (W.D. Mich. 1986). In other words, Chief Judge Hillman views the

Finally, as Justice Antonin Scalia writes in *Blakely v. Washington*, "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[52] The prosecutorial veto serves this interest by increasing, however slightly, the number of trials in which the jury and by extension the community may have a voice.

IV
THE CASE AGAINST THE PROSECUTORIAL VETO

If, however, the criminal justice system has, either in certain kinds of cases or with certain kinds of defendants, slanted jury trials in favor of the prosecution, then the community benefits of a jury trial are of small comfort to the defendant seeking protection from an unfair system. The question then would become not whether there are adequate policy justifications for the prosecutorial veto but whether those justifications would outweigh the interest in just process and fair trials.

According to the Court's explanations in both *Duncan* and *Singer*, the primary purpose of the Sixth Amendment trial right is to achieve the most just outcome, and not serve alternative purposes like catalyzing increased civic participation.[53] As the Court stated in *Duncan*, the framers designed the Sixth Amendment, like they did all of the Amendments in the Bill of Rights, with the purpose of protecting individuals against undue encroachments from the government.[54] Assuming that stated purpose is indeed the goal of the Sixth Amendment jury trial right, the interest in protecting the defendant from an unjust outcome would appear to supersede any interest in increased civic participation or in evening the playing field for the prosecutor.

So does a prosecutor require the prosecutorial veto in order to balance the adversarial system or is the system already tilted one way? Do defendants begin their trials at an inherent disadvantage simply by virtue of being defendants?

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jury trial as a conduit for community speech both for and against the government. The rest of this Note will consider this benefit a subset of the more general benefit of greater civic engagement.

52 542 U.S. 296, 306 (2004).

53 *See* Duncan v. Louisiana, 391 U.S. 145, 145, 157–58 (1968); Singer v. United States, 380 U.S. 24, 36 (1965).

54 *See Duncan*, 391 U.S. at 151.

A number of scholars, practicing attorneys, and judges believe that they do.[55] There are several institutional disadvantages that lead one to question whether the "beyond a reasonable doubt" standard leaves the defendant with a clear net benefit.[56] One of those institutional disadvantages is that the prosecution presents its case first, which, according to some research, makes the jury more likely to believe the prosecution.[57]

In light of these institutional disadvantages, the Supreme Court's justification for the *Singer* rule appears inadequate at best and starkly unjust at worst. By framing the prosecutorial veto as a necessary counterweight to the defendant's ability to waive the jury trial, the Court assumes that the two parties have begun the trial on level footing. If the opposite is true, that is, if the defense begins at a distinct disadvantage, then the prosecutorial veto only adds another mechanism by which courts reinforce that disadvantage. Given this understanding, courts should abandon the prosecutorial veto if for no other reason than to establish the defendant's absolute right to choose between bench and jury as a counterbalance to the prosecution's inherent advantages.

More than just reinforcing it, though, the prosecutorial veto worsens the imbalance against defendants. As Nancy King and Rosevelt Noble point out in their article on the subject, the prosecutorial veto frequently acts as another factor contributing to the uneven bargaining power during plea negotiations.[58] They note that prosecutors who have the veto and can ensure that their case will be tried and sentenced by a jury use those facts to their advantage in plea bargaining: "Defense attorneys and judges reported that prosecutors used the threat of a jury's sentence to obtain pleas in some cases, particularly drug and sex offense cases."[59]

Jury sentencing, as King and Noble point out, adds another dimension to the threat of the prosecutorial veto. In some states, if a jury tries a case, then a jury also sentences in

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55 *See generally* Kozinski, *supra* note 1, at iii–xiii (listing "some of the reasons to doubt that our criminal justice system is fundamentally just").

56 *See id.* at ix.

57 *See id.* ("[J]urors start forming a mental picture of the events in question as soon as they first hear about them from the prosecution witnesses. Later-introduced evidence, even if pointing in the opposite direction, may not be capable of fundamentally altering that picture . . . .").

58 *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 926 (2004).

59 *Id.*

that case,[60] and in those states with jury sentencing and the prosecutorial veto, prosecutors have a powerful weapon with which to threaten defendants. Of Arkansas prosecutors, King and Noble note that "many . . . seem to believe jury sentencing is a hammer useful for obtaining guilty pleas."[61] King and Noble note that prosecutors frequently assess how a case will play in front of a jury, and in those cases where a jury is more likely to favor the prosecution—precisely the cases where a defendant seeking a fairer trial would waive the right to a jury trial—the prosecution leverages the possible use of the jury trial in plea agreements.[62] When researchers asked a judge about the practice, he explained how it worked in his county:

> A: As a matter of strategy, then, in some counties, including mine, in serious cases the prosecutor will not agree to waive a jury.
>
> Q: So the prosecutor uses jury sentencing as leverage to get the plea?
>
> A: Exactly. In some less serious cases, say larceny or property offenses, the prosecutor is not as likely to insist on the jury. . . . But in cases that are likely to outrage a jury, they're going to ask for a jury.[63]

As the judge points out, the prosecutorial veto handicaps defendants most in need of a bench trial. Where the facts of a case will bias a jury against a defendant, and one need not look far for an example of that kind of case,[64] and the defendant would benefit from the relative impartiality of a bench trial, the prosecutor with a veto in hand can use the defendant's fear of the jury to extract a harsher plea deal than the defendant otherwise might agree to.

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60 Ironically, that more jurisdictions should institute the practice of jury sentencing is another of Judge Kozinski's proposals for reforming the criminal justice system. *See* Kozinski, *supra* note 1, at xxi ("[W]e studiously ignore the views of the very people who heard the evidence and are given the responsibility to determine guilt or innocence while reflecting the values of the community in which the offense occurred. . . . Jurors should be instructed on the range of punishments authorized by law and, if they find the defendant guilty, entrusted to weigh in on the appropriate sentence within that range.").

61 King & Noble, *supra* note 58, at 940 (emphasis omitted).

62 *See id.* at 922.

63 *Id.*

64 *See* Robert Barnes, *Supreme Court to Examine Racial Divide in Jury Selection*, WASH. POST (Oct. 25, 2015), https://www.washingtonpost.com/politics/courts_law/supreme-court-to-examine-racial-divide-in-jury-selection/2015/10/25/005ecc56-774d-11e5-a958-d889faf561dc_story.html [https://perma.cc/74VD-4AK6] (describing the facts of *Foster v. Chatman*, a case in which the defendant alleges prosecutors struck black jurors because they were black).

For example, in an especially high-profile case like the Dzhokhar Tsarnaev case—in which it was virtually impossible for Tsarnaev to find a jury with no outside knowledge of the Boston Marathon bombings[65]—a defendant's only possible avenue to a comparatively fair trial might be through a bench trial.[66] Of course, the prosecutorial veto would limit, if not eliminate, a defendant like Tsarnaev's ability to get that bench trial.

More than anything else, this practice appears to directly contradict the Supreme Court's stated purpose for the Sixth Amendment. If the Sixth Amendment protects or attempts to protect defendants from the "overzealous prosecutor,"[67] then the prosecutor's capacity to veto a jury trial right waiver serves the opposite purpose. The prosecutorial veto enables the "overzealous prosecutor" to achieve a more favorable outcome than he or she otherwise could. In other words, the prosecutorial veto, considered by the Court as another additional cog in the machine of the adversarial system,[68] becomes another mechanism by which the prosecutor asserts institutionalized advantage. While this is especially true where the jury has the power to sentence in addition to convict the defendant, it is no less applicable to those jurisdictions where the defendant has an interest in trying his or her case before a judge but cannot obtain consent from the prosecutor.

The problems with plea bargaining are well-documented. As Albert Alschuler and Andrew Deiss lament in an article on the gradual deterioration of the American criminal jury, uneven power in plea bargaining often leads to innocent defendants pleading guilty to crimes they did not commit in order to receive the guarantee of a lesser sentence.[69] Crowded dockets and overworked public defenders lead to plea deals even for triable cases. In the case of one defendant, the first day he met and

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65 *See* Ann O'Neill, *The 13th Juror: When Picking a Jury Turns into a Marathon*, CNN (Feb. 6, 2015, 1:20 PM), http://www.cnn.com/2015/01/29/us/dzhokhar-tsarnaev-trial-13th-juror/ [https://perma.cc/67FS-UB2H]. Although the court did eventually select the jury, Tsarnaev's lawyers maintained that the jury was biased. Trisha Thadani, *List of Jurors in Boston Marathon Bombing Trial Released*, USA Today (Feb. 13, 2016, 2:54 PM), https://www.usatoday.com/story/news/nation/2016/02/13/list-jurors-tsarnaev-trial-released/80339644/ [https://perma.cc/4K3B-5ESL].

66 Tsarnaev's case was in a federal court and thus subject to FED. R. CRIM. P. 23(a).

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

68 *See* Singer v. United States, 380 U.S. 24, 26 (1965).

69 *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 926 (1994).

spoke with his lawyer, she advised that he take the plea agreement for no jail time that the prosecutors offered him. That same day, she had made an appearance in court for thirty other felony cases. However, authorities later learned that "[he] was not guilty of the charge to which he had pleaded guilty; through a bureaucratic error, they had confused him with someone else."[70] Now, with many states adopting three strikes statutes in which three felony convictions can lead to jail time up to life without parole, even plea deals for no jail time can be extremely costly to a defendant.

Not only do most plea negotiations begin with uneven bargaining power in favor of the prosecutor, but plea negotiations, like many mechanisms within the criminal justice system, treat similar defendants differently based on their race. In a study done by the Vera Institute of Justice and funded by the Department of Justice, researchers found that black and Hispanic defendants were more likely to receive plea deals that included prison sentences than were white defendants who had committed the same crimes.[71] This study in concert with many others raises worrisome questions about the role of race and ethnicity in plea negotiations. Just as with studies on sentencing in death penalty cases,[72] data like these illustrate that the procedures already in place to protect defendants from unjust outcomes because of their race are not sufficient.

The stakes in criminal cases are the highest the judicial system faces, and the potential for harm to a defendant is

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70 *Id.*

71 *See* James McKinley, Jr., *Study Finds Racial Disparity in Criminal Prosecutions*, N.Y. TIMES (July 8, 2014), http://www.nytimes.com/2014/07/09/nyregion/09race.html [https://perma.cc/UN7G-2W32] ("The study found blacks were 27 percent more likely than whites to receive jail or prison time for misdemeanor drug offenses, while Hispanic defendants were 18 percent more likely to be incarcerated for those crimes.").

72 *E.g.*, David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. Crim. L. & Criminology 661 (1983). In addition to the famous Baldus study, see, for example, Ed Pilkington, *Research Exposes Racial Discrimination in America's Death Penalty Capital*, GUARDIAN (Mar. 13, 2013, 1:12 PM), http://www.theguardian.com/world/2013/mar/13/houston-texas-death-row-black-inmates [https://perma.cc/EB7H-PVFY] (discussing the research of a University of Maryland criminologist Ray Paternoster who found that "[t]he probability that the district attorney will advance a case to a [death] penalty trial is more than three times as high when the defendant is African American than for white defendants[.]") (second alteration added). The NAACP's Legal Defense and Educational Fund has published Paternoster's research in its entirety. *See* RAY PATERNOSTER, RACIAL DISPARITY IN THE CASE OF DUANE EDWARD BUCK (2012), NAACP Legal Def. & Educ. Fund, http://www.naacpldf.org/files/case_issue/Duane%20Buck-FINAL%20Signed%20Paternoster%20Report%20(00032221).pdf [https://perma.cc/H4BS-7QZG].

great. Given that plea bargaining is the most common resolution to criminal trials[73] and that it frequently leads to unjust outcomes for defendants,[74] the most readily apparent solution is to establish counterbalances to the prosecution's inherent advantages. One of those counterbalances could be a defendant's absolute right to a jury trial waiver. In all plea negotiations, and especially in jurisdictions that allow for jury sentencing, prosecutors possess disproportionate power such that the *Singer* Court's lauded adversarial system no longer pulls equally from both sides.[75] As the criminal justice system currently stands, the prosecutorial veto only makes the rich richer. Prosecutors can deny consent in all of the cases where a defendant would need it most, rendering the waiver of the jury trial right less a tool for the defendant to choose the most just venue and more a tool for the court to enjoy a more streamlined adjudication.[76]

In this context, sacrificing a fairer process is too high a price even to gain the benefits of more jury trials that the prosecutorial veto may enable. Civic engagement and political participation are indeed large profits from a robust jury institution, but frequently, the government does not use its veto in order to insist on a jury trial. Instead, prosecutors withhold consent as leverage for a more favorable plea agreement.[77] As Professor George Fisher has noted in his book, the gradual adoption of the plea agreement as the preferred method for resolution has caused an increase in procedures that encourage that end: participants in the legal process like lawyers and judges "raise up those procedural institutions that help plea bargaining and beat down those that threaten it."[78]

As the plea bargaining process has grown in its popularity, the jury, a once proud staple of the American criminal justice system, has faded into relative insignificance. Alschuler and Deiss see the advent of the plea bargain as the culprit:

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73 Alschuler & Deiss, *supra* note 69, at 924 ("Nevertheless, plea bargaining apparently became the dominant method of resolving even serious cases in urban America . . . .").

74 *Id.* at 926.

75 *See* discussion *infra* note 80.

76 *See* King & Noble, *supra* note 58, at 889.

77 *See id.* at 940 ("[M]any Arkansas prosecutors seem to *believe* jury sentencing is a hammer useful for obtaining guilty pleas . . . .").

78 GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 180 (2003).

> The American right to jury trial now resembles the hippopotamus in New York City. . . . The protagonists on both sides of the nineteenth-century battle over the authority of judge and jury to resolve questions of law have suffered resounding defeat. Today prosecutors are the judges of law and fact.[79]

Surely any attempt at restoring the jury to its former stature in order to reap the benefits of a more civically and politically engaged populace should begin at a reform of the plea bargaining process rather than with the jury trial waiver. It is there that the battle was lost, and there it should resume.

Finally, the *Singer* Court's rationale that the prosecutorial veto is an implement of the equal adversarial role of the prosecutor seems to deny the ugly reality that the modern criminal justice system is no longer balanced in favor of the defendant.[80] The *Singer* Court recognizes that the original purpose of the Sixth Amendment, and indeed the Bill of Rights as a whole, was to "protect the accused from oppression by the Government."[81] However, the underlying assumption of the *Singer* Court is that the Sixth Amendment in combination with the rest of criminal procedure is performing its function in protecting the accused from Government oppression. If that were the case, the Court's decision to empower prosecutors to veto jury trial waivers would serve the balancing interests that it purports to.[82] Unfortunately, in a system rigged against the defendant from the outset, the prosecutorial veto only worsens the imbalance.

Assuming then that the purpose of the jury trial waiver right is the *Duncan* rationale,[83] one major criticism remains of granting the defendant an absolute right to waive the trial:

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79 Alschuler & Deiss, *supra* note 69, at 927.

80 For an argument that the *Singer* Court's rationale was internally contradictory because it "creates an unbearable tension between two prosecutorial roles: that of litigant in an adversary system and that of neutral agent of justice[,]" see George C. Harris, *The Communitarian Function of the Criminal Jury Trial and the Rights of the Accused*, 74 NEB. L. REV. 804, 816 (1995) ("While the prosecutor may fulfill both roles at various times in the course of a prosecution, she cannot realistically remain a neutral agent of justice above the adversary fray at the time that she is asked to consent to jury waiver.").

81 Singer v. United States, 380 U.S. 24, 31 (1965).

82 For a pragmatic, efficiency-based argument against the prosecutorial veto, see DeCicco, *supra* note 6, at 1111 ("The expense and delay imposed on the defendant in [complex] cases may outweigh the general public interest in having the issues resolved by a jury.").

83 "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

doing so may actually expose the defendant to yet another prosecutorial advantage. If the prosecutor can manipulate the defendant into waiving the jury trial when the jury trial would be to his or her advantage, then granting the defendant that right would do nothing to balance out the inherent inequities in the criminal justice system. Prosecutors could also threaten to raise the charges or add additional charges if the defendant refused to waive the jury trial. Though there is ample research that the prosecutorial veto has an effect on the power dynamics in plea bargaining,[84] there is virtually none on the opposite proposition.[85]

There are some cited instances in particular cases of prosecutors using the threat of charges to induce the defendant into waiving his right to a jury right trial. In *Smith v. State*, a Maryland case from 2003, the defendant, who faced several drug charges and as a repeat drug offender was vulnerable to steep sentences should he be convicted, refused to plead guilty.[86] However, after the prosecutors changed the terms of the deal to lower the charges in exchange for the defendant's waiver of his jury trial right, the defendant agreed and was later convicted in a bench trial.[87]

Even further, there is a paternalism at the core of the criticism that assumes that defense attorneys and defendants will be unable to weigh the relative costs and risks of accepting a plea bargain in exchange for waiving the jury trial, a practice defense attorneys already employ when the defendants must decide whether to plead guilty and waive their right to any trial at all.[88] While the power dynamics in a given plea bargaining situation favor the prosecution, the defendant and the defense attorney who are planning on going to trial have a bargaining power that the defendant who is open to pleading guilty does not. The latter defendant is frequently accompanied by an

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84 *See supra* notes 58–63, 71–79 and accompanying text.

85 *See* Harris, *supra* note 80, at 816 ("A bench trial over the prosecutor's objection under the *Singer* exception is, in any case, a logical impossibility.").

86 375 Md. 365, 369 (2003).

87 *See id.* at 368. On appeal, the defendant argued that his Sixth Amendment right to trial by jury was violated because he had been coerced into waiving his right to a jury trial and that there was an expectation of a more lenient sentence because of his waiver. *See id.* The Court of Appeals of Maryland upheld the defendant's conviction on the grounds that there was insufficient evidence to show that either the trial judge had suggested leniency to induce the defendant to waive or that the trial judge's sentencing decision was based on a waiver of the right to jury trial. *See id.* at 403.

88 *See* Harris, *supra* note 80, at 817 ("[J]ust as the conscientious defense attorney will advise her client to waive only if she believes the court is at least as likely to acquit.").

overburdened defense attorney who is looking to bargain a way out of going to trial in order to cope with a demanding case load, which is one of the key conditions that exposes the defendant to an unfair plea bargaining process. A defense attorney who is already prepared to go to trial has an additional leverage to safeguard against an unfair plea deal.

Finally and most critically, many states (the gray group on the map[89]) have bypassed this difficulty at least in part by granting the Court the power to deny or grant a defendant's waiver of jury trial.[90] That way, as an impartial third party, the judge may weigh the interests of the defendant in determining whether to accept the jury trial waiver. Certainly it would be no solution to this problem to grant the prosecution the ability to veto the defendant's attempt to waive the jury trial. The prosecution, as an adversarial party, would have the incentive to use that veto to its advantage rather than as a mechanism for assuring that the defendant has not forsaken his or her rights unwisely. Also, significantly, many states expressly prohibit judges from engaging in the practice of influencing the plea bargain, which allows judges to sit as detached arbiters of the fairness of the defendant waiving his or her right to a jury trial.[91]

Granting the courts the power to deny or allow jury trial waivers would be much more likely to resolve any potential unfairness to the defendant. Further, courts already make determinations as to the validity of a defendant's waiver of constitutional rights, and to do so here would add no additional procedural requirement than those already in place for other constitutional rights.[92] Before North Carolina's legislature voted on whether to amend their state constitution to include a provision for jury trial right waiver, a group of researchers at University of North Carolina expressed concerns that judges, like prosecutors, had incentives to pressure defendants into

89 *See supra* p. fig.1.

90 *See, e.g.*, ME. R.U. CRIM. P. 23(a) ("All cases in the Unified Criminal Docket shall proceed to jury trial unless the defendant, with the approval of the court, waives a jury trial in writing signed by the defendant in open court . . . .").

91 *See, e.g.*, People v. Killibrew, 416 Mich. 189, 205 (1982) ("[A] trial judge shall not initiate or participate in discussions aimed at reaching a plea agreement. He may not engage in the negotiation of the bargain itself. The trial judge's role in the plea-bargaining procedure shall remain that of a detached and neutral judicial official.").

92 *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 498–99 (1966) (holding that a waiver of Fifth Amendment constitutional rights must be made intelligently and knowingly).

waiving their jury trial rights.[93] For prosecutors, the incentive would be to win the case at trial, but for judges, incentives might include control over the case's outcome or the greater efficiency of a bench trial. Empirical evidence that this sort of judicial pressure actually occurs in jurisdictions that require court approval is difficult to find, however.

The most significant criticism of the prosecutorial veto, however, is that it attempts to maintain a status quo that does not actually exist. Chief Justice Warren centered the *Singer* opinion around the notion that where a defendant has an interest to be served by the law, the government has an equal and opposite interest.[94] Unfortunately, that notion presumes that the two parties begin the litigation on equal footing, a presumption that is contrary to reality. It is possible that granting a defendant the unchecked and absolute capacity to waive the jury trial right would actually work to weaken the defendant's position at trial. However, there is no concern about the defendant's rights that, given the current state of the criminal justice system, would be best resolved by adding to the prosecution's litany of institutional advantages. The prosecutorial veto serves the government's interests even where those interests are outweighed by the defendant's, and in circumstances like a plea bargaining meeting, the defendant needs additional protection from institutional unfairness more than the prosecution needs its interests satisfied.

The unfortunate consequence of the Court's decision in *Singer* was to reinforce systemic advantage in favor of the prosecution. With federal law on the matter settled, the balance of the prosecutorial veto's fate has fallen to state law, where, on balance, it has again settled in favor of the prosecution. Every one of the fifty states has some relevant law on the matter, which leaves little room for the law to change via the courts.[95] If more states are going to eliminate the prosecutorial veto, it will likely have to be through the legislature.

There are thirty states that still have a codified version of the prosecutorial veto, and of the states without the prosecutorial veto, only four have given a defendant the absolute right to waive the jury trial right.[96] It was encouraging that the most recent state legislature to approach the issue, North

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93 *See* JEFFREY B. WELTY & KOMAL K. PATEL, UNDERSTANDING NORTH CAROLINA'S PROPOSED CONSTITUTIONAL AMENDMENT ALLOWING NON-JURY FELONY TRIALS 7 (2014).

94 *See* Singer v. United States, 380 U.S. 24, 36 (1965).

95 *See infra* APPENDIX.

96 *See id.*

Carolina's, declined to adopt the prosecutorial veto. However, given that there are no states remaining like North Carolina that have no settled law on the subject, the likelihood for legislative movement away from the prosecutorial veto at the state level is low.[97] The widespread adoption of the prosecutorial veto is a disappointing development for those who view the criminal justice system as inherently favoring the prosecution, but it is not at all a development out of line with the modern legal landscape for criminal defendants. Of any group of participants in the American criminal system, defendants are, after all, the most accustomed to losing.[98]

CONCLUSION

In 2002, Brian Banks was one of the most highly recruited high school linebackers in the country when he was accused of rape by a high school classmate.[99] Banks pleaded no contest to the charges and was sentenced to six years behind bars.[100] He was released on probation after serving more than five years in prison. He spent five more years on "high custody parole" while registered as a sex offender until his accuser recanted her entire testimony, and Banks was exonerated.[101] When asked after his exoneration why he pleaded no contest, Banks said he did so on advice from his attorney.[102] He said he was told "that [he] had no chance in trial because [he] was a big, black teenager and the jury would be an all-white jury."[103]

That the modern American criminal justice system is capable of imprisoning an innocent teenager for rape is not a debated point, but that it happened illustrates the fundamental barrier to justice that a defendant faces. The defendant does not enter the court room or the plea negotiation on equal footing with the prosecutor. This is how, without ever going to trial

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97 *See* N.C. CONST. art. I, § 24.

98 *See generally* DeCicco, *supra* note 6 (arguing there is an unfair system governing the defendant's ability to waive his constitutional right to a jury trial).

99 *See* Gary Myers, *Brian Banks Spent Five Years in Prison After Being Falsely Accused of Rape, but Now He Finally Has a Career in NFL*, N.Y. DAILY NEWS (Jan. 25, 2015, 12:09 AM), http://www.nydailynews.com/sports/football/wrongfully-imprisoned-banks-career-nfl-article-1.2090727 [https://perma.cc/E4BN-FRGK].

100 *See* Mike Tierney, *At 28, Rookie Refuses to Focus on Time Lost*, N.Y. TIMES (Aug. 5, 2013), http://www.nytimes.com/2013/08/06/sports/football/at-28-rookie-refuses-to-focus-on-time-lost.html [https://perma.cc/F6GJ-MTCX].

101 *See* Myers, *supra* note 99.

102 *See id.* Banks said, after his exoneration, that before pleading no contest, he turned down plea deals with the prosecution that would have put him in prison first for twenty-five years, then for eighteen years, and then for nine years. *See id.*

103 *Id.*

for a crime he did not commit, Brian Banks could still serve five years of prison time. He was at a disadvantage for a number of reasons outside of his control, and there were very few defenses between him and the government's power to imprison him.

While discussing the pardoning power given to the president in Article II, Section 2 of the Constitution,[104] Alexander Hamilton wrote that "the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[105] An absolute right to a jury trial waiver would be a narrow one perhaps, but in a criminal justice system so bereft of them, it would nonetheless be an exception in favor of the unfortunate defendant, guilty or not. With a system as unbalanced as this one, it is not enough to continue to pile procedures equally on both sides of the scales. Only by favoring the defense for as long as it takes to level it with the prosecution can the criminal justice system self-correct. For some future defendant in a position similar to Brian Banks's, an absolute right to a jury trial waiver would be no small correction to the system.

104 *See* U.S. CONST. art. II, § 2 ("[H]e shall have Power to Grant Reprieves and Pardons for Offences against the United States[ ].").

105 THE FEDERALIST NO. 74, at 482 (Modern Library 1937) (Alexander Hamilton).

APPENDIX
LIST OF STATE STATUTES, CASES, AND RULES OF CRIMINAL PROCEDURE ON JURY TRIAL WAIVER

Alabama
ALA. R. CRIM. P. 18.1(b).
Alaska
ALASKA R. CRIM. P. 23(a).
Arizona
ARIZ. R. CRIM. P. 18.1(b).
Arkansas
ARK. R. CRIM. P. 31.1.
California
CAL. CONST. art. I, § 16.
Colorado
COLO. REV. STAT. § 16-10-101 (2016).
Connecticut
CONN. GEN. STAT. § 54-82(a) (2015).
Delaware
DEL. SUPER. CT. CRIM. R. 23(a).
Florida
FLA. R. CRIM. P. 3.260.
Georgia
GA. CONST. art. I, stat. I, ¶ XI; *see* Pirkle v. State, 221 Ga. App. 657 (1996).
Hawaii
HAW. R. PENAL P. 23(a).
Idaho
IDAHO CRIM. R. 23(a)–(b).
Illinois
725 ILL. COMP. STAT. 5/103-6 (2016).
Indiana
IND. CODE § 35-37-1-2 (2016).
Iowa
IOWA R. CRIM. P. 2.17(1).
Kansas
KAN. STAT. ANN. § 22-3403(1) (2016).
Kentucky
KY. R. CRIM. P. 9.26(1).
Louisiana
LA. CODE CRIM. PROC. ANN. art. 780(B)–(C) (2016).
Maine
ME. R.U. CRIM. P. 23(a).

Maryland
MD. RULE 4-246(b).
Massachusetts
MASS. R. CRIM. P. 19(a).
Michigan
MICH. R. CRIM. P. 6.401.
Minnesota
MINN. R. CRIM. P. 26.01(2).
Mississippi
MISS. R. CRIM. P. 18.1(b).
Missouri
MO. R. CRIM. P. 27.01(b).
Montana
MONT. CODE ANN. § 46-16-110(2) (2015).
Nebraska
State v. Godfrey, 182 Neb. 451 (1968).
Nevada
NEV. REV. STAT. § 175.011 (2015).
New Hampshire
N.H. REV. STAT. ANN. § 606:7 (2016).
New Jersey
N.J. CT. R. 1:8-1.
New Mexico
N.M. R. ANN. 5-605.
New York
N.Y. CRIM. PROC. LAW § 320.10 (McKinney 2017).
North Carolina
N.C. CONST. art. I, § 24.
North Dakota
N.D. R. CRIM. P. 23(a).
Ohio
OHIO R. CRIM. P. 23(A).
Oklahoma
Crawford v. Boren, 536 P.2d 988 (Okla. Crim. App. 1975).
Oregon
OR. REV. STAT. § 136.001 (2015).
Pennsylvania
PA. R. CRIM. P. 620.
Rhode Island
12 R.I. GEN. LAWS § 12-17-3 (2016).
South Carolina
S.C. R. CRIM. P. 14(b).

South Dakota
S.D. CODIFIED LAWS § 23A-18-1 (2016).
Tennessee
TENN. R. CRIM. P. 23(b).
Texas
TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (West 2016).
Utah
UTAH R. CRIM. P. 17(c).
Vermont
VT. CONST., ch. 1, art. 10.
Virginia
VA. CODE ANN. § 19.2-257 (2016).
Washington
WASH. REV. CODE § 10.01.060 (2016).
West Virginia
W. VA. R. CRIM. P. 23(a).
Wisconsin
WIS. R. CRIM. P. 972.02(1).
Wyoming
WYO. R. CRIM. P. 23(a).