THE CONSTITUTIONAL RIGHT TO BENCH TRIAL*

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Sometimes juries are prejudiced against defendants. A jury may be predisposed to find a defendant guilty because of the nature of the charges. They may be predisposed to find a defendant guilty because of the reputation and demeanor of the defendant. They may be biased against a defendant for bigoted reasons, either consciously or not. A jury may also lack the ability to understand and apply the law in some cases. And indeed, such kinds of juror prejudice may pervade the jury pool.

The resulting pervasive juror prejudice imposes constitutional harms on the defendant. Among other things, pervasive juror prejudice contravenes a defendant's presumption of innocence and a defendant's right to fair trial procedures. The way our current law handles such pervasive juror prejudice is inadequate: courts are unlikely to delay trial when appropriate, instead relying on voir dire and jury selection to avoid a prejudicial jury. But this is no solution, because voir dire and jury selection are unable to cure pervasive juror prejudice.

In this Article, I proffer the first comprehensive, multimodal argument that defendants have a constitutional right to bench trial. First, I explain that as a theoretical matter, providing the defendant with the unilateral option of a bench trial with the requirement of a reasoned opinion is the only effective way to combat pervasive juror prejudice. Second, I show that the empirical and historical evidence confirm that the problem of pervasive prejudice is substantial: it arises frequently, including in the most high-profile cases; prosecutors do refuse consent to bench trial in cases where prejudice may arise; and the purported solutions of voir dire and jury selection are ineffectual. Finally, I show that, as a doctrinal matter, the interpretation of the Sixth Amendment—including with respect to the right to waive counsel, the right to a unanimous jury trial verdict,

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and the Court's response to racism in jury selection and jury deliberations—shows that the defendant has the unilateral right to bench trial.

INTRODUCTION

Some criminal defendants are widely despised.[1] That might be because of the nature of the allegations against them or their proposed defenses.[2] It might be because of their manner or demeanor.[3] It might be because of their prior acts.[4] It might be because of their notoriety, perhaps unrelated to anything criminal.[5] It might be because others say so.[6] And as we know all too well, it

1. *See, e.g.*, Bob Carlson, *Defense of the Unpopular: Lawyers Should Not Suffer Backlash for Defending Rights of Unsympathetic Clients*, ABA J. (July 1, 2019, 12:50 AM), https://www.abajournal.com/magazine/article/defense-unpopular-clients [https://perma.cc/P8DF-48EW (dark archive)] (discussing John Adams's representation, in 1770, of British soldiers who were accused of killing five colonists in the Boston Massacre and widely hated).

2. *See, e.g.*, Susan Zalkind, *Dzhokhar Tsarnaev Trial Set To Start Despite Attempts To Delay Proceedings*, BOS. MAG. (Jan. 2, 2015, 2:58 PM), https://www.bostonmagazine.com/news/2015/01/02/tsarnaev-trial-boston-date-january-5/ [https://perma.cc/9ZUL-E7JA (dark archive)] (detailing Tsarnaev's argument that a fair jury trial would be impossible because of the impact and trauma of the Boston Marathon bombing); Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities*, 52 ALA. L. REV. 193, 208 (2000) [hereinafter Perlin, *"For the Misdemeanor Outlaw"*] ("Insanity pleaders are among the most despised individuals in our society . . . ."). When this Article was first drafted, the Supreme Court was slated to consider whether the sentencing jury in Tsarnaev's trial was infected with bias based on their exposure to news media about the Boston Marathon bombing. Amy Howe, *Justices Will Decide Whether To Reinstate Death Penalty for Boston Marathon Bomber*, SCOTUSBLOG (Mar. 22, 2021, 5:06 PM), https://www.scotusblog.com/2021/03/justices-will-decide-whether-to-reinstate-death-penalty-for-boston-marathon-bomber/ [https://perma.cc/SYH2-5D9D]. The Court decided the case in March 2022, holding that the district court did not err in refusing to ask jurors about their exposure to pretrial publicity, and that even such bias would not imply a juror could not be unbiased and impartial. United States v. Tsarnaev, No. 20–443, slip op. at 9–10 (U.S. Mar. 4, 2022).

3. *See* Laurie L. Levenson, *Courtroom Demeanor: The Theater of the Courtroom*, 92 MINN. L. REV. 573, 575–76 (2008) ("High-profile criminal trials show that jurors use a defendant's courtroom demeanor to determine his sincerity and culpability. The impression that the defendant makes on the jury can thus have an enormous impact on the outcome of the trial."). Levenson discusses a number of cases, including those of Lorena Bobbitt, Erik and Lyle Menendez, and Timothy McVeigh. *Id.* at 592–96.

4. *See, e.g.*, Julia T. Rickert, *Denying Defendants the Benefit of a Reasonable Doubt: Federal Rule of Evidence 609 and Past Sex Crime Convictions*, 100 J. CRIM. L. & CRIMINOLOGY 213, 213 (2010) ("[O]verwhelming evidence shows that sex offenders are the most feared and despised group in this country . . . ."); *O.J. Simpson's Lawyers Request Another Trial*, CNN (Oct. 10, 2008), https://www.cnn.com/2008/CRIME/10/10/simpson.newtrial/ [https://perma.cc/8BTG-YTFZ] (raising unsuccessfully the claim that some jurors' disagreement with Simpson's acquittal in the 1995 double homicide case may have tainted the jury's verdict).

5. Bethany McLean, *Everything You Know About Martin Shkreli Is Wrong—or Is It?*, VANITY FAIR (Dec. 18, 2015), https://www.vanityfair.com/news/2015/12/martin-shkreli-pharmaceuticals-ceo-interview [https://perma.cc/YBN5-BZDZ (dark archive)] ("Even before his arrest this week on securities fraud allegations, Wall Street's most visible villain was infamous for gouging AIDS patients and pregnant women, buying a very overpriced Wu-Tang Clan album, and trolling the world on Twitter.").

6. Tim Rutten, *The Threat of Nancy Grace*, L.A. TIMES (July 23, 2011, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2011-jul-23-la-oe-rutten-nancy-grace-20110723-story.html [https://perma.cc/9H4L-D69V (dark archive)] ("Anyone who had occasion to watch [Nancy Grace's] relentless coverage of the recently completed Casey Anthony murder trial witnessed something quite

might be because of their race, gender, orientation, ethnicity, or religion.[7] The potential reasons are myriad. What is clear, however, is that these dispositions toward many defendants are not rare, and they obdurately persist. A fundamental tenet of our criminal justice system is that every defendant deserves a fair trial with proper procedures and the presumption of innocence. But how can our system ensure that for the despised defendant when they stand adjudged by a jury that might hate, fear, or inherently distrust them?

Consider a fictional example: a young, bombastic person takes over as CEO of a large company. Within the bounds of the law, the company adopts a number of policies that are unpopular with its customers and exploitative of its workers. When asked about it, the CEO is unapologetic. This becomes the source of considerable public acrimony. The CEO embraces it. Now, because of the company's market share and position within the industry, people have no recourse to discipline the company. They simply must live with the company's—and the CEO's—behavior.[8]

Thereafter, seemingly because of the CEO's notorious profile, the CEO and company come under suspicion of having engaged in financial crimes. In due course, the CEO is indicted. Plea negotiations do not reach settlement and the CEO wishes to exercise their constitutional right to go to trial. The CEO's attorneys are worried. They explain that, because of the CEO's renown, most everyone in the jury pool will know the CEO and will likely have a poor impression of the CEO. Furthermore, the attorneys explain that the nature of the alleged financial crimes are complex and technical, so juror impressions of the CEO are likely to have strong weight in the case. Indeed, with at least some

new to the American news media: a mainstream news organization giving one of its commentators a nightly forum from which to campaign for the conviction of a criminal defendant. It was a campaign that continued after Anthony's acquittal with virtually nonstop on-air abuse of the jurors and defense attorneys.").

7. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861, 869 (2017) (holding that, as an exception to the rule allowing no impeachment of a jury's deliberations, there can be an investigation into a jury's verdict where a juror made a clear statement of racial animus, such as, in the instant case, statements expressing "anti-Hispanic bias toward petitioner and petitioner's alibi witness"); United States v. Heller, 785 F.2d 1524, 1526, 1529 (11th Cir. 1986) (overturning defendant's conviction for tax evasion because of juror misconduct when jurors made anti-Semitic slurs about the defendant); Christian B. Sundquist, *Uncovering Juror Racial Bias*, 96 DENV. L. REV. 309, 313 (2019) (discussing juror racial bias and stating that "[i]t has proven difficult to shed the racial bias ingrained in the American adversarial process"); Adam Romero & Ilan Meyer, *Anti-Gay Bias Has No Place in Our Juries*, JURIST (Apr. 2, 2019, 1:48 PM), https://www.jurist.org/commentary/2019/04/adam-romero-ilan-meyer-anti-gay-bias/ [https://perma.cc/G8MX-BCUJ] (describing *Rhines v. Young*, 899 F.3d 482 (8th Cir. 2018), where there was evidence that jurors exhibited anti-gay bias in deliberations on whether defendant should be sentenced to death).

8. The example I have provided is fictional but inspired by the reported behavior of real individuals. *See, e.g.*, McLean, *supra* note 5 (discussing Martin Shkreli and the pricing strategy of his pharmaceutical company on certain drugs relating to pregnancy and HIV).

jurors, these impressions may supplant the legal questions altogether. The attorneys therefore suggest opting for a bench trial, and the CEO concurs.

The CEO and his attorneys promptly request a bench trial. The prosecution objects, stating that the public has a strong interest in adjudging the defendant CEO's guilt or innocence, and thus, the prosecution wants a jury to hear the case. One might suspect, however, among the prosecutor's unstated reasons is that, due to the CEO's notoriety and otherwise distasteful profile, the jury will be predisposed to find the CEO guilty. The judge informs the defendant CEO that they will proceed to a jury trial—there is no right to bench trial in that jurisdiction and all parties must consent for one to be granted.[9]

The judge understands the defendant CEO's societal status, or lack thereof, and the accompanying concern. But not to worry, the judge assures, because the judge will instruct the jury to treat the defendant CEO fairly at every turn. The CEO and attorneys remain unassuaged. The case proceeds to trial and the jury convicts.

Or consider another example: the defendant, a young, Central American immigrant man, is accused of committing a violent crime against a white woman. The evidence is not overwhelming, and there are potential alibi claims for the defendant. The alleged crime takes place in a community where there is a growing rage against immigration and immigrants, especially from Central America. Some politicians have continually expressed anger and fear at "invading," "violent" immigrants that threaten their "way of life." They claim that crime rates have soared against white individuals and that these immigrants are seeking to replace the white population. Many people in the jurisdiction expressly support these politicians and this anti-immigration platform; many more are silently sympathetic to these views, and together they make up a solid majority of voting citizens. The defendant's counsel is well aware of this and requests a bench trial. The elected prosecutor rejects this request, stating that the community has a right to seek vindication on behalf of the victim. This jurisdiction does not allow for the unilateral right to bench trial either, and the elected judge unquestioningly follows the statute. But the judge states that voir dire will ensure an impartial jury.[10] After jury selection, an all-white jury from the locality is chosen. Defense counsel urges the defendant to seek a plea, which

9. For one example, consider Federal Rules of Criminal Procedure Rule 23(a):

> If 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.

FED. R. CRIM. P. 23(a). For other jurisdictions, see *infra* notes 73–76 and accompanying text.

10. Voir dire is the "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).

results in a sentence that is nearly eighty percent of the average sentence for the crime.

In each case, improper biases might have influenced the jury—and that can result in illegitimate convictions or coerced pleas. In most cases, it is impossible to know what happened in the jury deliberation room. But that need not stop us from recognizing that something has gone wrong in these cases. Moreover, these cases are not rare. The same sort of situation, where a jury is predisposed to have animus or fear toward the defendant, occurs in several different types of cases: a woman accused of surreptitiously murdering her wealthy husband, someone accused of child abuse, pedophilia, or possessing and distributing child pornography, or an Arab Muslim person accused of terrorism.

There are plausible reasons to doubt that these defendants will genuinely receive a fair trial. Like the general public, the jurors—the decision makers in this case—may have overwhelming, irrational biases against these defendants. These biases, in turn, may have an impact in the jurors' decisions to convict. And even if the jurors' decisions were not in fact impacted by biases against the defendants, the appearance of such failures in our justice system is itself problematic. Consequently, the proceeding becomes tainted.

What could be done in such situations? The honest answer: not much. Courts are highly unlikely to dismiss charges because a fair jury cannot be selected.[11] Indeed, courts are unlikely to even delay or move a trial for juror prejudice.[12] Instead, courts rest on voir dire and jury selection to filter out biased or unable jurors and jury instructions to explain to jurors how they can adjudicate fairly.[13] The problems with these purported solutions are manifold: voir dire is an uncertain process; it can be difficult for attorneys and judges to determine facts about the mental state or disposition of jurors. Moreover, it may be difficult for jurors themselves to understand their true dispositions.[14] And even if such prejudice can be identified, when such prejudice pervades the jury pool, selection simply cannot result in a fair jury.[15] For similar reasons, even the best formulated instructions may not do the requisite work, because jurors may not even recognize their biases and deficiencies. Indeed, the empirical and historical evidence confirms this in droves.[16] The result is that the

11. *See infra* Section III.A.

12. *See infra* Section III.A.

13. *See infra* Section III.A.

14. *See, e.g.*, United States v. Villar, 586 F.3d 76, 87 n.5 (1st Cir. 2009) ("Because the bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it . . . .'" (quoting Smith v. Phillips, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring))).

15. See *infra* Section III.A for an explanation of why it might be hard to determine juror beliefs or thoughts.

16. *See infra* Section III.A.

system fails to safeguard the constitutional rights of many defendants—who are the targets of these forms of juror prejudice.

What should be done in such situations? I contend that our system must provide the defendant with a unilateral right to choose a bench trial.[17] When a defendant asks for a bench trial instead of a jury trial, the request should be granted—regardless of what the prosecutor and court say. Importantly, it is not just that it would be good or efficient to do so; this is not simply a matter of systemic or personal preference. Rather, I contend that the Constitution *requires* that we recognize the defendant's unilateral right to bench trial.

The rest of this Article is devoted to making that constitutional case. I utilize a comprehensive, multimodal approach to make this argument. *First*, I explain that as a theoretical matter, providing the defendant with the unilateral option of a bench trial, with the requirement of a reasoned opinion, is the only effective way to combat pervasive juror prejudice without jeopardizing the defendant's constitutional rights. *Second*, I show that the empirical and historical evidence confirm that the problem of pervasive prejudice is

17. *See, e.g.*, Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC. iii, xlii–xliii (2015) ("The prosecution has many institutional advantages, not the least being that they get to go first and . . . 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." (emphasis omitted)); Evan G. Hall, Note, *The House Always Wins: Systemic Disadvantage for Criminal Defendants and the Case Against the Prosecutorial Veto*, 102 CORNELL L. REV. 1717, 1727–37 (2017) (arguing for elimination of a prosecutorial veto to bench trial to equalize the power differential between prosecutors and defendants); Uzi Segal & Alex Stein, *Ambiguity Aversion and the Criminal Process*, 81 NOTRE DAME L. REV. 1495, 1549 (2006) (providing a probabilistic and empirical argument, employing the concept of ambiguity aversion, to contend that providing bench trials would eliminate inefficient prosecutor leverage over defendants); Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call To Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 316–17 (1993) (arguing for allowing defendant to opt unilaterally for bench trial in federal criminal proceedings for a variety of policy reasons, including complexity of federal criminal law and vindicating defendant's right to testify without juror prejudice due to impeachment by prior act evidence); Jon Fieldman, Comment, Singer v. United States *and the Misapprehended Source of the Nonconsensual Bench Trial*, 51 U. CHI. L. REV. 222, 222–23 (1984) (arguing that the requirement of government consent should be removed once the defendant has shown juror partiality); Note, *Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure*, 65 YALE L.J. 1032, 1042–44 (1956) (discussing the requirement of government consent to bench trial regarding the case *United States v. Silverman*, Crim. No. 9111, D. Conn. (Mar. 29, 1956), and suggesting that such waiver should be solely with the defendant); Richard C. Donnelly, *The Defendant's Right To Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 247–59 (1956) (discussing the state of doctrine on unilateral waiver, concluding it is not constitutionally required, but suggesting a court-approval rule based on whether defendant's waiver is knowing and intelligent); Tim Lynch, *The Right To Choose: Trial by Jury, or Judge*, CATO INST. (June 27, 2016), https://www.cato.org/commentary/right-choose-trial-jury-or-judge# [https://perma.cc/PZJ3-NVAM] (discussing *Singer v. United States*, 380 U.S. 24 (1965), and suggesting reasons in fairness to allow defendants optionality). *See generally* Fred Anthony DeCicco, Note, *Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the "Prosecutorial Veto,"* 51 FORDHAM L. REV. 1091, 1091 (1983) (recognizing potential constitutional harms but arguing for a court-approval rule, in order to balance the interest of jury trial against the defendant's interest in an impartial trial).

substantial. It arises frequently, including in the most high-profile cases, and the purported solutions of voir dire and jury selection are ineffectual. *Finally*, I show that, as a doctrinal matter, this interpretation of the Sixth Amendment, including with respect to the right of counsel and the right to a unanimous jury trial verdict, demonstrates that the defendant has the right to waive a jury trial and opt for a bench trial. To be clear, the defendant's right to bench trial is no panacea. Judges—who are, after all, humans—may be inflicted with the same types of biases that impact juries. But with systemic features, like reasoned opinions, appellate review, and perhaps multi-judge panels, bench trials may offer defendants a fair(er) proceeding, when juries cannot. The defendant has the constitutional right to choose.

This Article proceeds in five parts. In Part I, I provide a brief history and explanation of the role of the jury, the presumption of innocence, and the right to fair trial procedures. I then explain the phenomena of pervasive juror bias and deficiency. Part II defines the contours of the law regarding bench trials and the current state of their deployment. Part III proffers the theoretical case for the right to bench trial. Part IV grounds this argument in history and empirical evidence. Part V bolsters this argument with a doctrinal analysis of the Sixth Amendment. I briefly conclude with observations about how this intervention fits in the greater program of reforming our criminal justice system.

I. THE JURY AND FAIR TRIALS

A. *The Jury*

The right to jury trial in criminal proceedings is enshrined in the Constitution, principally in the Sixth Amendment.[18] The Sixth Amendment states in relevant part,

18. The right to jury trial is also mentioned in Article III, Section 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." U.S. CONST. art. III, § 2. The text itself seems to suggest that this is not as much a right as it is a command that, in Article III proceedings, all criminal cases must be decided by jury. The Court has rejected that textual reading, instead understanding Article III to pose no conflict to the rights formulation in the Sixth Amendment. Patton v. United States, 281 U.S. 276, 298 (1930) ("Upon this view of the constitutional provisions we conclude that Article III, Section 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so, is to convert a privilege into an imperative requirement."). Notably, the jury trial right does not attach to every criminal proceeding. Through a series of cases, the Court has made clear that the right to a jury only applies when one charge carries more than six months incarceration. Baldwin v. New York, 399 U.S. 66, 69 (1970); Lewis v. United States, 518 U.S. 322, 323–24 (1996).

> In 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*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .[19]

Based on the prefatory language "the accused shall enjoy the right," it seems clear that this was primarily understood as serving to safeguard the defendant's rights.[20] In order for the defendant to be adjudged guilty of a crime, the defendant has the right to insist that a jury of their peers renders a verdict of guilty beyond a reasonable doubt. And as the Supreme Court recently held, that verdict must be unanimous.[21] This is a high bar. Convincing any one person of anything beyond a reasonable doubt is challenging, so convincing a panel of randomly drawn persons is all the more difficult.

Under a standard view, the motivation behind the institution of the jury is that it is representative of the community, or at least more so than courts and judges.[22] Because of this representational benefit, juries are democratically empowered and can "fight tyranny and legitimate the law."[23] This has led to the understanding of the jury as a "bulwark" of liberty, standing between the government and the criminal defendant.[24]

19. U.S. CONST. amend. VI (emphasis added).

20. *Id.* Some scholars, primarily Laura Appleman, disagree with this proposition. Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 406 (2009). Appleman marshals the history of the evolution of the jury and early sources, contemporaneous with the Constitution, to argue that the jury trial right was seen as a right of the collective community. In response to Appleman's position, I contend that the placement of the right in the Sixth Amendment strongly suggests, at least for purposes of the Sixth Amendment grant, that the right is principally a protection for the defendant. Appleman suggests the protection for the defendant is that the right be speedy and impartial, and that the jury trial right remains the collective. This is a textually plausible reading, but not a dispositive one. The text simply is not enough. And regardless, as Appleman recognizes, the current state of the Sixth Amendment jury trial right is understood as one in service of the defendant. *Id.* at 440 ("[T]wentieth-century courts have assigned the jury trial right almost exclusively to defendants . . . ."). In an important article, Barbara Underwood contends that race discrimination in jury selection violates the equal protection rights of the jurors to participate in the critical democratic institution of the jury. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?*, 92 COLUM. L. REV. 725, 742–43 (1992). My view is completely consistent with this position: insofar as there is a jury, all should have the equal right to serve on it; but the people do not have the right to insist that a defendant be tried by jury.

21. Ramos v. Louisiana, 140 S. Ct. 1390, 1395 (2020).

22. Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 878 (2014) ("Juries are better positioned to assess matters reflecting their communities' values than are judges because they are more representative of their communities than judges. In contrast to judges, juries are drawn from the local vicinage and are considered bodies 'truly representative of the community.'" (citation omitted)).

23. *Id.* at 880.

24. *Id.* at 856 (stating that juries "act as a bulwark of liberty and invite citizen participation in the government"); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 428 ("The jury's power over criminal law certainly meant that it might serve as a bulwark of

Under current law, juries are primarily supposed to be the "finders of fact," with judges deciding questions of law.[25] But the criminal jury's role goes beyond purely "factual" determinations. Juries are called upon to answer a number of hybrid factual-legal questions that implicate moral questions, such as when jurors are called to determine if conduct is "'reckless,' 'without consent,' 'depraved,' 'grave,' 'cruel,' 'wanton,' 'heinous,' 'debased,' [a] 'perversion,' and 'impair[s] or debase[s] the morals.'"[26] Indeed, juries are called upon to render a verdict itself, which is at its core a hybrid determination, combining fact, law, and individual and societal moral considerations.[27]

Juries may in fact have a larger role to play than simply making factual determinations and answering rare hybrid fact-law questions. Jury nullification refers to the

> jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness.[28]

Because a jury's decision to acquit is generally final and unappealable by the government, juries have the absolute power to nullify. There is a question about whether this is a design feature or a bug: some maintain that juries are entrusted with this power as a way to serve as a check against other power structures.[29] Others contend that nullification is a pathological outcome that our

liberty by acquitting defendants who were the subject of a malicious or oppressive prosecution."); *see also* Duncan v. Louisiana, 391 U.S. 145, 155 (1968) ("The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."). Actually, the defendant in *Duncan* did not want a bench trial, perhaps due to the nature of judges. *Id.* at 146. And sometimes juries will be better than judges. Defendants should have the right to make that determination and choice.

25. *See* Harrington, *supra* note 24, at 377 (stating "[i]t has become something of an article of faith in the legal community that it is 'the duty of the court to expound the law[,] and that of the jury to apply the law as thus declared[,]'" and "[i]n practice, this is often interpreted to mean that the judge alone has the power to determine the law and the jury is limited to applying the law to the facts," but that this division is more recent than previously thought and the jury should have a role in finding the law (quoting Sparf v. United States, 156 U.S. 51, 106 (1895))).

26. Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255, 1260. Lee recognizes that juries must make moral judgments but questions what perspective they should ultimately take in doing so. He ultimately rejects the claim that juries should be stewards of community standards, and instead that they should apply their own perspective, which will in the aggregate produce a diversity of views that reflect the community standards. *Id.* at 1285–88.

27. *Id.* at 1262–63.

28. *Jury Nullification*, BLACK'S LAW DICTIONARY (11th ed. 2019); *see also* Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700–01 (1995) (further defining jury nullification).

29. CLAY S. CONRAD, JURY NULLIFICATION: THE EVOLUTION OF A DOCTRINE 5, 13 (2014); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1228 (1993) ("[J]ury nullification

system must tolerate in order to allow for the benefits of juries, and that nullification should be appropriately cabined.[30] But, importantly, those who believe in the propriety of jury nullification believe that it is a power to favor the defendant. Nullification cannot be used to disadvantage a defendant, that is, to find a defendant guilty when acquittal would be appropriate.

B. *The Presumption of Innocence*

Criminal defendants are entitled to a "presumption of innocence."[31] This is true as a matter of our constitutional law, but it is also a cornerstone of most criminal legal systems.[32] The precise meaning of this presumption can be difficult to pin, however. As Larry Laudan quipped, "It is . . . mildly disconcerting to discover that there is little consensus about precisely what the presumption of innocence means."[33]

As a rough first pass, one might define "presumption of innocence" as requiring that defendants subjected to criminal inquiry be treated as though they are innocent, until and unless proven otherwise (to the requisite standard of proof).[34] That notion of the presumption of innocence, though perhaps admirable, is unfortunately false. In our system, the presumption of innocence has been duly cabined as a trial right.[35] Indeed, courts may make a pretrial determination of the likelihood of a defendant's guilt in deciding to deny a defendant bail and jail them.[36]

But even as a trial right, there has been a great deal of scholarly and judicial confusion over what the presumption of innocence is and requires. Some have suggested that the presumption of innocence has a meta-rule status that gives rise to the allocation of burdens, the right to silence, the right to counsel, the right to confrontation, and the right to discovery.[37] In *Bell v. Wolfish*,[38] the Court characterized the presumption of innocence as follows:

was a popular tool by which English and colonial juries shielded their citizens from government tyranny.").

30. *See* Lawrence W. Crispo, Jill M. Slansky & Geanene M. Yriarte, *Jury Nullification: Law Versus Anarchy*, 31 LOY. L.A. L. REV. 1, 3–4 (1997) (arguing that jury nullification is inconsistent with the rule of law).

31. Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

32. *Id.* at 453–54; Larry Laudan, *The Presumption of Innocence: Material or Probatory?*, 11 LEGAL THEORY 333, 333 (2005) (stating "[t]he presumption of innocence . . . is among the small handful of doctrines in criminal law that are ubiquitous across a very broad spectrum of legal systems").

33. Laudan, *supra* note 32, at 334.

34. Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 724–25 (2011).

35. Laudan, *supra* note 32, at 337–38.

36. *Id.* at 339; Baradaran, *supra* note 34, at 724–25.

37. William S. Laufer, *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 333–34 (1995).

38. 441 U.S. 520 (1979).

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of suspicions that may arise from the fact of his arrest, indictment, or custody, or from other matters not introduced as proof at trial.[39]

Indeed, the Supreme Court has stated that the high standard of proof is requisite to safeguard the presumption of innocence.[40]

The precise contours of the presumption of innocence remain in flux. Here, I follow Laudan in understanding the presumption of innocence as limited—it is a trial right that jurors maintain the *probatory innocence* of the defendant.[41] This means that jurors are to maintain, at the beginning of trial, that the case against the defendant has not reached the standard of proof beyond a reasonable doubt and that the defendant's appearance before the tribunal does not count as evidence of any determination of guilt.[42] Indeed, this accords with the Court's explanation in *Bell*.[43]

C. *The Right to Fair Trial Procedures*

Apart from the presumption of innocence, a defendant also has the right to fair trial procedures.[44] Defendants cannot be adjudged guilty through random processes like rolling dice or flipping coins—that would offend due process.[45] Nor can defendants be adjudged guilty through nonprobative evidence.[46] If a trial included the testimony of, say, an astrologer or psychic who testified that

39. *Id.* at 533.

40. Lego v. Twomey, 404 U.S. 477, 486–87 (1972) ("A high standard of proof is necessary, we said, to ensure against unjust convictions by giving substance to the presumption of innocence.").

41. Laudan, *supra* note 32, at 341–43.

42. *Id.* at 343–46.

43. *Bell*, 441 U.S. at 533.

44. U.S. CONST. amend. V; Lisenba v. California, 314 U.S. 219, 236 (1941) ("As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice.").

45. *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and dissenting in part) ("Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."); Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 HARV. C.R.-C.L. L. REV. 585, 633–35 (2020) (discussing how a coin-toss procedure in clemency proceedings would offend due process); *see also* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY L. REV. 1, 27 (2009) ("For judges, flipping coins is an easy way to draw misconduct sanctions. It is a basis for penalties well beyond mere reversal by an appellate court.").

46. *See In re* Glasmann, 286 P.3d 673, 677, 679–80 (Wash. 2012) (en banc) (holding that a prosecutor's use of an altered booking photo of the defendant in closing was improper and required reversal, stating "[a]lthough a prosecutor has wide latitude to argue reasonable inferences from the evidence[,] a prosecutor must 'seek convictions based only on probative evidence and sound reason'" (citations omitted)).

the defendant was guilty on the basis of supernatural information, that, too, would offend due process, because—at least as a matter of our legal system—astrology and psychic extrasensory perception are not probative sources of evidence.[47]

In the same vein, if jurors assess a defendant to be guilty because they believe people who are serious or quiet are generally more dangerous, then, because that is false, that would be convicting based on nonprobative evidence.[48] Or if jurors were to adjudge a defendant guilty because of their race, ethnicity, or religion, then that too would be an unsound judgment based on nonprobative evidence.[49] These jury determinations would violate the defendant's rights.

Additionally, if jurors were tasked with duties that they did not have the ability to complete, that, too, may offend due process. For example, if some set of jurors did not understand spoken English and no translator was provided, then asking those jurors to process evidence presented in English would not be possible for them. That would be a due process violation.[50]

Finally, it is axiomatic that a defendant cannot be convicted unless the finder of fact determines that the defendant is guilty *beyond a reasonable doubt*. This is a staple of the Anglo-American criminal justice system, and it is required as a constitutional matter.[51] This is a high standard of proof, and indeed it is often identified as the highest standard of proof in the law.[52] If a juror convicts short of this standard, then that would offend due process.[53] For example, suppose jurors are fairly certain the defendant committed the crime, but they have some lingering doubts. Nevertheless, they decide to convict—perhaps because they think the defendant is dangerous or otherwise deserving of punishment. That decision fails to afford the defendant their right to be

47. Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. CONTEMP. LEGAL ISSUES 473, 484 (1996) ("[I]t seems uncontroversial that no court would permit, for example, a conviction based on the testimony of an astrologer who contended that the defendant's astrological chart demonstrated that he was guilty, or a medium who claimed that the dead victim named the murderer.").

48. In general, defendants do not always have a remedy for such violations of their rights, because juror deliberations are, with notable exception for bigoted animus, not open for investigation. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 863 (2017) (discussing the jury no-impeachment rule).

49. *Id.* at 869 (holding that there is an exception to the jury no-impeachment rule in cases where juror deliberations are tainted by racial animus).

50. Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Tanner v. United States, 483 U.S. 107, 115, 122 (1987).

51. *In re* Winship, 397 U.S. 358, 364 (1970).

52. Michael D. Pepson & John N. Sharifi, Lego v. Twomey*: The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 AM. CRIM. L. REV. 1185, 1194 (2010) ("The highest standard of proof—proof beyond a reasonable doubt—is reserved for criminal cases where, at least insofar as elements of the charged offense are concerned, its status as a constitutional imperative is axiomatic.").

53. *See In re Winship*, 397 U.S. at 364 (holding that the Due Process Clause requires the beyond-a-reasonable-doubt standard in criminal proceedings).

convicted only if adjudged guilty beyond a reasonable doubt—and consequently violates the defendant's constitutional rights.

D. *Juror Bias and Deficiency*

Jurors are tasked with making determinations about the defendant's guilt, or determinations that will directly bear on the ultimate determination of guilt. In so doing, the jury must afford the defendant the presumption of innocence, and they must follow directions regarding the proper analysis of the evidence. Certainly, jurors can fail in these regards: they may have biases that disrupt the presumption of innocence, and they may also lack the ability to follow directions, which in turn results in a trial that fails in its truth function.

There are many potential biases and deficiencies that jurors may bring to a case that disrupt the presumption of innocence or the fairness of trial procedures. I identify four categories of these harms.

First, jurors may have biases related to the nature of the crime and criminal proceedings. For example, in the most general sense, jurors may regard the fact that the defendant was apprehended for a crime and appears before the criminal justice system as some evidence of the defendant's guilt. This is commonly what jury instructions on the presumption of innocence are supposed to guard against.[54]

But there are other ways this bias may manifest. Jurors may think a defendant accused of a heinous crime is more likely to be worthy of punishment. For example, jurors may regard those accused of violent crimes or sex crimes with fear or animus.[55] That might cause them to think that the defendant was

54. *See* Bell v. Wolfish, 441 U.S. 520, 533 (1979).

55. *See, e.g.*, Craig Haney, *Violence and the Capital Jury: Mechanisms of Moral Disengagement and the Impulse To Condemn to Death*, 49 STAN. L. REV. 1447, 1485 (1997) (observing that the typical juror employs stereotypical views of violent criminals, engendering certain emotional reactions); Erica Beecher-Monas, *The Epistemology of Prediction: Future Dangerousness Testimony and Intellectual Due Process*, 60 WASH. & LEE L. REV. 353, 392 (2003) ("The anchoring heuristic suggests that because the jurors first learned about the defendant in the context of a graphically violent crime, they are likely to persist in thinking of the defendant as violent, even in the face of contrary evidence."); Bruce M. Lyons, *Defending Violent Crimes Cases*, PRAC. LITIGATOR, Nov. 1999, at 35, 43 ("It is the rare juror who is not repelled by the idea of one person doing a violent act to another, and this repulsion is apt to distract the juror from weighing the facts dispassionately."); Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 296–98 (2006) (describing sex crimes as the most feared crimes, with such fear only continuing to escalate, resulting in a litany of difficulties and dangers facing sex offenders); Michael P. Griffin & Desirée A. West, *The Lowest of the Low? Addressing the Disparity Between Community View, Public Policy, and Treatment Effectiveness for Sex Offenders*, 30 LAW & PSYCH. REV. 143, 156–57 (2006) (explaining that sex offenders are seen as extremely dangerous and immutably deviant). The levels of fear and animus are more intense with respect to sex crimes involving children. *See* Rickert, *supra* note 4, at 228 (observing that "condemnation is infinitely swifter and more enduring when the alleged victim is a child"); Anna K. LaRoy, Comment, *Discovering Child Pornography: The Death of the Presumption of Innocence*, 6 AVE MARIA L. REV. 559, 559–60 (2008) ("The media and the public are ready to condemn those accused

more likely to commit the crime, thus instilling the fact that the defendant is before the tribunal as having some evidentiary value that it does not or should not have. Or it might lead jurors to think that, whatever the evidence, the person is more likely to be dangerous or terrible such that it is worth convicting them and punishing them. It could be a combination of both, where the jury adjusts the standard of proof based on the gravity of the charges.

Second, jurors may have biases related to the individual defendant, based on such things as the defendant's reputation or demeanor. A prime example of such reputation bias concerns the defendant's prior acts, especially crimes. In general, jurors are greatly influenced by information about prior acts and crimes, beyond their probative value.[56] Indeed, Federal Rule of Evidence 404 addresses this point directly, by excluding "[e]vidence of a crime, wrong, or other act [offered] to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character," and creating further procedures for a prosecutor who plans on introducing such evidence for permitted purposes.[57] But of course, if such information is already known to the jury, then Rule 404 may have little impact in reducing the prejudice to the defendant.[58]

Jurors may also have biases against a defendant because of their demeanor. Jurors may believe that a defendant who appears calm, serious, and collected during a trial of a gruesome crime or a crime against a child, partner, relative, or close associate is likely to have committed the crime.[59] But this is not probative evidence of the defendant committing the crime. There are any number of explanations of a defendant's behavior that have nothing to do with the defendant's guilt: counsel may have coached the defendant to behave like that or the defendant may simply have a different way of processing grief. Indeed, the defendant's apparent behavior may be an innate or otherwise immutable feature of the defendant's personality. Nevertheless, jurors may be swayed by these facts, either consciously or unconsciously.[60]

Third, jurors may have biases related to immutable features of the defendant or the defendant's membership in a protected class. In its most

of child sex crimes well before they have had their chance to present a defense, often before the prosecution even has enough evidence for a formal charge.").

56. J. Alexander Tanford, *A Political-Choice Approach to Limiting Prejudicial Evidence*, 64 IND. L.J. 831, 831, 838 (1989).

57. FED. R. EVID. 404. Rule 404 allows prior act, crimes, or wrongs for other purposes "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." *Id.* But if such evidence is to be presented in a criminal case, the prosecutor must provide notice and a specific articulation for why such evidence fits the purported admissible purpose. *Id.*

58. United States v. King, 254 F.3d 1098, 1101 n.* (D.C. Cir. 2001) (stating that exposing the jury to inappropriate character information, and merely relying on instructions, would "eviscerate Rule 404(b)").

59. Levenson, *supra* note 3, at 577–78.

60. *Id.* at 624.

common instance, there is the all-too-familiar story of jurors regarding defendants of a particular race as predisposed to guilt.[61] Jurors may also have animus against those defendants of different religions or ethnicities, such that they do not apply the proper standard in deciding whether to punish them.[62]

Fourth, jurors may lack the ability to follow directions in the assessment of evidence. In particular, they may not be able to assess evidence for their limited purposes, as defined by the law, as with evidence of prior crimes and acts relevant to a testifying defendant's credibility but not to whether the defendant committed the act. And jurors may not be able to fully understand the limited probative value of other forms of evidence, like eye-witness testimony, confessions, and the like.[63]

These categories are not meant to be mutually exclusive.[64] Jurors can exhibit multiple of these biases and deficiencies, and indeed it may be that bias leads to the jury's deficiency as well. Also, these categories are meant to be representative but perhaps not exhaustive. There may be other varieties of bias or deficiency that impact jurors as well.

At the same time, jurors are not required to be a tabula rasa when they serve.[65] Our system does not expect jurors to come to the courtroom without any preexisting beliefs or understandings.[66] That would be an impractical and unproductive demand. Our system understands that jurors are human and have predispositions based on their life experiences. For the most part, these are beneficial predispositions, because our system wants jurors to represent the polity and societal attitudes.[67] Indeed, this may serve to safeguard the rights of the defendant.[68]

Determining which predispositions are impermissible biases and which are permissible features of the human experience is difficult work. Many of these determinations will be inherently controversial, especially in the context of an adversarial system. Similarly, in practice there is little ability to determine

61. *See infra* notes 224–33 and accompanying text.

62. *See infra* notes 234–35 and accompanying text.

63. *See infra* notes 243–52 and accompanying text.

64. DeCicco, *supra* note 17, at 1091 (discussing the *Singer* case and identifying "massive pretrial publicity," "the particularly heinous nature of the crime charged," and "characteristics of the defendant such as race, religion or prior criminal record" as potential bases for juror prejudice).

65. United States v. Taylor, 777 F.3d 434, 441 (7th Cir. 2015) ("A prospective juror does not come to the courtroom as a *tabula rasa*. The important question is whether the juror can put aside the experiences and beliefs that may prejudice his view of the case and render a verdict based on the evidence and the law.").

66. Thompson v. Parker, 867 F.3d 641, 647 (6th Cir. 2017) ("But impartiality and indifference do not require ignorance. Because 'jurors will have opinions from their life experiences, it would be impractical for the Sixth Amendment to require that each juror's mind be a tabula rasa.'" (citation omitted)).

67. Ryan, *supra* note 22, at 878.

68. *Id.* at 856.

whether jurors can actually properly analyze the evidence dispassionately and rigorously.

But even if practically difficult to resolve, that does not mean these questions are utterly intractable: jurors clearly should not regard a defendant accused of a grievous crime as guilty or worthy of punishment simply because they have been so accused. Similarly, jurors should not regard prior criminal acts or reputation as dispositive of the instant charges. And jurors should not use race, ethnicity, or religion as evidence of guilt. Moreover, it is generally clear that a juror who cannot or will not follow judicial instructions should not be deciding the case (saving room for nullification).

II. BENCH TRIALS: DEFINITION AND LEGAL LANDSCAPE

At its most basic definition, a bench trial is a trial in which the factfinder is a judge instead of civilian jurors. Thus, in addition to determining the governing law, the necessary factual determinations and the ultimate verdict are decided by the judge. In most all jurisdictions, bench trials are conducted with one judge. That is not a necessity, however, because bench trials could expand to include more judges.[69]

One feature of bench trials is that they often come with a reasoned explanation by the judge. That explanation usually sets forth the governing statute and any important legal doctrines, then lays out how the evidence presented supports the judge's factual determinations and, consequently, their verdict. In some jurisdictions, this is formally required.[70] In others, it is not required.[71]

In most states, the defendant has no unfettered right to bench trial. Many states require jury trials in death penalty cases.[72] In noncapital cases, only a few

69. Connecticut allows defendants to opt for a three-judge-panel bench trial in cases "punishable by . . . life imprisonment without the possibility of release or life imprisonment." CONN. GEN. STAT. § 54-82(b) (Westlaw through 2022 Reg. Sess.). This also includes crimes punishable by "death," but Connecticut has since abolished the death penalty. *See* State v. Santiago, 122 A.3d 1, 85 (Conn. 2015).

70. Federal Rule of Criminal Procedure 23(c) states: "In a case tried without a jury, the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion." FED. R. CRIM. P. 23(c); *see also* United States v. Silberman, 464 F. Supp. 866, 869 (M.D. Fla. 1979) ("A defendant's request for special findings under Fed. R. Crim. P. 23(c) must be granted and the Court's findings, reasoning, and conclusions must be adequate to enable intelligent appellate review of the basis for the decision." (citing United States v. Pinner, 561 F.2d 1203, 1206 (5th Cir. 1977); United States v. Johnson, 496 F.2d 1131, 1138 (5th Cir. 1974))).

71. Ohio Rule of Criminal Procedure 23(c) states: "In a case tried without a jury the court shall make a general finding." OHIO R. CRIM. P. 23(c). This has been interpreted not to require a detailed statement explaining the verdict; the statement of the verdict is sufficient. *See* State v. Ham, 3d Dist. Wyandot No. 16-09-01, 2009-Ohio-3822, at ¶¶ 41–42.

72. Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 14 & n.49 (1980) (listing states requiring jury determination for capital punishment).

states afford a defendant the right to opt for bench trial without requiring the consent of the prosecutor or the judge.[73] Indeed, most states, by rule or practice, require consent by the prosecutor.[74] In a few states, the defendant need only

73. In my research, I have found eight states, Connecticut, Illinois, Iowa, Louisiana, Maryland, Nebraska, New Hampshire, and Ohio, that offer this right to defendants. *See* LA. CONST. art. I, § 17(A); LA. CODE CRIM. PROC. ANN. art. 780 (Westlaw through 2022 First Extraordinary Sess.); IOWA R. CRIM. P. 2.17(1); State v. Henderson, 287 N.W.2d 583, 585 (Iowa 1980) (holding that defendants have a unilateral right to opt for a bench trial); MD. R. CRIM. CAUSES 4-246(b) (LEXIS through June 13, 2022); Thomas v. State, 598 A.2d 789, 793 (Md. Ct. Spec. App. 1991) (holding that a defendant may unilaterally opt for a bench trial); CONN. GEN. STAT. § 54-82(a) (2021); 725 ILL. COMP. STAT. ANN. 5/115-1 (Westlaw through Public Act 102-730 of the 2022 Reg. Sess.); N.H. REV. STAT. ANN. § 606:7 (2022); OHIO R. CRIM. P. 23(a). Nebraska seems to allow a defendant to waive unilaterally the right to a jury trial, but the court may require that the defendant adhere to some reasonable conditions in exercising that right. NEB. CONST. art. I, § 6; State v. Carpenter, 150 N.W.2d 129, 131 (Neb. 1967) ("The right to a jury trial is personal to the defendant, and the state is without power to require one if the defendant wishes to waive it."); State v. Godfrey, 155 N.W.2d 438, 442–43 (Neb. 1968) (deciding that a court may impose reasonable conditions, including on timing, for defendant to exercise the right to waive jury trial). As mentioned, some of these states allow for capital punishment and do not allow jury trial waiver in those cases. Additionally, many of the states do not offer the right to waive jury trial in cases involving joinder of multiple defendants, if one defendant wishes to proceed to a jury trial.

74. ALA. R. CRIM. P. 18.1(b); ALASKA R. CRIM. P. 23(a); ARIZ. CONST. art. VI, § 17; ARIZ. R. CRIM. P. 18.1(b)(1); ARK. CONST. art. II, § 7; ARK. R. CRIM. P. 31.1, 31.4; CAL. CONST. art. I, § 16; COLO. R. CRIM. P. 23(a)(5)(I); DEL. SUPER. CT. R. CRIM. P. 23(a); D.C. CODE § 16-705(b)(2) (2022); D.C. SUPER. CT. CRIM. R. 23(a); FLA. R. CRIM. P. 3.260; IDAHO CONST. art. I, § 7; IND. CODE § 35-37-1-2 (2022); KAN. STAT. ANN. § 22-3403(1) (2021); KY. R. CRIM. P. 9.26(1); MICH. COMP. LAWS § 763.3(1) (2022); MICH. CT. R. 6.401; Evans v. State, 547 So. 2d 38, 40 (Miss. 1989) (citing Rule 5.13 of the Uniform Criminal Rules of Circuit Court Practice and stating that "[i]t is well settled that trial by jury in criminal cases may be waived by agreement of the prosecution except where the death penalty is involved"); NEV. REV. STAT. § 175.011(1) (2022); N.M. R. CRIM. P. 5-605(A); N.D. R. CRIM. P. 23(a)(2); Valega v. City of Oklahoma City, 755 P.2d 118, 119 (Okla. Crim. App. 1988) (requiring prosecutor and court consent to waive jury trial); PA. R. CRIM. P. 620; S.C. R. CRIM. P. 14(b); S.D. CODIFIED LAWS § 23A-18-1 (2022); TENN. R. CRIM. P. 23(b)(2)(B); TENN. CODE ANN. § 39-13-205(a) (LEXIS through Ch. 877 (except Chapters 862 through 876) of the 2022 Reg. Sess.); TEX. CODE CRIM. PROC. ANN. art. 1.13(a) (Westlaw through 2021 Reg. and Called Sess. of the 87th Legislature); UTAH R. CRIM. P. 17(c); VA. CONST. art. I, § 8; VT. CONST. ch. I, art. 10; VT. R. CRIM. P. 23(a); W. VA. R. CRIM. P. 23(a); WIS. CONST. art. I, § 5; WIS. STAT. § 972.02(1) (2022); WYO. R. CRIM. P. 23(a). Some states require the court to waive jury trial on agreement of the parties. *See* FLA. R. CRIM. P. 3.260. Others require the court to agree independently. *See Valega*, 755 P.2d at 119.

obtain the court's consent.[75] And one state allows no such waiver in felony cases.[76]

On this backdrop, I contend that the Constitution requires that defendants receive a unilateral right to bench trial. Specifically, defendants should have the right to opt for a bench trial that is accompanied by a reasoned explanation of the judges' verdict, without requiring the consent of the prosecutor or the court.

III. THE THEORETICAL CASE

In this part, I set forth the theoretical case for recognizing a right to bench trial. There are two components to this argument: *First*, certain types of juror bias and deficiency are pervasive and thus threaten the defendant's presumption of innocence and right to fair trial procedures. Bench trials are the most effective way of combating these risks. *Second*, certain types of juror bias and deficiency are difficult to ascertain as an epistemic matter. Giving the defendant the option of a bench trial is the best way to allocate the risks of mistake and harm.

A. *Pervasive Juror Bias and Deficiency*

As seen above, there are various ways potential jurors can be biased or deficient in deliberating and rendering a decision in the case. Some of these biases or deficiencies will impact particular jurors. Voir dire can determine some of these prejudices so that the potential juror may be removed, though that process is not infallible.

But even though voir dire and jury selection can uncover and remove such overt biases, it does not take much to see that such juror biases and deficiencies (which I collectively refer to as "juror prejudice") need not be limited to the peculiar experiences of particular individuals; they could instead pervade the

75. GA. CONST. art. I, § 1, ¶ XI; McCorquodale v. State, 211 S.E.2d 577, 581–82 (Ga. 1974) (holding that trial court has discretion to reject defendant's jury-trial waiver); HAW. REV. STAT. § 806-61 (2022); HAW. R. PENAL P. 23(a); ME. STAT. tit. 15, § 2114 (2022); ME. R. CRIM. P. 23(a); MASS. GEN. LAWS ch. 263, § 6 (2022); MASS. R. CRIM. P. 19(a); MO. CONST. art. I, § 22(a); MINN. R. CRIM. P. 26.01(2)(c) (allowing defendant to waive jury trial on court finding that there is a problem of prejudicial publicity); MONT. CONST. art. II, § 26; N.Y. CONST. art. I, § 2; N.Y. CRIM. PROC. LAW § 320.10 (McKinney 2022); OR. CONST. art. I, § 11; OR. REV. STAT. ANN. § 136.001(2) (2021) (allowing the state to waive trial by jury was held unconstitutional), *invalidated by* State v. Baker, 976 P.2d 1132 (Or. 1999) (en banc); State v. Dunne, 590 A.2d 1144, 1149 (N.J. 1991) (discussing New Jersey Court Rule 1:8-1(a) and requiring the court to approve the request for waiver of jury trial based on a set of factors); R.I. SUPER. CT. R. CRIM. P. 23(a); WASH. REV. CODE § 10.01.060 (2022).

76. N.C. CONST. art. I, § 24; N.C. GEN. STAT. § 15A-1201 (LEXIS through Sess. Laws 2022-11 of the 2022 Reg. Sess. of the Gen. Assemb.). For other compilations of this information on the rules by jurisdiction, see Kurland, *supra* note 17, at 321–23 nn.39–45; and Hall, *supra* note 17, at 1721–23 nn.5–35.

jury pool. Above, I identified four categories of juror prejudice.[77] It is possible for each of these categories of juror prejudice to pervasively impact the jury pool. Indeed, as I show below, these forms of prejudice do manifest—with regularity.[78] And in such cases, a trial with such a jury sitting in judgment of the defendant would violate the defendant's constitutional rights, namely the presumption of innocence and the right to fair trial procedures. Consider each:

(1) Pervasive bias due to the nature of the allegations or defenses could lead to the jury failing to afford the defendant the presumption of innocence. It could also result in the jury lowering the standard of proof from beyond a reasonable doubt by, for example, balancing the risk of harms of potential recidivism against the chance that the defendant is innocent.

(2) Pervasive bias due to the defendant's reputation—for example, regarding prior bad acts or crimes—could also fail to afford the defendant the presumption of innocence. Furthermore, it could also result in judgments by the jury that are not grounded in truth, but instead more prejudicial than probative. This would then expose the defendant to a judgment based on unfair trial procedures. With respect to demeanor, here, too, that might expose the defendant to unfair trial procedures, as judgments made on demeanor are not actually probative of guilt.

(3) Pervasive bias due to defendant's race, ethnicity, religion, or other such immutable characteristics would also clearly violate the defendant's right to fair trial procedures. These facts are not probative of guilt.

(4) Lastly, pervasive deficiency by the jury in following directions and properly assessing evidence also would straightforwardly violate the defendant's right to fair trial procedures.

Thus, in the situation where there is pervasive juror bias or deficiency, the defendant's constitutional rights to the presumption of innocence or fair trial procedures will be prima facie violated by proceeding by jury trial.

1. The Current State of the Law in Solving Pervasive Prejudice

If a defendant does not have the option of a bench trial, the way the current law might handle a situation of pervasive juror bias or deficiency is inadequate; it fails to safeguard the defendant's rights. Essentially, if a court were to

77. *See supra* Section I.D. The four categories identified were: (1) jurors may be biased against the defendant due to the nature of the charges and defenses; (2) jurors may be biased against the defendant due to the reputation or demeanor of the defendant; (3) jurors may be biased against the defendant due to immutable features of the defendant, like race, ethnicity, sexual orientation, or religion; and (4) jurors may be deficient in their abilities to follow instructions on understanding and applying the law. Neil Vidmar introduces a similar, but distinct typology of juror prejudice: interest prejudice, specific prejudice, generic prejudice, and conformity prejudice. *See* Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 LAW & HUM. BEHAV. 73, 76–82 (2002).

78. *See infra* Part IV.

encounter pervasive juror bias or deficiency—by claim of the defendant—the court would most likely reject the claim. As shown below, in the event that the court plumbs further, it will (1) rest on voir dire and jury selection to solve the problem. In very rare cases, it may (2) delay the trial. In the rarest cases, the court may (3) investigate the jury deliberations for explicit bigotry and animus. These are all ineffectual solutions to the problem of pervasive juror prejudice. That is why the right to bench trial is necessary.

a. Reliance of Voir Dire and Jury Selection—Skilling v. United States

If the court recognizes that there is a problem of juror impartiality, the court will most likely rest on the voir dire and jury selection process. But by assumption, the problem is pervasive, and so removing some limited number of jurors will not cure the concern. When faced with the fact of pervasive juror prejudice, however, courts will most likely rule that there is no such pervasive juror prejudice in the jury. Judges will often seek to rehabilitate jurors who express bias or deficiency by asking prospective jurors whether they can apply the law and follow directions.[79] Most prospective jurors, at least enough to fill a jury, will often answer these questions in the positive.[80] This is not necessarily because jurors are disingenuous; they may not realize their own biases or deficiencies.[81] Regardless, the courts will then find the jurors suitable for seating. The parties could use their peremptory challenges to strike any jurors they have some particularized worry about, but again these peremptory challenges will not cure pervasive bias or deficiency.

Indeed, the Supreme Court essentially blessed this approach in *Skilling v. United States*.[82] *Skilling* concerned a number of charges—including fraud, misrepresentation, and insider trading—against Jeffrey Skilling, the former CEO of Enron Corporation.[83] Enron famously went bankrupt, and an "investigation uncovered an elaborate conspiracy to prop up Enron's short-run stock prices by overstating the company's financial well-being."[84]

79. *See* Caroline B. Crocker & Margaret Bull Kovera, *The Effects of Rehabilitative Voir Dire on Juror Bias and Decision Making*, 34 LAW & HUM. BEHAV. 212, 212 (2010).

80. *See, e.g.*, David Suggs & Bruce D. Sales, *Juror Self-Disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245, 260 (1981) (suggesting that jurors are encouraged by many factors to provide conforming answers to questions in voir dire).

81. The problems of unconscious bias are well known, but the Court recognized this way back in 1909. *See* Crawford v. United States, 212 U.S. 183, 196 (1909) ("Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.").

82. 561 U.S. 358 (2010).

83. *Id.* at 368.

84. *Id.*

Prior to trial, Skilling moved to change venue, charging that "hostility toward him in Houston, coupled with extensive pretrial publicity, had poisoned potential jurors."[85] Skilling presented "hundreds of news reports detailing Enron's downfall . . . [as well as] affidavits from the experts he engaged portraying community attitudes in Houston in comparison to other potential venues."[86] The district court nevertheless denied the motion.[87] The court acknowledged "incidents of intemperate commentary," but found that the press was overall objective and thus rejected the motion, ruling that "effective *voir dire*" would detect juror bias.[88] After extensive voir dire, Skilling went to trial and was convicted on a host of charges.[89]

Skilling appealed, raising numerous claims, including that the district court's denial of the change of venue was improper.[90] The Fifth Circuit affirmed.[91] In so doing, the court of appeals "determined that the volume and negative tone of media coverage generated by Enron's collapse created a presumption of juror prejudice," but that the extensive and thorough voir dire rebutted the presumption, resulting in an impartial jury.[92]

The Supreme Court granted the petition for certiorari and then affirmed in part and vacated in part.[93] The Court first held that, contrary to the court of appeals, there was no presumed prejudice.[94] In its reasoning, the Court pointed to the facts that there was a large jury pool in Houston, the publicity was not blatantly prejudicial, and there was a delay between the events and the trial.[95] The Court emphasized that such presumed prejudice was reserved for "extreme" cases.[96]

Then the Court held that voir dire was proper and that the resulting jury was impartial.[97] The Court acknowledged that "many [of the jurors] expressed sympathy for victims of Enron's bankruptcy and speculated that greed contributed to the corporation's collapse," but found that "these sentiments did not translate into animus toward Skilling" based on the fact that jurors answered

85. *Id.* at 369.
86. *Id.* at 369–70.
87. *Id.* at 370.
88. *Id.*
89. *Id.* at 373–75.
90. *Id.* at 377.
91. *Id.* at 375–77.
92. *Id.*
93. *Id.* at 368.
94. *See id.* at 381–85.
95. *See id.* at 382–83. The Court also pointed to the fact that the jury acquitted Skilling on some counts. *Id.* at 383–84. But this fact was simply not instructive. The jury may have thought that the prosecution had overcharged and thereby decided to reach a compromise verdict.
96. *Id.* at 381.
97. *Id.* at 385–95.

questions saying that they could be fair.[98] Skilling challenged the fact that the district court seemed to accept the juror's assertions at face value, but the Court was unmoved.[99]

The Court's decision in *Skilling* makes clear that there is little chance that a court—at any level—would find pervasive bias or deficiency reason to halt a jury trial and hold up a case. The Court brushed aside the very real potential for prejudice here: information about Enron's bankruptcy was widely disseminated, the going story was that Enron's demise was brought about by corporate greed, most if not all potential jurors would have known about that narrative, and many would have directly or indirectly been impacted financially. Nevertheless, all of the courts took the jurors' rote assertions that they could adjudge the case fairly as enough to pass inspection.[100]

Importantly, Skilling was only looking for a change of venue. This might lead to the conclusion that the Supreme Court, and the lower courts in tow, are even less likely to grant the more extreme remedy of halting the trial or dismissing the case. Indeed, when such a remedy would be appropriate because of pervasive bias, those cases are even less likely to get such a remedy since a court is unlikely to grant a hated defendant, say, a literal "get out of jail free" card.[101] Courts are mindful of the public's condemnation of judgments on so-called "technicalities," and granting a defendant an acquittal because they are so hated would count chiefly in that set.[102]

98. *See id.* at 391–92.

99. *See id.* at 392.

100. *See id.* There was a point in time where the Court was more receptive to the dangers of pretrial publicity and prejudice. In a pair of decisions—*Rideau v. Louisiana*, 373 U.S. 723 (1963), and *Irvin v. Dowd*, 366 U.S. 717 (1961)—the Court reversed convictions based on the prejudice that occurred from pretrial publicity. *See Rideau*, 373 U.S. at 727; *Irvin*, 366 U.S. at 729. But after *Skilling*, those decisions are no more than artifacts at this point. Indeed, in each of those decisions, the Court determined that there was a way to circumvent the prejudice—the courts could have allowed for a change of venue or delayed the case. But things are different now. With the advent of technology, there is very little news that is entirely local. This is especially true with crimes. Moreover, we have a diminished ability, or even an inability, to forget. Notwithstanding, in the case of Dzhokar Tsarnaev, the Court still held that it was proper for the district court to prohibit the defense from asking jurors about their pretrial exposure to media coverage of the bombings. *See supra* note 2.

101. *See* Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 486 (1997) (describing the public's disposition against "technicalities" that result in acquittals); Samuel Bray, Comment, *Not Proven: Introducing a Third Verdict*, 72 U. CHI. L. REV. 1299, 1326 (2005) (explaining that in "protections like the exclusionary rule, where the stricter the protection is perceived as being, the greater the chance that the public will think acquittals are due to 'technicalities'"); Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1352 (2010) (observing that elected judges are responsive to public opinion).

102. *See, e.g.*, Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 657 (2011) ("[J]udges often appear to be uncomfortable applying the rule, particularly for minor violations of police procedure, and especially in the case of more serious crimes. Judges are reluctant to free, or be seen to free, seemingly guilty defendants, so they manipulate the jurisprudence so as to avoid exclusion."); Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111,

b. Delaying Trial and the Anathema of Right to Speedy Trial Remedies

In the rare event that the court recognizes that there is pervasive prejudice in the jury pool, the best the defendant could hope for is that the court simply delays the trial. The animating idea is that certain types of bias or deficiency may subside with the passage of time.

That may work in some cases, but it will be unlikely to work in others. For example, in many cases of bias or deficiency, delay is unlikely to be effective. Consider each category of bias. The passage of time is unlikely to erode bias due to the nature of the charges—which the jury will obviously viscerally learn about through the trial. It is similarly unlikely to erode bias related to bigotry, unless there are large changes in society. And it is unlikely to diminish deficiencies of the jury in assessing evidence—those are often longstanding and related to certain kinds of cognitive deficits in people that are obdurate.

The one kind of bias that might subside is that related to the defendant's reputation. Delay might allow people to forget about the defendant, with any media sensationalism being replaced by the next story. But that may be a dated possibility: in a world of social media, it is hard for the defendant to be forgotten. Moreover, the trial itself might serve as a trigger for jurors to remember the defendant, reigniting the possibility of bias. Thus, delay is unlikely to actually benefit the defendant. Instead, it will likely result in the defendant having a potentially endless delay for trial or require the defendant to sacrifice the right to a fair trial.

Additionally, as a formal matter, there is a limit to the amount of time that the court may delay the trial, due to the defendant's right to speedy trial. The right to speedy trial ensures that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[103] The Supreme Court has refused to define a specific time period after which the defendant's right to speedy trial is violated,[104] but the Court has made clear that when the right is violated, dismissal is the only proper remedy.[105] This may seem like a welcome

112 (2003). One might ask why, then, we should trust judges to oversee bench trials and potentially grant acquittals. One reason is that acquittals for lack of evidence are *not* judgments on technicalities. There is still a reverence for "proof beyond a reasonable doubt," that is unlike "no trial because the defendant is too despised." I discuss this further at *infra* note 168 and accompanying text.

103. U.S. CONST. amend. VI.

104. Barker v. Wingo, 407 U.S. 514, 523 (1972) ("The first suggestion is that we hold that the Constitution requires a criminal defendant to be offered a trial within a specified time period . . . . But such a result would require this Court to engage in legislative or rulemaking activity, rather than in the adjudicative process to which we should confine our efforts. We do not establish procedural rules for the States, except when mandated by the Constitution. We find no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months.").

105. Strunk v. United States, 412 U.S. 434, 438 (1973) ("The remedy for a violation of this constitutional right has traditionally been the dismissal of the indictment or the vacation of the sentence.").

result for the defendant. If pervasive juror bias or deficiency would require delay of the trial, and the defendant's right to speedy trial limits the amount of that delay, that might mean that the case must be dismissed against the defendant. Indeed, Jon Fieldman, in an excellent student comment,[106] made a similar point with respect to the case *Singer v. United States*.[107]

Singer involved a defendant charged with thirty infractions of the mail fraud statute, and he allegedly "used the mails to dupe amateur songwriters into sending him money for the marketing of their songs."[108] He sought a bench trial to shorten the proceedings, and, although the court was willing, the government refused to consent.[109] The defendant was tried by jury and convicted on twenty-nine of the thirty counts.[110] Thereafter the defendant appealed, claiming that he had a right to bench trial.[111] The Court ultimately denied that defendants have such a unilateral right.[112] However, the Court held open the possibility that there may be a case "where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."[113] Fieldman argued that this open possibility was actually a nullity.[114] If there were circumstances that would impinge on the defendant's impartial trial right, and the presiding court recognized this impingement, then the defendant would not opt for a bench trial.[115] Instead, the defendant could insist on satisfaction of their jury trial right, and because that is not possible, the only remedy would be dismissal.[116] Thus, the option of bench trial would never arise, because the defendant would rather obtain a dismissal than a bench trial.[117]

Though perhaps formally compelling, this argument overlooks the ground realities. It is the very severe nature of this remedy that makes it practically unlikely. The remedy here is dismissal *with prejudice*, the equivalent of an acquittal for the defendant. But it is highly unlikely that the presiding court will grant the defendant an acquittal in such a scenario. To see this, consider the Court's actual interpretation of the right to speedy trial. In *Barker v. Wingo*,[118]

106. Fieldman, *supra* note 17, at 224.

107. 380 U.S. 24 (1965).

108. *Id.* at 25.

109. *Id.*

110. *Id.*

111. *Id.* at 25–26.

112. *Id.* at 34–35, 38.

113. *Id.* at 37–38 ("Petitioner argues that there might arise situations where 'passion, prejudice[,] . . . public feeling' or some other factor may render impossible or unlikely an impartial trial by jury." (citation omitted)).

114. *See* Fieldman, *supra* note 17, at 232.

115. *See id.*

116. *See id.*

117. *Id.*

118. 407 U.S. 514 (1972).

the Court eschewed any rigid time periods in which the defendant must be tried after being charged.[119] Instead, the Court set forth a four-factor test that considers "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."[120] In *Barker* itself, the Court found that a five-year delay did not trigger the right to speedy trial to require dismissal.[121] In general, the Court's jurisprudence has resulted in a cabined right to speedy trial.[122] Courts have very rarely granted a dismissal based on a violation of the defendant's right to speedy trial.[123] Indeed, courts have found the extreme nature of the remedy itself a deterrence to granting it.[124]

However, without courts granting the right to speedy trial remedy, even if courts were to recognize pervasive jury bias or deficiency, the result would simply be that the defendant's trial is held in abeyance. Though this may be preferable for some defendants, it will not be for many. The defendant is simply held in jeopardy—and, indeed, if the crime is serious, the defendant may remain detained.[125] That is not an adequate remedy for the defendant, and it simply does not safeguard the defendant's rights. Rather, it requires the defendant to make a severe concession—remain under the sword of Damocles and perhaps detained—in order to *potentially* safeguard their right to a fair trial.

119. *See id.* at 523.

120. *Id.* at 523, 530.

121. *See id.* at 533–36.

122. *See, e.g.*, Alfredo Garcia, *Speedy Trial Swift Justice: Full-Fledged Right or "Second-Class Citizen?"*, 21 SW. U. L. REV. 31, 34 (1992) (arguing that the right to speedy trial has a second-class status and is difficult to assert effectively); Anthony G. Amsterdam, *Speedy Criminal Trial: Rights and Remedies*, 27 STAN. L. REV. 525, 525 (1975) ("In a quite literal sense, the sixth amendment right to speedy trial has today become . . . more honored in the breach than the observance.").

123. United States v. Bert, 814 F.3d 591, 593 (2d Cir. 2016) (observing that speedy trial violations are "rare").

124. *See, e.g.*, United States v. Jones, 524 F.2d 834, 852 (D.C. Cir. 1975) ("Operating in a field where the only possible remedy is 'the draconian remedy of dismissal of the indictment,' we have been reluctant to find that an accused's right to a speedy trial has been violated absent a credible showing that he has been substantially prejudiced by the delay." (citation omitted)); State v. Alfred, 337 So. 2d 1049, 1057 (La. 1976) ("The amorphous quality of the right to a speedy trial leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because, unlike the exclusionary rule or the reversal for a new trial, it means that a defendant who may be guilty of a serious crime, or two as in this case, will go free without having been tried. Overzealous application of this remedy would infringe 'the societal interest in trying people accused of crime, rather than granting them immunization because of legal error . . . .'" (quoting United States v. Ewell, 383 U.S. 116, 121 (1966))); *see also* Amsterdam, *supra* note 122, at 543 ("Some would no doubt argue that the dismissal sanction upon which the Supreme Court has concentrated all of its attention is a more effective monitory device, because it threatens what state courts and prosecutors fear most. I would perhaps agree if there were any prospect that the dismissal sanction would be rigorously enforced to this end. But the lesson of the present sorry state of sixth amendment law is precisely that dismissal as a remedy has the sole effect of making judges almost universally prefer the disease.").

125. *See* Richard A. Bierschbach & Stephanos Bibas, *Rationing Criminal Justice*, 116 MICH. L. REV. 187, 213 (2017) (stating that some "statutes authorize pretrial detention for particular types of serious crimes").

c. Challenging Jury Deliberations Infected by Bigotry and Animus

A final long-shot possibility is for the defendant to challenge a guilty verdict based on the fact that the jury's verdict was grounded in improper bias or deficiency, as demonstrated through their deliberations.

In *Pena-Rodriguez v. Colorado*,[126] the defendant was charged with harassment, unlawful sexual contact, and attempted sexual assault on a child.[127] The defendant was convicted of the first two charges, but the jury deadlocked on the third.[128] After the jury was discharged, two jurors informed defense counsel that one juror had made derogatory remarks against Hispanics during the deliberations.[129] Defense counsel then made a motion for a new trial, based on the affidavits of the informing jurors.[130] The trial court denied the motion based on the state "no-impeachment" rule that protected jury deliberations from examination.[131] The case was affirmed by the Colorado Court of Appeals and Colorado Supreme Court before arriving to the U.S. Supreme Court.[132] The Court reversed, holding that

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[133]

But the Court cautioned that

> [n]ot every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict.[134]

Pena-Rodriguez is a decision to celebrate, for to let such a verdict stand in the face of perverse juror conduct would have been unconscionable. Yet it is clear that *Pena-Rodriguez* will aid a vanishingly small number of defendants,

126. 137 S. Ct. 855 (2017).
127. *Id.* at 861.
128. *Id.*
129. *Id.*
130. *Id.* at 862.
131. *See id.*
132. *Id.* at 862–63.
133. *Id.* at 869.
134. *Id.*

even where pervasive juror prejudice is a problem. First, most conscious juror prejudice is not made explicit—most racists will not use slurs in public among strangers. Second, even if made explicit, many jurors will not report this conduct to defense counsel or the prosecution.[135] Third, much of juror prejudice is unconscious. Fourth, it is not clear that *Pena-Rodriguez* touches forms of juror prejudice that are not bigotry or direct animus.[136] Thus, this is not a true solution to the problem of pervasive juror prejudice.

In sum, when bench trials are not an option, the current state of the law offers very little to combat pervasive juror prejudice. In most cases, courts will simply ignore the prejudice, or hope that voir dire and jury selection will cure the harm. In the rare event that they do recognize pervasive juror prejudice, courts may at best delay the trial. But the purported solution of delay is highly ineffectual for the defendant. Finally, a defendant has a prayer of a claim in plumbing juror deliberations, but that will not uproot most forms of juror prejudice.

2. The Right to Bench Trial and Pervasive Prejudice

I contend the problem of pervasive juror prejudice can be greatly mitigated by ensuring that defendants have a right to bench trial. In particular, a bench trial can ensure that the defendant obtains a fairer trial, with a factfinder who is impartial or at least more accountable. Importantly, it does not require any delay in proceedings in order to preserve their right to a fair trial. Furthermore, recognizing the right to bench trial—in giving the defendant the option—does no harm to the status quo.

As an initial point, the right to bench trial will not preserve the defendant's right to a trial *by impartial jury*. Where there is pervasive juror prejudice, there is no right to trial *by impartial jury* left to preserve (because when there is such pervasive juror prejudice, the very problem is that we cannot obtain a fair and impartial jury). Every solution is seeking the second best—to preserve the rights to a fair trial, without impingement of any other rights, including of other parties.

With that in mind, first begin with the fact that the right to bench trial better preserves the defendant's right to a fair trial. The basic idea here is that the jury—which is impacted by pervasive bias or deficiency—can be replaced with a judge—who is presumably not. Generally, there is a strong intuition that

135. *See* Daniel S. Harawa, *Sacrificing Secrecy*, 55 GA. L. REV. 593, 634 (2021) (discussing the difficulty in discovering juror bias).

136. Worryingly, there is reason to think that the Court's holding may not reach other forms of bigotry, like anti-homosexual bigotry. *See* Mark Joseph Stern, *A Jury Likely Sentenced a Man to Death Because He's Gay. The Supreme Court Just Let Its Verdict Stand.*, SLATE (June 18, 2018, 4:24 PM), https://slate.com/news-and-politics/2018/06/rhines-v-south-dakota-supreme-court-refuses-to-hear-case-about-anti-gay-jury.html [https://perma.cc/HK28-B47S (dark archive)].

judges, who have been educated in the law and have been selected, either by nomination and confirmation procedures or through elections, will be significantly more likely to set aside bias and will not be deficient in their application of the law.[137] At least with respect to applying the law to facts properly, it does seem very likely that judges are better than juries. Indeed, one empirical study by Reid Hastie and W. Kip Viscusi concluded that judges are "better able to deal with risk judgments made in hindsight than were the citizens."[138] And in an article comparing jury trials to bench trials, Uzi Segal and Alex Stein found that there were higher acquittal rates in bench trials than in jury trials.[139] They explained that this was due to defendants opting for bench trials in cases where the underlying evidence favored them, because judges were more consistent than juries in their application of the law to facts due to a host of systemic incentives.[140] If it is right that judges are better able to set aside bias and less susceptible to deficiencies, then moving to a bench trial—with the more apt judge as factfinder—can mitigate the harms of pervasive juror prejudice.

Perhaps a "big if." There certainly is reason to think that judges are not much better than juries, especially when it comes to bias.[141] After all, judges are human, and many of these biases are, as discussed, unconscious and implicit. Some judges may be educated about this and thus reflective enough to identify these biases and counteract them. Others may not. Indeed, there is substantial

137. *See* Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486, 504 n.75 (1975) (stating that "because of the generally careful selection process, federal judges are likely to be highly experienced, intelligent individuals steeped in traditions of the law," and "[t]hus, it is probable that at least in most cases judges will be better able to control their prejudices than will jurors"); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1510 (2003) (stating "judges are likely to exhibit less bias in their decisionmaking than juries," because "[a] judge, either in a ruling on summary judgment or at the conclusion of a bench trial, presumably seeks to prevent personal prejudice and bias from swaying decisionmaking").

138. Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901, 916 (1998). This case concerned civil cases, but there is good reason to think the relative abilities to analyze law would similarly apply in criminal cases as well.

139. Segal et al., *supra* note 17, at 1500, 1504.

140. *See id.* at 1500, 1504–05 (discussing systemic incentives like "evenhandedness, professionalism, . . . an unqualified commitment to the institutionally affirmed reasons for decisions," and predictability). This may require using separate judges for pretrial matters from the trial itself, to avoid prejudicing the bench trial judge. Many federal judges already use magistrate judges for potentially prejudicial pretrial issues.

141. *See* Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 49 (1994) ("Judicial bias does exist; where it exists unidentified and untempered by the judge or by an attorney via recusal mechanisms, the bias of a judge can negatively impact the outcome of a trial or other judicial proceedings."); Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1225–26 (2009) (arguing that judges are affected by implicit bias but can overcome it with sufficient motivation and proper mechanisms).

empirical evidence suggesting that judges are worryingly susceptible to bias, and at the same level as juries.[142]

This is where a common feature of bench trials, that they be accompanied with a reasoned opinion,[143] may make a substantial difference in mitigating the problem of pervasive fact-finder prejudice. A reasoned opinion can help ensure that the verdict is not reached due to bias, but rather is rationally supported.[144] In a criminal case, a reasoned opinion must explain how the evidence shows beyond a reasonable doubt that the defendant committed the crime (and satisfied each of the elements).[145] The beyond-a-reasonable-doubt standard is a high threshold.[146] Requiring the court to state its reasons for why the standard is met—why there is no plausible explanation of innocence or why there is not a small percentage chance that the defendant is innocent—is exacting. The court's analysis is transparent, for both the defendant's and public's examination. Thus, in explaining its reasoning, the court cannot appeal to the sources of bias—like facts about the defendant's prior acts, reputation, courtroom demeanor, or immutable characteristics—because those are not types of admissible or probative evidence. This can effectively combat overt bias and deficiency infecting the judgment.[147] And if the court's explanation fails in these regards, it is subject to examination on appeal and audit by the public (and perhaps by other decision makers).[148]

Beyond prejudice, a bench trial also requires no delay. If the defendant is allowed to choose a bench trial, that can be accomplished in less time than a jury

142. *See, e.g.*, Justin D. Levinson, Mark W. Bennett & Koichi Hioki, *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63, 68–70 (2017); James R. Steiner-Dillon, *Epistemic Exceptionalism*, 52 IND. L. REV. 207, 208–10 (2019).

143. *See supra* Part II.

144. *See* Redish, *supra* note 137, at 504 n.75 (noting the requirement that judges' factual findings must be made explicitly makes their verdicts more susceptible to judicial review); Moore, *supra* note 137, at 1510 (noting that judges' decisions are more easily scrutinized in light of more transparent disclosures of findings of fact and conclusions of law); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 35–42 (2007) (showing that judging is often intuitive, and thus susceptible to bias, but that this bias can be mitigated by training, prompting, and opinion writing). Observe that we can require a reasoned opinion of bench trials, but likely cannot do so for jury trials. Jurors may not be able to write opinions explaining their reasoning, individually or collectively, and imposing such a requirement may improperly (and illegally) skew the makeup of the jury.

145. *See* Abhi Raghunathan, Note, *"Nothing Else but Mad": The Hidden Costs of Preventive Detention*, 100 GEO. L.J. 967, 968–69 (2012) ("In traditional criminal law, the state must prove all elements of a crime beyond a reasonable doubt to obtain a conviction and deprive an individual's liberty." (citing *In re* Winship, 397 U.S 358, 364 (1970))). A reasoned opinion would explain how each of these elements is proven beyond a reasonable doubt.

146. Pepson et al., *supra* note 52, at 1194.

147. *See* Guthrie et al., *supra* note 144, at 36–38 (explaining how requiring written opinions can mitigate judicial bias).

148. *See* Rachlinski et al., *supra* note 141, at 1226 (discussing institutional mechanisms and reforms, including auditing, that can help judges avoid succumbing to bias).

trial, since a bench trial does not require the time-consuming voir dire. If accompanied by a reasoned opinion, that may take some time to produce, but judges can generally produce that in short order (or we can require it of them). Indeed, bench trials are generally considered more efficient than jury trials, in terms of judicial resources.[149]

Importantly, recognizing the defendant's right to bench trial does nothing to impact any other rights the defendant might have. That is simply because it is an *option* for the defendant. If the defendant does not want a bench trial, then the defendant can continue to jury trial—as is the defendant's constitutional right—and the status quo remains unaltered. The only adverse possibility is that the optionality of a bench trial will cause courts to be less likely to recognize and hold that there is pervasive juror prejudice. But as we saw,[150] courts are already highly unlikely to recognize any pervasive juror prejudice—so it is unlikely that defendants will be disadvantaged in this way.[151]

Now, the option of a bench trial, even with the requirement of reasoned opinion, is no panacea for the problem of pervasive factfinder bias. As discussed, judges may be impacted by the same pervasive biases that can strike jurors. I have argued the requirement of reasoned opinion may mitigate the effect of such bias to a great extent. But there are subtle, implicit ways in which bias can impact the judge, and the requirement of writing a reasoned opinion may not eject those biases from impacting the determination. For example, suppose a judge renders a decision of guilty beyond a reasonable doubt. In the opinion, the judge explains that some of the defendant's proffered theories of innocence were implausible or highly unlikely. At some point, the judge's analysis may do little else than assert that in the judge's estimation—based on their experience and understanding of the world—that such possibilities are implausible or highly unlikely. It is here that bias may creep in, impacting why the judge believes such possibilities are implausible or highly unlikely. There is very little to do about that; because it is part of our human experience, it is part of our

149. *See, e.g.*, Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1050–67 (1984) (arguing that widespread use of bench trials can be as efficient as a system that uses pleas); Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 185, 209 ("In contrast to a jury trial, a bench trial can be a remarkably more efficient means of conducting a trial.").

150. *See supra* note 100 and accompanying text.

151. One other potential concern is that providing a defendant with this unilateral option for a bench trial will serve to the defendant's detriment, as they can more easily be strong armed—by judge or prosecutor—into waiving their right to jury trial. This is implausible. As it is, defendants can opt for bench trial with the consent of the judge or prosecutor. So, these actors can already strong arm the defendant into waiving jury trial. Unilateral bench trial does not make this more likely. Regardless, such strong arming is a constitutional violation, and we should vigilantly prevent it. Moreover, if this is a truly intractable concern, we could impose a requirement that jury determination of guilt and judge determination of guilt be jointly required to convict.

system.[152] Nevertheless, in some cases, properly constructed and conducted bench trials can go far—and further than jury trials—in mitigating the harms from bias. Defendants should have that choice.

B. *The Epistemic Problems of Juror Prejudice*

One might inquire whether pervasive juror prejudice is actually a problem that requires our attention. I have pointed to reasons to think that it is possible, and below I make the case that the problem of pervasive juror prejudice is widespread.[153] But the problem has rarely, if ever, been recognized by any court. So, the skeptic's doubts may persist. As I will show, I think the empirical and historical evidence pellucidly show that it is a problem. But there is also a theoretical answer. Here I explain (1) the two main epistemic problems and (2) how the resulting epistemic risk should be allocated, showing that the option of a bench trial is optimal.

1. Epistemic Uncertainty

There are at least two sources of epistemic uncertainty about juror prejudice. The *first* problem occurs at a fundamental level and points to a concern observed earlier.[154] How do we know whether particular dispositions that jurors may have constitute impermissible bias or deficiency, rather than permissible beliefs or abilities that are part of a diverse body of jurors?

But suppose that there is a set of identifiable biases or deficiencies of juries, for which there is a consensus that they are impermissible. Even still, there is a *second* problem: How do we know that jurors have these biases or deficiencies and that they will impact their ability to fairly adjudge a defendant's case? These are difficult questions, and there is no uncontroversial answer to either.

Part and parcel of a jury trial is that there are multiple decision makers, each independently assessing the case. Juries do deliberate, but each juror is in control of their own vote. And in adjudging the case and casting their vote, each juror will be informed by their education, their reasoning, and their life experience. This is generally considered a benefit of the system in ensuring the truth function of the jury.

However, there is a line between acceptable life experience and inapt bias or deficiency. Not controversially, bigotry and personal knowledge about the defendant or the prosecution are not permissible.[155] On the other hand, a juror's

152. *See infra* Section III.B (discussing how providing the defendant with the unilateral right to bench trial allows the defendant to manage the relative risks of juror and judge bias).

153. *See infra* Part IV.

154. *See supra* Part I.

155. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 868 (2017) ("Permitting racial prejudice in the jury system damages 'both the fact and the perception' of the jury's role as 'a vital check against the

knowledge about case subject matter—say, financial transactions or gun trajectories—that aids them in understanding facts about the crime are permissible.[156] Those examples are easy enough, but gray areas persist.

For example, suppose a juror is making credibility determinations about witnesses. In so doing, the juror appeals to their life experiences with people who tell the truth and lie. Informed by their life experiences, the juror determines that a person is lying because the witness was sweating, had certain facial tics, and made quick hand gestures. Is that permissible?

At first glance, this seems appropriate, and courts generally entrust jurors with the task of making exactly these kinds of determinations.[157] However, on further inspection, some of these assumptions about human behavior may be based on facts about the witness's anxious demeanor that have nothing to do with the truth of the witness's statements. For example, the assumptions may be ableist, privileging certain kinds of abilities that the witness does not have but are also not related to their truth telling. Indeed, the assumptions may also implicate deeply embedded cultural, ethnic, and racial biases. Or they may not—all of this may remain within rational faculties to determine credibility. Determining the permissibility of juror biases is a genuinely difficult issue; there is no obvious answer. And these questions are not rare: they arise any time the parties and the court are required to assess factfinders for trial. Consequently, there is substantial epistemic uncertainty about what qualifies as impermissible juror prejudice.

Furthermore, even with a definitive set of impermissible juror biases or deficiencies, there would still be great epistemic uncertainty about whether particular jurors exhibit them. Through the course of voir dire, some jurors may reveal that they do have impermissible biases or deficiencies; perhaps they admit that they are racist, or that they dislike the defendant, or that they have difficulty keeping attention. But of course, if there is a seated jury then there will be a sufficient number of jurors who do not so admit and whom the court deemed acceptable.[158] Yet we can still ask whether the jurors have these impermissible biases or deficiencies. Jurors may lie about their biases. Specifically, if jurors are motivated by animus, either against the individual defendant or due to bigotry, then they may seek to hide that animus so that they can make it on to the jury and vote to convict the defendant. Or jurors

wrongful exercise of power by the State.'" (citations omitted)); JOHN HENRY WIGMORE, 6 EVIDENCE IN TRIALS AT COMMON LAW § 1800 (4th ed. 2022) (discussing personal knowledge).

156. Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 351 (1980).

157. *E.g.*, United States v. Muthana, 60 F.3d 1217, 1223 (7th Cir. 1995) ("Assessing a witness'[s] credibility 'is a matter inherently within the province of the jury.'" (citation omitted)).

158. *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165, 187–89 (2011) (discussing the difficulty of uncovering bias in voir dire).

may be in denial or embarrassed to admit publicly that they have a particular animus. Even when jurors are not being deliberately disingenuous or circumventive, they may be mistaken about their unconscious biases or deficiencies in assessing evidence of which they are themselves unaware.[159] Thus, there are numerous reasons to be uncertain whether jurors are in fact impacted by impermissible prejudice, whether in the form of bias or deficiency. Combined with the uncertainty about what constitutes impermissible prejudice, there is an epistemic deficit with respect to whether jurors are appropriate to serve as adjudicators.

2. Allocating Epistemic Risk

If there is impermissible prejudice that informs some juror's judgment in a jury trial, then a violation of the defendant's constitutional rights will occur. If jury trial is mandated, the only choice to avoid the constitutional violation is not to hold the trial, either by delay or dismissal. But courts are highly unlikely to adopt these extreme remedies. Moreover, there is no doubt that pervasive juror prejudice will infect some trials. Thus, there will likely be some number of constitutional violations, with no practical solution.

As I contended above, this Gordian knot can be loosened by utilizing bench trials. Now, given the epistemic uncertainty of whether there is such bias or deficiency, who is best tasked with deciding whether there should be a bench trial: The prosecutor, the court, or the defendant?

I contend it is best to allocate this epistemic risk solely to the defendant. Because the defendant has a right to a jury trial, to hold a bench trial, the defendant must opt to have a bench trial. Thus, the functional question is whether the prosecutor or the court should also get input in this decision—in the form of a veto.

Prosecutors. The prosecutor is a bad choice to assess juror prejudice. The prosecutor is adverse to the defendant, and in this situation the prosecutor is trying to obtain a conviction against the defendant. Thus, prejudice that would disfavor the defendant would likely favor the prosecution in trial.[160] Ideally, a prosecutor would be able to set that aside, because, as prosecutors will often tell you, they are supposed to seek justice, not convictions.[161] But defendants have the right to their own counsel for a reason—to safeguard their own rights. It

159. Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 505–21 (1965) (challenging the efficacy of voir dire based on the fact that jurors lie, subconsciously and consciously).

160. This is under a binary understanding of the trial outcome.

161. Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541–42 (1996) (observing that "[t]he most notable and noble principle of prosecution directs prosecutors to seek justice, not convictions" and providing numerous citations).

would be poor design to rely on the prosecutor to balance the defendant's right to a fair trial and the objective of convicting the defendant.[162]

Prosecutors may determine that, on balance, it is more just to convict a defendant than to safeguard their rights. Or prosecutors may be susceptible to motivated reasoning, either rationalized or unconscious.[163] This is especially the case when there is epistemic uncertainty and the question of whether there is impermissible prejudice can be plausibly answered either way. And even if the prosecutor acts perfectly with the defendant's fair-trial rights in mind, there may still be a problem of appearance, wherein the defendant and public question whether the prosecutor did in fact do so.

Courts. Certainly, the court is generally an appropriate actor in considering safeguards for the defendant's rights. But here the court may be pulled in different directions that may impact its judgment. First, the court may have an incentive for the criminal case to proceed via jury trial. A jury trial allows the court to "dodge" making judgments themselves by punting the result to the jury, thereby avoiding scrutiny and blame for the results.[164] Moreover, insofar as the court is vested with an independent judgment as to whether a bench trial is warranted,[165] the court would need to affirm that there was pervasive juror bias or deficiency in the jury pool—that is, the general citizenry. But judges are political actors—many state-court judges are elected and even federal judges, with life tenure, may feel political pressures.[166] On that backdrop, judges may be hesitant to make such an assertion, because of its potential political toll.[167] Moreover, if the court makes this assertion, then the defendant might insist on a jury trial, which would then put the court in the bind of having to halt trial.[168]

162. Indeed, our experience with peremptory challenges in voir dire demonstrates that we cannot simply trust prosecutors to safeguard the rights of defendants to a fair trial. That has necessitated *Batson* challenges. *See infra* Section V.B.

163. Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 805, 814–15 (2012) (finding that prosecutors are susceptible to unconscious and implicit bias in every stage of decision-making, including pretrial strategic choices).

164. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 941 (2004) (suggesting that judges prefer jury sentencing because it allows them to "dodge" criticism).

165. It may be the case that the court is simply required to approve the defendant's request for a bench trial. If so, the defendant is the actual decision maker on whether there is a bench trial—which is equivalent to the proposal I proffer as best.

166. *See* Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1352 (2010).

167. Indeed, courts feel these hesitancies in granting *Batson* challenges, for fear of labeling attorneys, and especially government attorneys, bigots, or liars. Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 4 (2014). They could reasonably feel similarly hesitant in labeling members of the public liars or bigots.

168. That is, if the court determines that the jury is sufficiently infected with prejudice that a bench trial is required, then, in light of that finding, the defendant may revoke the request for bench

As we saw before, this would be an extreme remedy that the court is unlikely to embrace. Thus, this may result in the court denying claims of juror prejudice when there are good reasons to believe that explicit or implicit biases will disfavor the defendant.[169]

The Defendant. The defendant is generally not torn about protecting their own rights—that will be among the defendant's primary concerns. So, the defendant can be trusted to assess this risk properly, because it is the defendant's neck that is on the line.

Moreover, giving the defendant this choice will not frustrate the pursuit of justice. This is not akin, for example, to seeking the defendant's permission to be put on trial at all. Whether under a bench trial or a jury trial, the defendant will be criminally tried. Neither would this spell a death knell for jury trial. Jury trial has certain advantages over bench trial that may favor a defendant. For example, if a defendant is averse to convictions, as many are, then the fact that a jury trial requires a unanimous verdict of jurors voting for guilt beyond a reasonable doubt may often favor the defendant.[170] In contrast, a bench trial often requires only one factfinder—the judge—to determine whether the defendant is guilty.[171] If the defendant is equally concerned about bias or

trial and demand an impartial jury trial—which in turn is an impossibility given the court's finding on jury prejudice. I discuss this further *infra* Section V.C (under *Alternative Solutions*).

169. One might query whether this objection to courts also impugns the efficacy of bench trials. I do not think it does. First, I contend there is a substantial difference between adjudging whether jurors are adequate and whether the defendant is guilty beyond a reasonable doubt. The former imposes pressures on the court—such as the ability to dodge, avoiding impugning the public, and avoiding halting or delaying the proceedings. The latter does not—finding that the evidence does not show guilt is simply not as controversial for the court (and the blame is shared with the prosecution). Second, with proper institutional and auditing mechanisms, we may be able to better judicial determinations—both on juror competence and on guilt. I think such judicial reforms are easier to impose in the ultimate question of guilt, as it is not under the same pressures as the juror competence inquiry. Furthermore, such reforms are better utilized on substantive questions of guilt, because there is little cost in affording defendants bench trials if they so choose. We do not need to save the structure of prosecutor/court veto of bench trials.

170. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1397 (2020).

171. Because of the requirement of unanimity, if the judge and jurors are equivalent adjudicators, it should be substantially more difficult to obtain a guilty verdict from a jury of twelve than from one judge. For example, if jurors were acting independently, and they each had a 95% likelihood of convicting, there would be a 54% chance of obtaining a unanimous guilty verdict. Of course, juries do not act independently, but neither do they act in complete uniformity, and so the likelihood of conviction can be estimated to be greater than 54% but strictly less than 95%. In comparison, in a bench trial, if a judge has a 95% (or X%) likelihood of convicting, then there is a 95% (or X%) chance of conviction. Thus, whether a defendant should rationally opt for a bench trial will depend on the jury's prior proclivity to convict, compared to a judge's. It could be that the jury's likelihood is, due to bias, substantially greater than a judge's, which in turn may rationally justify opting for a bench trial. For example, suppose a judge has an 80% likelihood of convicting. And suppose, due to bias, jurors have a 95% chance of convicting and that there are really just two important voices in the jury box—with all the other jurors following in tow. In such a case, the jury has a 90% chance of convicting. That is significant and would rationally justify the defendant opting for a bench trial.

deficiency on the part of the judge, and that the requirement of reasoned opinion will not rectify that concern, then opting for a jury trial may still be best.

On the other hand, if every defendant thinks that juries are regularly tainted by pervasive bias such that bench trials are preferable, that might result in a paucity of jury trials. I submit that this is an acceptable, if not favorable, result. Moreover, there is already a paucity of jury trials, given the prominence of plea bargaining,[172] so this would not significantly change the status quo. Again, this does no harm to the defendant's rights. Because it remains an option for the defendant, if the defendant wishes to pursue their rights to challenge the seating of the jury due to pervasive bias or deficiency and insist on a jury trial, the defendant is free to do so. The option of a bench trial does not formally or practically impact that right.[173]

C. *Further Objections*

We now consider some pressing objections to the theoretical case. *First*, given the pervasiveness of bias, including with judges, and the nature of appellate review, does the bench trial offer any actual benefit over jury trials? *Second*, if we understand the jury trial as having societal benefits separate from protecting the defendant, does the option of bench trial improperly curb that benefit?

1. The Impact of Bench Trials

The first question is whether the optionality of bench trial will have any material impact. The idea is that judges, too, are impacted by bias and so decisions from the trial court will also be biased. In particular, even if there is a reasoned opinion supporting the decision, appellate review—employing the sufficiency of the evidence standard—is deferential and permissive. Thus, the bench trial does little to ameliorate the problem.

There is a deep, unfortunate truth here: if such bias is truly pervasive among judges, with the power to blind, then bench trials with reasoned opinions will do little work. But we have reason to think that the level of bias in the judiciary is not so blinding. That is, I contend that generally judges can determine whether an opinion fails to support properly the claim that the defendant is guilty beyond a reasonable doubt. Therefore, the requirement of a bench trial with a reasoned opinion can make a significant difference. It can expose, for the reviewing court and indeed the factfinding judge themselves,

172. Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 TUL. L. REV. 1237, 1238 (2008) (reporting that more than 95% of all state and federal felony convictions are obtained by guilty pleas).

173. *See* Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 869 (2017).

whether bias or deficiency is afoot. Moreover, insofar as such bias persists, tackling that problem requires institutional reforms, auditing mechanisms, and pressing appellate review.[174]

The possibility of error will persist. If a fact-finding judge produces a wholly biased or deficient opinion, then the reviewing court will have to undertake the analysis themselves. They may affirm, examining for the sufficiency of the evidence. That review is essentially the same as when a reviewing court examines a jury's verdict. In such a case, a bench trial may offer no improvement over a jury trial.

Again, however, I contend our system is better equipped to fix problems with the judiciary than with the entire jury pool. Implementing judicial selection, judge training, and audit or review mechanisms will substantially mitigate bias.[175] Whereas eradicating bias in the jury pool—that is, the citizenry—is considerably more difficult.[176] Continuing that huge project is important, but offering the defendant the option of bench trial, with a reformed judiciary, can safeguard defendants' rights in the interim.

This is not *merely* a response to an objection. I wholeheartedly agree that reforms are necessary to make bench trials—and the judiciary—more effective in combating bias, and such reforms are part of my overarching proposal. No doubt, we must press systemic maintenance of and reforms to the judiciary. That said, the perfect should not be the enemy of the good. The fact that the

174. Rachlinski et al., *supra* note 141, at 1226 (discussing institutional mechanisms and reforms, including auditing, that can help judges avoid succumbing to bias); Guthrie et al., *supra* note 144, at 35–42 (explaining various reforms to mitigate judicial bias). Appellate review here is often deferential, just as with juries. United States v. Medina, 969 F.3d 819, 821 (7th Cir. 2020); Jackson v. Virginia, 443 U.S. 307, 319 (1979), *superseded on other grounds by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1218–19 (codified at 28 U.S.C. § 2254(d) (1996)). But even still, the reviewing court must explain how the evidence would permit a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Unlike with jury trials, if there is a bench trial, the reviewing court will not be working on a blank slate—it will have a reasoned opinion from the fact-finding judge. If the fact-finding judge's verdict is a product of bias or deficiency, that should be more transparent for the reviewing court. This, I contend, will result in better determinations. Moreover, though not my focus here, I suggest changing the level of deference issued to bench trial judgments. Additionally, we should also think deeply about elected judges and their propriety for criminal adjudications. Political pressures may push judges to be "tough on crime," and thus compromise fair trials. Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1101 (2006); Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 793 (2010) (stating "[m]ajoritarian pressures on elected judges are at their apex in criminal cases"); DANIEL R. PINELLO, THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY 99 (1995) (finding that appointed judges are more likely to favor criminal defendants than elected judges).

175. *See* Rachlinski et al., *supra* note 141, at 1226; Guthrie et al., *supra* note 144, at 35–42.

176. To be clear, it is more difficult to implement these reforms citizenry-wide, simply because there are more citizens than judges.

optionality of bench trials may allow some defendants to avoid juror prejudice, where no practical solution otherwise occurs, is enough to demand it now.

2. The Other Societal Benefits of Jury Trial

The crux of this objection is to challenge the assumption that the jury's purpose is to afford protections for the defendant. Instead, the argument is that the jury serves other societal benefits, including principally allowing community representation in the criminal process, whether for the benefit of the defendant or not. If these other societal benefits exist, then providing the defendant with the option of avoiding the jury will potentially negate these societal benefits.

As an initial matter, I maintain that the jury's purpose is principally as a shield for the defendant.[177] Even if there are other benefits to the jury, such as community representation, those benefits are lexically inferior to the interests of protecting the defendant's due process rights. Thus, if bench trial optionality enhances the defendant's rights to a fair trial, then that must trump any ancillary benefits of a jury trial.

Even assuming that there is an interest in community representation served by a jury trial that must be balanced against the defendant's fair trial rights, our system has already shown that it has little space or regard for that interest. The vast majority of cases in both the federal and state systems are resolved by pleas—which do not afford any room for juries.[178] Given the lack of community representation through juries in most all criminal cases, even if the right to bench trial reduced the number of jury trials, that would be of little consequence for the already slight role that juries play in the criminal law.

There is one important exception: death penalty cases. In such cases, there is usually a jury trial.[179] In this subset of cases, an objector may contend that community representation through juries is critical. In response, again I maintain such community representation is only important *insofar as it protects the defendant*. I contend that there is no particularly special interest in vindicating the community's desire to be directly involved in the determination that the defendant be killed by the state. But even if one thinks there is value in such (retributive) judgment, certainly no such interest would trump the defendant's interests in fair proceedings. Moreover, capital cases are particularly susceptible to bias and deficiency of the forms that the option of a bench trial may protect against.[180]

177. *See supra* Section I.A.

178. Covey, *supra* note 172, at 1238.

179. *See* Ring v. Arizona, 536 U.S. 584, 609 (2002) (requiring juries to determine the aggravating factors required for imposition of the death penalty).

180. In particular, these cases involve serious, grave harms, where there is the potential for strong juror prejudice. *See supra* Section III.A.1.

In sum, there are several potential sources for pervasive juror prejudice. When the defendant does not have the option for a bench trial, the current state of the law is ineffectual in addressing such pervasive prejudice. The primary response is to use voir dire to sift out problematic jurors, but this cannot properly cope with *pervasive* juror prejudice. The other solution—refusing to hold the trial—fails due to its extreme nature; courts simply will not employ it. Here, recognizing the defendant's right to choose a bench trial can mitigate the harms of pervasive juror prejudice. Principally, if judges writing reasoned opinions are less susceptible to these forms of prejudice, then defendants can better ensure that they are given a fair trial. Further, providing defendants with this option does no harm to the defendant's other rights, and it does not curtail the principal purpose of the jury in protecting the defendant's rights.

IV. THE HISTORICAL AND EMPIRICAL CASE

In the prior section, I contended that, because of the possibility of pervasive juror prejudice, providing the defendant with the option of a bench trial best preserves the defendant's rights to a fair and impartial trial. In this section, I show that the problem of pervasive prejudice is not simply of the theoretical realm. Based on our historical and empirical evidence, pervasive prejudice is manifest in many cases, and the right to bench trial can mitigate those harms. Next, consider each of the four types of prejudice identified above.[181]

A. *The Nature of Charges and Defenses*

There is substantial evidence that pervasive bias may arise in the jury pool against defendants due to the nature of the charges and defenses. The most common pathway is that some cases involve such gruesome, terrible, or disgusting allegations that jurors' passions—principally, fear and animus—are raised so that they are inclined to find the defendant guilty.[182] Ultimately, jurors know that it is not random chance that brought the defendant before the tribunal.[183] Jurors are aware that law enforcement had probable cause to believe the defendant committed the crime and the prosecution believed it could prove the charges beyond a reasonable doubt.[184] In the face of terrible allegations, jurors may be inclined to relax the presumption of innocence, the standard of

181. *See supra* Section I.D.

182. *See* Neil Vidmar, *Generic Prejudice and the Presumption of Guilt in Sex Abuse Trials*, 21 LAW & HUM. BEHAV. 5, 6–10 (1997) [hereinafter Vidmar, *Generic Prejudice*] (discussing "specific prejudice" against issues in particular cases and providing examples relating to the grievous nature of the crimes).

183. *See* Holbrook v. Flynn, 475 U.S. 560, 567 (1986) (discussing the presumption of innocence and stating that "jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance").

184. *See id.*

proof, or other evidentiary standards in assessing the defendant's guilt. This could be because of ire or disgust; it could also be due to fear, where the jury thinks it is better to punish (and incapacitate) this person, than to risk recurrent harms of recidivism; and it could be unconscious and nonrational. For these reasons, it is common in such cases to ask jurors in voir dire if the allegations would affect their ability to be impartial. In most all cases, a sufficient number of jurors state they are able. But there is good reason to doubt those professions of impartiality.

As a prime example, we know that there is widespread hatred and fear of those accused of child sexual assault offenses.[185] As Neil Vidmar has shown, in these child sexual assault cases, there is a "generic prejudice" that predominates in the jury pool.[186] The impact of the generic prejudice is such that many jurors are unable to make impartial determinations about whether the alleged assault even occurred and whether the defendant was responsible.[187]

Another area of similar hatred and fear is "terrorist" trials, involving prosecutions after incidents of alleged terrorism. Two such examples are the prosecution of Timothy McVeigh[188] after the Oklahoma City Bombing and the prosecution of John Walker Lindh[189] (now known as Abu Sulayman al-Irlandi),[190] following the tragedies of September 11, in the U.S. military's operation in Afghanistan.

In McVeigh's case, his defense counsel filed a motion to change venue, which the district court granted.[191] In so doing, the court emphasized the devastating consequences of the bombing: 168 people died, the Alfred P. Murrah Federal Office Building was destroyed and there was grievous collateral damage to the nearby area, the estimated incident cost was $651,594,000, and there were "immeasurable effects on the hearts and minds of the people of Oklahoma from the blast."[192] The district court also observed the nature of media coverage, which comprehensively documented the losses felt by the community and the arrest of Timothy McVeigh, "showing him in restraints and

185. *See* Vidmar, *Generic Prejudice*, *supra* note 182, at 6.

186. *See id.*

187. *Id.* at 18 ("[T]he issue was not mere disapprobation or abhorrence of sex abuse but rather attitudes and beliefs that bear on the presumption of innocence when a defendant is accused of sexual abuse. Simply upon hearing the nature of the charges against the defendant, substantial numbers of jurors swore under oath that they could not be impartial in deciding guilt or innocence and were found partial by the triers.").

188. United States v. McVeigh, 918 F. Supp. 1467 (W.D. Okla. 1996).

189. United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002).

190. Ruth Styles, *John Walker Lindh Is Released from Prison Amid Outrage at Decision To Free American Taliban After 17 Years*, DAILY MAIL (May 23, 2019, 10:38 EDT), https://www.dailymail.co.uk/news/article-7062311/John-Walker-Lindh-released-prison.html [https://perma.cc/JN8Y-VRGC].

191. *McVeigh*, 918 F. Supp. at 1469, 1475.

192. *Id.* at 1469.

clad in bright orange jail clothing being led into a van while surrounded by a very vocal and angry crowd."[193] In light of all this, the district court determined that the potential for juror prejudice in Oklahoma was too large.[194] The court thus granted the motion to change venue and shifted the case to Denver, Colorado.[195] But one could indeed question whether a Denver jury would have fared any better: the coverage of the Oklahoma City Bombing was a national event. Denver jurors knew that 168 people died and that an American city was destroyed, and they too saw Timothy McVeigh arrested.

Consider Lindh's case. In the aftermath of 9/11, the United States commenced operations in Afghanistan.[196] In combat, the U.S. military apprehended Lindh, an American citizen who was fighting with the Taliban.[197] Lindh allegedly participated in a prisoner uprising, during which he escaped.[198] He was later apprehended again on the battlefield.[199] He was then charged in the Eastern District of Virginia with a panoply of crimes, including conspiracy to murder and providing material support to terrorist organizations.[200] His counsel moved to dismiss the charges or change venue.[201]

In support of the motion, counsel proffered a survey done by Professor Steven Penrod that showed the level of juror prejudice against Lindh.[202] Prior to trial, survey respondents in five different jurisdictions, including Virginia, stated by over 70% that Lindh was definitely or probably guilty and by 37% or higher that a not-guilty verdict would be unacceptable.[203] Nevertheless, in all of the jurisdictions, nearly 70% of respondents asserted that they could be impartial.[204] Professor Vidmar did an analysis of the interviews, concluding that if the respondents professing impartiality were the jury pool, *a random selection would likely result in four of twelve jurors starting with a disposition inconsistent with the presumption of innocence*.[205] Even still, the district court denied the motion to dismiss or change venue.[206] Shortly thereafter, Lindh would plead guilty to two of the charges, and receive a sentence of twenty years.[207]

193. *Id.* at 1471.

194. *Id.* at 1474–75.

195. *Id.* at 1475.

196. *See* Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 CHI.-KENT L. REV. 1143, 1156 (2003) [hereinafter Vidmar, *When All of Us Are Victims*].

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.* at 1156.

201. *Id.* at 1157 n.78.

202. *Id.* at 1157.

203. *Id.* at 1161.

204. *Id.* at 1162.

205. *Id.* at 1169.

206. *Id.* at 1171.

207. *Id.*; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, WASH. POST (July 16, 2002), https://www.washingtonpost.com/archive/politics/2002/07/16/in-deal-lindh-pleads-guilty-

In the same vein, we see a significantly prejudicial impact on juries when the allegations and evidence involve terrible and graphic violence. For example, David Bright and Jane Goodman-Delahunty found that the conviction rate was higher among mock juries that saw gruesome photographic evidence compared to those that saw no such photographic evidence and that the juries who saw the evidence "reported experiencing significantly more intense emotional responses, including greater anger at the defendant."[208] Similarly, Kevin Douglas, David Lyon, and James Ogloff found that mock jurors shown color and black-and-white photographs of the murder victim were twice as likely to convict the defendant.[209] Finally, scholars have identified that there is a level of animus, in the public and jury pool, against those defendants who raise insanity defenses.[210] That may be due to the public's sense that these defendants are attempting to circumvent liability through a legal technicality.[211]

B. *Reputation and Demeanor*

A defendant's reputation or demeanor may also be a potent source for pervasive bias. A common example of this is if the jury knows of the defendant's prior crimes or acts. In Justice Oliver Wendell Holmes's words, the commission of a prior crime indicates to the jury a "general readiness to do evil" and the jury may "infer a readiness to lie in the particular case."[212] Indeed, the empirical research backs this up: "Jurors are more likely to convict an accused if they receive information about previous convictions than if they do not."[213]

Federal Rule of Evidence Rule 404 was designed precisely to combat this type of bias, and there are substantially similar rules in state evidence codes as well.[214] Rule 404 attempts to exclude such evidence from the jury's

to-aiding-taliban/d323d911-d0d5-4aaf-8db7-e49eedfc964b/ [https://perma.cc/HN55-CB2H (dark archive)].

208. David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183, 183 (2006).

209. Kevin S. Douglas, David R. Lyon & James R.P. Ogloff, *The Impact of Graphic Photographic Evidence on Mock Jurors' Decisions in a Murder Trial: Probative or Prejudicial?*, 21 LAW & HUM. BEHAV. 485, 492 (1997).

210. *See* Perlin, *"For the Misdemeanor Outlaw," supra* note 2, at 208 (stating that "[i]nsanity pleaders are among the most despised individuals in our society").

211. *See* Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1380, 1403 (1997).

212. Gertz v. Fitchburg R.R. Co., 137 Mass. 77, 78 (1884).

213. David R. Shaffer, *The Defendant's Testimony*, *in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE 124, 131 (Saul M. Kassin & Lawrence S. Wrightsman eds., 1985); Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 433 (2018) (collecting studies and performing a new empirical study showing that prior convictions impact juror assessments of guilt).

214. FED. R. EVID. 404. Rule 404(b)(1)–(2), most relevant here, reads:

> Rule 404(b) Other Crimes, Wrongs, or Acts.

consideration. The rule arises out of the recognition that juries are overwhelmed by defendants' prior crimes and acts and that the potential for juror prejudice is great.

Unfortunately, Rule 404 can only do so much. First, as explained above, Rule 404 has certain exceptions, like impeachment, wherein prior crimes and acts may be admitted into evidence. Rule 404 directs that when such evidence is admitted, it is to be limited to the relevant purpose.[215] But the empirical evidence reveals that juries often use the prior crimes and acts evidence to adjudge the propensity of the defendant to commit the crime—a prohibited use.[216] Consequently, this may practically prevent the defendant from taking critical actions to their defense, like testifying themselves.

Second, some defendants are infamous, and therefore their prior crimes and acts cannot be shielded from the jury. Most famously, consider O.J. Simpson, who was charged, tried, and convicted of robbery and kidnapping stemming from events in 2007.[217] At the time of his 2007 trial, virtually every adult in the jury pool knew he had been tried, and acquitted, for the murders of Nicole Brown Simpson and Ron Goldman.[218] And, in the age of social media

> (1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

See also Spencer v. Texas, 385 U.S. 554, 575 (1967) (Warren, C.J., concurring in part and dissenting in part) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a previous offense, or feel that incarceration is justified because the accused is a 'bad man,' without regard to his guilt of the crime currently charged. Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him."); United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("Evidence of crimes not charged in the indictment is not admissible for the purpose of showing that the defendant has a criminal disposition in order to generate the inference that he committed the crime with which he is charged. A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is. The reason for this rule is that it is likely that the defendant will be seriously prejudiced by the admission of evidence indicating that he has committed other crimes." (citations omitted)).

215. *See* FED. R. EVID. 404.

216. Bellin, *supra* note 213, at 425–27.

217. *O.J. Simpson's Lawyers Request Another Trial*, CNN (Oct. 10, 2008), https://www.cnn.com/2008/CRIME/10/10/simpson.newtrial/ [https://perma.cc/GQ26-PW9A] (raising unsuccessfully the claim that some jurors' disagreement with Simpson's acquittal in the 1995 double homicide case may have tainted the jury's verdict).

218. *See* Emily Shapiro, *The OJ Simpson Trial: Where the Key Players Are 25 Years After His Acquittal*, ABC (Oct. 3, 2020, 6:00 AM), https://abcnews.go.com/US/oj-simpson-case-key-players-25-years/story?id=63180970 [https://perma.cc/J3GE-CZFW]. There was a Saturday Night Live sketch lampooning the effort to find unbiased jurors in the 2007 trial. Saturday Night Live, *O.J. Simpson Jurors*

and internet access, news is significantly more widespread. In the trial and subsequent conviction of Joaquin "El Chapo" Guzman on drug and conspiracy charges, defense counsel charged that at least five jurors had "followed news reports and Twitter feeds about the case, against a judge's orders, and were aware of potentially prejudicial material that jurors weren't supposed to see."[219] Because of the grave potential of prejudice, these defendants cannot be assured a fair and impartial jury trial.

The example of demeanor is similar.[220] Studies have shown that jurors are strongly influenced by a defendant's attractiveness.[221] Jurors may also be impacted by similar things like clothing choices, fidgeting and hand movements, smiling (or lack thereof), and eye contact (or lack thereof), among other things.[222] Some of these can be managed, but some cannot. For example, a defendant's attractiveness is not something they can change. And their fidgeting and hand movements may be a product of nervousness or anxiety that cannot be controlled. Additionally, the defendant's proclivity for smiling and making eye contact may be a product of shyness, nervousness, or anxiety and thus not within their control. At minimum, a defendant should not have to change any of these features of their persona or behavior to receive a fair determination from the jury. None of these have any demonstrated probative relationship with the defendant's guilt; demeanor is not evidence and courts rarely instruct juries on how to consider it.[223] Yet juries are impacted by it, and this may severely (and predictably) disadvantage certain defendants.

C. *Identity and Bigotry*

Our history and experience are rife with pervasive juror bias due to immutable traits of personal identity. The history of the jury during the Jim Crow era as an institution thoroughly impacted by racial prejudice has been well documented.[224] Even after civil rights reforms to our society and the jury, there is convincing evidence that juries continue to be impacted by bias with respect to race and ethnicity. As discussed above, the Supreme Court confronted the issue head on in *Pena-Rodriguez v. Colorado*, which involved a juror making

Are Hard To Come By, YOUTUBE (Oct. 11, 2013), https://www.youtube.com/watch?v=vSahneOul10 [https://perma.cc/99QW-AZ3N].

219. Jim Mustian & Michael R. Sisak, *El Chapo's Lawyers Raise Concerns Over Allegations of Jury Misconduct*, CHI. TRIB. (Feb. 20, 2019, 5:09 PM), https://www.chicagotribune.com/nation-world/ct-el-chapo-trial-jury-misconduct-report-20190220-story.html [https://perma.cc/7E6G-6YGJ (staff-uploaded, dark archive)].

220. Levenson, *supra* note 3, at 577–78.

221. *See id.* at 576 (describing how juries are more likely to vote guilty for unattractive defendants and not guilty for attractive ones).

222. *Id.*

223. *Id.* at 579 ("[J]urors are not given any direction on how to consider a defendant's demeanor.").

224. *See infra* Section V.B.

bigoted statements against the defendant during jury deliberations.[225] But the Court's response of allowing inquiry into jury deliberations only when there were overt bigoted remarks by jurors falls woefully short of recognizing the depth of the problem.[226]

The empirical evidence is deafening: bias pervades juries in their deliberations. For example, Samuel Sommers and Phoebe Ellsworth have shown that, in certain settings, white jurors exhibit bias against Black defendants and that this affects determinations of guilt and sentencing recommendations.[227] Sommers and Ellsworth found this was especially evident with respect to violent crimes.[228] In a mock jury study, Dolores Perez, Harmon Hosch, Bruce Ponder, and Gloria Chanez Trejo found that white-majority juries were more lenient on white defendants than Hispanic defendants.[229] And Justin Levinson's work through empirical surveys has similarly shown that the race and skin tone of the perpetrator impacts jurors through implicit bias.[230] In particular, Levinson demonstrates that respondents implicitly associated black with guilty and white with not guilty[231] and "misremember case facts in racially biased ways," including misremembering facts to find them aggressive when the defendant is Black.[232] Reviewing a decade of research, Jennifer Hunt stated that

225. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 861–62 (2017).

226. *Id.* at 869.

227. Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1006 (2003) (summarizing results of various surveys and experiments). Interestingly, Sommers and Ellsworth found that racial bias by white jurors is more likely to occur when the trial is *not* racially charged, but rather when the salient racial norms are absent from the discourse of the trial. As they state, "White juror bias may be most likely when a trial is not racially charged and jurors' concerns about racism are not made salient. In other words, it is the non-race-salient, run-of-the-mill trial in which the defendant simply happens to be Black that might be most likely to elicit White juror bias." *Id.* at 1014. Given that racial norms are often not explicitly part of the trial discourse, this may mean that racial bias is actually more prevalent than not.

228. *Id.* at 1007–08.

229. Dolores A. Perez, Harmon M. Hosch, Bruce Ponder & Gloria Chanez Trejo, *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. APPLIED SOC. PSYCH. 1249, 1256 (1993). The study also found that Hispanic majority juries treated white and Hispanic defendants equally. *Id.*

230. Justin D. Levinson, Huajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187, 189–90 (2010) [hereinafter Levinson, *The Test*]; Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 350–51 (2007) [hereinafter Levinson, *Equality*]; *see also* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 310–11 (2010) [hereinafter Levinson et al., *Shades*] (identifying racial bias in jurors' evaluation of evidence).

231. Levinson, *The Test*, *supra* note 230, at 190 (finding that empirical study respondents implicitly associated black with guilty and white with not guilty).

232. Levinson, *Equality*, *supra* note 230, at 345; *see also* Levinson et al., *Shades*, *supra* note 230, at 310–11 (finding in empirical study that participants' judgments of evidence varied upon whether they had seen a photograph of a darker- or lighter-skinned perpetrator). There have been substantial questions about the science and strength of the conclusions on implicit bias. I do not take the literature on implicit bias to be irrefutable, but I think that the implicit bias literature, combined with the other

"the race and ethnicity of defendants, victims, and jurors can impact the outcomes of criminal trials."[233]

Though not as well studied, similar attitudes based on a defendant's religion or religious beliefs can negatively impact defendants.[234] This is especially true of religious backgrounds that are considered abnormal or deviant by the majority or are portrayed negatively in media and popular culture. In the context of prosecutions of terrorism, Vidmar observes:

> When accused persons are ethnically of Arab descent and adhere to the Muslim, religion generic prejudices about the links between these factors and terrorism are likely to be foremost in prospective jurors' minds, even among those who do not harbor general hostility toward Arabs or Muslims. It is very plausible to hypothesize that these beliefs are present in all communities since all Americans are potential victims, though, as noted before, they may vary in degree between communities.[235]

One case that brought this issue of potential religious bias by the jury into the spotlight was *United States v. Sun Myung Moon*.[236] In that case, the Reverend Sun Myung Moon and Takeru Kamiyama were charged with crimes related to alleged tax evasion.[237] Moon was famously the head of the Unification Church, his religion loosely based on Christianity in which he claimed to be and was revered as the messiah.[238] Moon grieved that his prosecution was religiously motivated.[239] At the commencement of proceedings, Moon attempted to waive his right to a jury and sought a bench trial, contending that hostility towards his religion and him would deprive him of a fair trial.[240] The government opposed the bench trial, contending that because Moon had made a public statement questioning the prosecutorial motives, placing the factfinding burden on one

empirical evidence, bolsters the claim that pervasive juror prejudice relating to the defendant's immutable features arises frequently and can be difficult to discover through voir dire and jury selection.

233. Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 273 (2015); *see also* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1142 (2012) ("Notwithstanding some mixed findings, the general research consensus is that jurors of one race tend to show bias against defendants who belong to another race ('racial outgroups').").

234. Marc W. Pearce & Samantha L. Schwartz, *Can Jurors' Religious Biases Affect Verdicts in Criminal Trials?*, 41 MONITOR ON PSYCH. 26, 26 (2012) (contending that implicit bias against Muslims can be difficult to detect and could impact juror attitudes, and calling for further study on the subject).

235. Vidmar, *When All of Us Are Victims*, *supra* note 196, at 1172.

236. 718 F.2d 1210 (2d Cir. 1983).

237. *Id.* at 1216.

238. Alfred J. Sciarrino, United States v. Sun Myung Moon*: Precedent for Tax Fraud Prosecution of Local Pastors?*, 1984 S. ILL. U. L.J. 237, 242.

239. *Id.* at 246.

240. *Sun Myung Moon*, 718 F.2d at 1217, 1219.

judge, instead of a full jury, would put the judge in an "untenable" position.[241] The district court denied Moon's request for bench trial, Moon was convicted, and the Second Circuit affirmed.[242] It is hard to say whether the jury was in fact impacted by Moon's religion. But the public generally unfavorably regarded Moon and the Unification Church as a cult.[243] The prosecution may have benefited from a biased jury, but the prosecution had a ready explanation for why it opposed bench trial based on Moon's accusation of juror bias.

D. *Juror Incompetency*

Finally, there are areas of juror incompetency that remain widespread in the jury pool. Some cases are inherently complex. For example, cases involving financial transactions and healthcare fraud can often test the ability of the jury to comprehend volumes of evidence on unfamiliar subject matter. Indeed, one such case was *United States v. Panteleakis*.[244] The defendants in the case were charged with twenty-one counts of Medicare fraud.[245] They sought a bench trial, and the government objected.[246] However, the district court granted the bench trial over the government's objection, observing that the case involved complex issues, difficult evidentiary questions that would be resolved differently for each defendant, and potentially prejudicial news coverage.[247] Thus, the district court circumvented the requirement of Federal Rule of Criminal Procedure 23(a) of government consent to proceed via bench trial. And though this *result* is uncommon, this kind of case is not rare. There are numerous federal prosecutions on such complex subject matter, involving multiple defendants and potentially conflicting evidentiary rulings, or prejudicial news coverage that is easily accessible by the jury.

There are also other kinds of evidentiary rules that even the most well-intentioned jurors may be unable to apply faithfully. As discussed, juries are greatly swayed by prior crimes and acts evidence to a prejudicial level—necessitating exclusionary rules like Rule 404.[248] But the evidentiary rules are not without important exceptions: prior crimes and acts evidence may be allowed to impeach a testifying defendant—*but only for the purposes of*

241. *Id.* at 1217.

242. *Id.* at 1217–18.

243. *See* Rachael Bletchly, *Dark Side of the Moon: How Megalomaniac Moonie Leader Built a Billion-Dollar Business Empire Through Sinister Cult*, MIRROR (Sept. 4, 2012, 4:23 AM), https://www.mirror.co.uk/news/world-news/inside-the-sinister-moonie-cult-how-1301689 [https:// perma.cc/Q4J9-5SUJ].

244. 422 F. Supp. 247 (D.R.I. 1976).

245. *Id.* at 248.

246. *Id.*

247. *Id.* at 249–50.

248. FED. R. EVID. 404.

impeachment.[249] Such evidence may be allowed to show "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[250] But again such evidence is only allowed for these purposes—not to show that the defendant acted similarly as they did before.[251] This distinction is a fine one, and jurors simply may not be able to consider the evidence for the isolated purposes that are allowed.[252]

This can lead to substantial impingements of a defendant's case. First, jurors may be so prejudiced by the evidence itself that they are unable to follow the court's instructions. But also, the defendant may be forced to craft their case in a way to avoid such prejudice, such as by not testifying or not proffering other evidence that would "open the door" to the prejudice.[253] These circumstances are all too common.

E. *The Need for the Right to Bench Trial*

Thus, the empirical and historical evidence show that pervasive juror prejudice is an actual problem in our criminal justice system. Each form of juror prejudice—juror bias due to the nature of the charges, bias due to the defendant's reputation or demeanor, bias due to immutable features of the defendant, and juror deficiency in the ability to comprehend and apply the law—manifest with relative frequency.

Moreover, when such pervasive juror prejudice does manifest, the empirical evidence reveals that jurors often regard themselves as fair and impartial decision makers.[254] Consequently, when there is pervasive juror prejudice, our main pathways to mitigating such prejudice are blocked. Courts are likely to rely on voir dire to sift out jurors who are afflicted with such prejudice, whether it be some form of bias or deficiency. Yet the evidence shows that this is unlikely to be an effective method of mitigating prejudice precisely

249. *See* FED. R. EVID. 404(b)(1).

250. FED. R. EVID. 404(b)(1)–(2).

251. *Id.*

252. *Panteleakis*, 422 F. Supp. at 249.

253. *See* Kurland, *supra* note 17, at 336 (arguing that providing a unilateral right to bench trial may better vindicate a defendant's ability to testify, by avoiding potential prejudice from impeaching evidence). Kurland discusses the case *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968), dealing with income tax evasion charges. *Id.* at 461. The government had initially consented to a bench trial, and the defendant was duly convicted. *Id.* at 461–62. That conviction was later overturned as a result of the Solicitor General's representation that some of the evidence may have been unlawfully obtained. *Id.* In the second trial, the government sought to withdraw its consent to a bench trial. *Id.* The late great Judge Jack Weinstein refused to allow the government to withdraw its consent and granted the motion for bench trial, *id.* at 464, because "the nature of charges made it impossible for the jury not to be made aware of the defendant's prior criminal record," Kurland, *supra* note 17, at 339 n.97. But again, it is unclear whether most judges would apply Rule 23(a) in this fashion—hence the need for the defendant's optionality.

254. *See supra* notes 202–04 and accompanying text.

because jurors, even answering voir dire questions honestly, do not recognize their own biases or deficiencies.[255]

This results in constitutional harms that demand remedy. I contend that remedy, at least partially, is to provide the defendant with the unilateral right to bench trial. One might inquire, however, whether it is empirically necessary to vest a unilateral right with the defendant. Do prosecutors and courts actually reject a defendant's request for bench trial in cases with the potential for juror prejudice? There is not much available empirical evidence on this question, and it would be hard to obtain. For one, prosecutors and courts are unlikely to admit this. Moreover, most cases do not proceed to trial, making this further difficult to study.

Prosecutors do sometimes oppose defendants' requests for bench trial; such opposition comes precisely in the kinds of cases where the identified varieties of pervasive juror prejudice are likely to arise.[256] Those include cases involving unsympathetic defendants like those accused of tax evasion, fraud, and driving under the influence; cases involving allegations of grievous, violent conduct, or prurient conduct; and cases involving claimed discrimination of a distinct minority. We also know that jury trial is mandated in most death penalty cases, which are very likely to be emotionally charged. Overall, these cases are the ones in which the prosecution's opposition to bench trial is most dangerous to the defendant's constitutional rights.

Of course, not every defendant's case will be infected by pervasive juror prejudice. For example, defendants charged with relatively nonserious crimes, defendants who have no worrying reputation or prior history, and defendants

255. *See supra* Sections IV.C, IV.D.

256. *See, e.g.*, Singer v. United States, 380 U.S. 24, 25–26 (1965) (involving complex claims of fraud against songwriters); United States v. Sun Myung Moon, 718 F.2d 1210, 1216–17 (2d Cir. 1983) (involving claim of religious discrimination by prosecutors in tax fraud case); United States. v. Cohn, 481 F. Supp. 3d 122, 123–24 (E.D.N.Y. 2020) (granting bench trial over prosecutor's objection due to complexity of issues and complications with selecting jury due to COVID-19 pandemic, in case involving obstruction of justice by former SEC official); United States v. Gabriel, 125 F.3d 89, 91–92 (2d Cir. 1997) (upholding government's decision to oppose defendants' motion for bench trial, in case against executives of jet engine repair company charged with fraud related to representations about repairs made), *overruled in part on other grounds*, United States v. Quattrone, 441 F.3d 153, 176 (2d Cir. 2006); People v. King, 463 P.2d 753, 754 (Cal. 1970) (upholding government's opposition to bench trial in grievous murder case); People v. Washington, 458 P.2d 479, 485–500 (Cal. 1969) (upholding government's opposition to bench trial in grievous murder case involving prurient conduct); State v. Austin, 360 P.3d 603, 607–10 (Or. Ct. App. 2015) (overturning conviction of DUI case, where defendant requested bench trial, prosecution preferred jury trial, and court proceeded with jury trial); State v. Childs, 53,833, pp. 2–6 (La. App. 2 Cir. 5/17/21); 317 So. 3d 917, 918–20 (involving a prosecutor's opposition to defendant's request for bench trial in case involving armed robbery and attempted murder, where defendant allegedly terrorized children); *see also* Jody Godoy, *Ex-SEC Examiner Wants Bench Trial Over Feds' Protest*, LAW360 (Aug. 10, 2020, 2:43 PM), https://www.law360.com/articles/1299883/ex-sec-examiner-wants-bench-trial-over-feds-protest [https://perma.cc/3PEP-SGKT (staff-uploaded, dark archive)] ("A source with knowledge of the office's policies told Law360 that prosecutors in the district generally oppose bench trials in criminal cases.").

who belong to the preferred majority groups may have little to worry about in terms of detrimental juror prejudice.[257] But there are a great number of defendants who belong to the precarious complements. These defendants face the specter of a jury of some peers—not necessarily theirs—who are already inclined to find them guilty or are unable to assess their guilt. Our justice system is adjudged not on how it handles easy cases, but rather how it ascertains the truth while safeguarding the rights of the damned and despised. Consequently, we should place the decision between jury trial and bench trial solely in the hands of the defendant, ensuring that determination is made in the interest of protecting the defendant's rights.

V. THE DOCTRINAL CASE

This Article first explored the theoretical case for recognizing the right to bench trial. In the face of pervasive juror prejudice, providing the defendant with the optionality of bench trial can best mitigate any juror bias or deficiency, while safeguarding the defendant's other rights. This is not simply a theoretical exercise. The empirical and historical evidence demonstrate that pervasive juror prejudice occurs with relative frequency and, when it does occur, voir dire is unlikely to be effective in mitigating the harms. Moreover, prosecutors may oppose bench trial in the most precarious cases; and, jury trials are usually mandated in death penalty cases. Thus, providing the defendant with the choice of bench trial is, as a practical matter, requisite to mitigating pervasive juror prejudice.

Finally, then, is the doctrinal case. I contend that the Sixth Amendment, as expounded upon by the Court's precedent, strongly supports recognizing the defendant's right to bench trial.

A. *Waiver of Sixth Amendment Rights*

The Sixth Amendment is a cornucopia of protections for defendants. The Amendment enumerates the following rights: (1) speedy trial; (2) public trial; (3) trial by an impartial jury; (4) trial in a particular district of the crime's commission; (5) to be informed of the nature and cause of the accusation; (6) to confront adverse witnesses; (7) to have compulsory process for obtaining witnesses; and (8) to have assistance of counsel.[258]

257. We do not have particularized evidence that jurors are prejudiced against such defendants. But if they are, that makes the argument for the right to opt for bench trial all the stronger.

258. U.S. CONST. amend. VI. ("In 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.").

First, consider the defendant's right to counsel. The Supreme Court has held that, with certain qualifications, a defendant has a unilateral right to waive the right to counsel. In *Faretta v. California*,[259] the defendant, charged with grand theft, timely requested to represent himself.[260] The court questioned his intention, to which the defendant responded that he had previously represented himself "in a criminal prosecution, that he had a high school education, and that he did not want to be represented by the public defender because he believed that that office was 'very loaded down with . . . a heavy case load.'"[261] The court stated that the defendant was making a mistake, but tentatively granted him the right to proceed without counsel.[262] Thereafter, the court inquired into the state of the defendant's representation and tested his knowledge of substantive doctrine.[263] Based on his answers, the court determined that the defendant's waiver was not knowing and intelligent and overturned its decision to allow the defendant to proceed without counsel.[264] The defendant sought to act as co-counsel and sought to make motions himself.[265] Those requests were rejected and the court "required that [the] defense be conducted only through the appointed lawyer from the public defender's office."[266] The defendant was convicted and sentenced.[267] His appeals to the California Court of Appeal and California Supreme Court were unsuccessful and the case found its way to the U.S. Supreme Court.[268]

The Court reversed, holding that a defendant has the unilateral right to waive the assistance of counsel.[269] The Court reasoned that the "language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally," and that forcing counsel upon the defendant "violates the logic of the Amendment."[270] The Court also looked to history, explaining that "[i]n the American Colonies the insistence upon a right of self-representation was, if anything, . . . fervent," due to the "appreciation of the virtues of self-reliance and a traditional distrust of lawyers."[271] Thus, though the benefits of representation by counsel were recognized, the right to self-

259. 422 U.S. 806 (1975).
260. *Id.* at 807.
261. *Id.* (citation omitted).
262. *Id.* at 808.
263. *Id.*
264. *Id.* at 809–10.
265. *Id.* at 810.
266. *Id.* at 811.
267. *Id.*
268. *Id.* at 811–12.
269. *Id.* at 836.
270. *Id.* at 820.
271. *Id.* at 826.

representation was never doubted.[272] Indeed, the Court stated that, though representation by counsel is most likely better for the defendant, in some cases the defendant may be better off representing themselves.[273] That is a personal choice for the defendant and the defendant will bear the consequences of that choice.[274]

The Court did condition the right to waive counsel: "[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits"; that is not a question of the defendant's skill but rather their awareness of the dangers and disadvantages of self-representation.[275] Subsequently, in *Indiana v. Edwards*,[276] the Court further elucidated that where a defendant is competent to stand trial, but not competent to conduct trial proceedings by themselves—for example, due to the defendant's mental illness—the government may insist that the defendant be represented by counsel.[277]

The Supreme Court's teaching in *Faretta* makes plain that a defendant should have an analogous unilateral right to waive jury trial in favor of bench trial. Just as with the right to counsel, the Sixth Amendment right to an impartial jury is principally a right to protect the defendant. And just as with representation by counsel, if a jury does not protect the defendant, then the government should not be able to impose a jury trial upon the defendant instead of a bench trial. That too violates the logic of the Amendment: the purpose is to provide the defendant with an impartial factfinder, but if a jury is unable to do that, then we should not impose that upon the defendant. As explained above, the defendant is the best situated to determine whether the jury is impartial. Though a jury trial may be better for the defendant in most cases, in some it will not. Consequently, that choice should be left to the defendant—who must bear the consequences of that choice.

In addition to the defendant's unilateral right to waive counsel, the defendant also has the unilateral right to have a compulsory process for obtaining witnesses.[278] The defendant can simply not avail themselves of this right—and opt not to serve process on any witnesses. This too fits analogously with the defendant's right to waive a jury trial and opt for a bench trial.

Now, many of these Sixth Amendment rights cannot be unilaterally waived by the defendant. The defendant cannot unilaterally waive their right

272. *Id.* at 852.
273. *Id.* at 834.
274. *Id.* at 835, 845.
275. *Id.* at 835 (citation omitted).
276. 554 U.S. 164 (2008).
277. *Id.* at 174.
278. U.S. CONST. amend. VI.

to speedy trial and insist that the trial be continually delayed.[279] The defendant does not get to unilaterally waive that the trial be held in the district of the crime's commission, instead demanding another venue.[280] The defendant also seemingly cannot unilaterally waive the requirement that they be informed of the nature and cause of the accusation—the defendant may be required to appear when summoned by the court and then they will be informed of the charges.[281]

There is an important distinction that makes the disanalogy plain: each of these rights cannot be unilaterally waived because their satisfaction is critical to there being a proceeding.[282] The defendant does not have the right to opt that there be no criminal proceeding against them. This is unlike the right to counsel and the right to a compulsory process; there can be an adversarial proceeding against the defendant, even if the defendant does not avail themselves of those rights.

Putting all of this together, I contend that Sixth Amendment waiver of rights is explained by the following principle: the defendant has the right to waive their Sixth Amendment rights that are in service of protecting the defendant and do not halt or hinder an adversarial proceeding against the defendant. Indeed, this distinction—whether the right is critical to the occurrence of a proceeding—makes sense of the Court's conspicuous holding in *Edwards*. There, the incapacity of the defendant to conduct trial proceedings themselves would have halted the ability to conduct adversarial proceedings against the defendant—and thus, it could not be waived.[283] In contrast, the right to jury trial can be waived without jeopardizing the existence of an adversarial proceeding, for the case will proceed as a bench trial. Thus, as a matter of constitutional doctrine, the defendant should have the choice.

B. *Bigotry in Jury Selection and Decision-Making*

Our history with the institution of the jury also shows its grave deficiencies and why there should be a constitutional right to bench trial. It is

279. *See* Garcia, *supra* note 122, at 34 (arguing that the right to speedy trial has a second-class status and is difficult to assert effectively); *see also* Amsterdam, *supra* note 122, at 525 ("In a quite literal sense, the sixth amendment right to speedy trial has today become . . . more honored in the breach than the observance.").

280. *See, e.g.*, Skilling v. United States, 561 U.S. 358, 379–85 (2010).

281. Consider the federal bail statute, 18 U.S.C. § 3142(g), which considers whether a defendant will appear as required.

282. The right to a particular venue—the district where the crime was committed—is not generally unilaterally waivable by the defendant. And one could argue that this does not fit the rule, given that changing venue would not obviously halt the proceeding. In response, changing the venue may drastically increase the cost of the proceeding (and practically halt the proceeding) or substantially delay it, since witnesses and parties would have to travel to the new venue. Neither is the case with bench trial.

283. Indiana v. Edwards, 554 U.S. 164, 177–78 (2008).

well documented how the institution of the jury was crafted as a tool of Jim Crow, leading to discrimination against Black people and other minorities in the criminal justice system.[284] As Dorothy Roberts explains, "With the reinstatement of the white supremacist regime in the South, all-white juries became an instrument of white terror. Maintaining the slavery-era rule that only white people were entitled to serve on juries was a way for the Jim Crow state to reenslave newly freed blacks [through imprisonment]."[285] That continues to permeate features of the modern jury.[286]

One primary place where we see manipulation of the jury in racist or otherwise bigoted ways is in selection of the jury itself. Historically, Black people were excluded from juries explicitly based on their race.[287] When such explicit discrimination became illegal and an unavailable method, jurisdictions used other purportedly facially race-neutral means to accomplish the same goal. For example, jurisdictions used "key-man" systems (as opposed to randomized selection), where an individual was appointed to select jurors for the venire, from which the petit jury would be chosen.[288] These systems could and did result in racial discrimination in juries, primarily excluding Black people.[289]

In addition, regardless of the system used to select the venire, even if the venire is populated with minority individuals, prosecutors can use peremptory challenges to eliminate them from the jury. We know this continues to occur with shameful regularity.[290] In *Flowers v. Mississippi*,[291] the Court recognized this

284. RANDALL KENNEDY, RACE, CRIME, AND THE LAW 168–92 (1997); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 95–102 (2019); Kenneth B. Nunn, *Rights Held Hostage: Race, Ideology and the Peremptory Challenge*, 28 HARV. C.R.-C.L. L. REV. 63, 110 (1993) (noting the "history of racism in this country and the history of the use of the jury to enforce that racism").

285. Roberts, *supra* note 284, at 101. On this point, see also the following sources cited in Professor Roberts's opus: William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 259 (2001); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 110–15 (1990); James Forman, Jr., *Juries and Race in the Nineteenth Century*, 113 YALE L.J. 895, 909–10 (2004); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1616–49 (1985).

286. Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1620 (2018) ("The Jim Crow jury never fully fell. While the methods of racial exclusion have changed over the years—peremptory challenges, for example, 'did not become a primary tool for excluding black jurors until 1935'—equitable representation on criminal juries has not existed since the height of Reconstruction (and only then in limited areas). Put differently, across American jury boxes today there are thousands of missing nonwhite jurors. Instead, these seats are filled by white jurors that, absent systemic racial exclusion, a nonwhite juror would be occupying. In kind, if not degree, it has always been so since Congress outlawed racial discrimination in jury selection 143 years ago.").

287. KENNEDY, *supra* note 284, at 169–75.

288. *Id.* at 182–86.

289. *Id.*

290. *Id.* at 193–230.

291. 139 S. Ct. 2228 (2019).

truth, writing "the freedom to exercise peremptory strikes for any reason meant that 'the problem of racial exclusion from jury service' remained 'widespread' and 'deeply entrenched.'"[292] The Court further explained the "cold reality of jury selection . . . both history and math tell us that a system of race-based peremptories does not treat black defendants and black prospective jurors equally with prosecutors and white prospective jurors."[293] As discussed in *Flowers*, the Supreme Court in *Batson v. Kentucky*[294] set forth a procedure by which parties could challenge the adverse party's peremptory strikes as on the basis of protected grounds.[295] But, as many have explained, the Court's efforts to curtail the racist use of peremptory challenges has largely failed, because attorneys can articulate pretextual, non-race-based explanations for their racist use of peremptory challenges.[296] For example, in a 2010 report on racial discrimination in jury selection, the Equal Justice Initiative found that "a startlingly common reason given by prosecutors for striking black prospective jurors is a juror's alleged 'low intelligence' or 'lack of education.'"[297] Furthermore, as observed by Luz E. Herrera & Pilar Margarita Hernández Escontrías, "Spanish-language fluency has often been cited as a legitimate reason to exclude Latinxs from serving on juries," even when jurors are competent to assess the case in English.[298] To this end, Herrera and Hernández Escontrías highlight the case *Hernandez v. New York*,[299] where the Supreme Court acknowledged the "harsh paradox that one may become proficient enough in English to participate in trial . . . only to encounter disqualification because he knows a second language as well."[300] But the Court nevertheless affirmed the conviction and blessed the peremptory strike because of its purported race-neutral basis.[301]

But the racist and bigoted aspects of the jury were not limited to juror selection—they infected the juror decision-making process as well. Consider

292. *Id.* at 2239 (citation omitted).

293. *Id.* at 2242.

294. 476 U.S. 79 (1986).

295. *Flowers*, 139 S. Ct. at 2241–44.

296. *See generally* KENNEDY, *supra* note 284, at 208–14 (discussing the issue of enforcing the prohibition on racially discriminatory peremptory challenges); Harry I. Subin & Michael C. Meltsner, *Confronting Unequal Protection of the Law*, 24 N.Y.U. REV. L. & SOC. CHANGE 163, 166 (1998); Morrison, *supra* note 167, at 38 (setting forth empirical evidence of the failure of *Batson* to curb abuse of peremptory strikes).

297. Luz E. Herrera & Pilar Margarita Hernández Escontrías, *The Network for Justice: Pursuing a Latinx Civil Rights Agenda*, 21 HARV. LATINX L. REV. 165, 206 (2018) (quoting EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 17 (2010), https://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/8667-284F]).

298. *Id.*

299. 500 U.S. 352 (1991).

300. *Id.* at 371 (citation omitted).

301. *Id.* at 372.

the recent Supreme Court case *Ramos v. Louisiana*.[302] *Ramos* concerned whether it is a constitutional requirement that criminal jury verdicts be unanimous.[303] There, the defendant was charged with a serious crime and opted to be tried by jury, and the jury convicted by a verdict of ten to two.[304] Whereas in forty-eight states, all but Louisiana and Oregon, such a nonunanimous verdict would have resulted in further deliberations and, if not resolved into a unanimous verdict, in a mistrial, and in Louisiana that margin was sufficient to convict.[305] The defendant was sentenced to life without parole and appealed the conviction on the basis that the nonunanimous verdict violated his Sixth Amendment rights.[306]

The Court agreed and reversed the conviction.[307] In so doing, the Court traced the history of the Louisiana and Oregon rules allowing for nonunanimous verdicts.[308] The Court's recognition of the sordid, bigoted history of these rules is stunning:

> Louisiana first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to "establish the supremacy of the white race," and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.
>
> Nor was it only the prospect of African Americans voting that concerned the delegates. Just a week before the convention, the U.S. Senate passed a resolution calling for an investigation into whether Louisiana was systemically excluding African Americans from juries. Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African American jurors as a violation of the Fourteenth Amendment, the delegates sought to undermine African American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a "facially race-neutral" rule permitting 10-to-2 verdicts in order "to ensure that African-American juror service would be meaningless."
>
> Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute "the influence of racial, ethnic, and religious minorities on Oregon

302. 140 S. Ct. 1390 (2020).
303. *Id.* at 1393–94.
304. *Id.* at 1394.
305. *Id.*
306. *Id.* at 1394–95.
307. *Id.* at 1397, 1408.
308. *Id.* at 1394–95.

> juries." In fact, no one before us contests any of this; courts in both Louisiana and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States' respective nonunanimity rules.[309]

On the backdrop of this history, the Court observed that "[t]he text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the content and requirements of a jury trial."[310] The Court then elucidated how unanimity was historically regarded as critical to ensuring impartiality of the jury.[311] Thus, applying this historical understanding, the Court held that such impartiality required unanimity of the jury in casting its verdict.[312]

Finally, revisit the now familiar *Pena-Rodriguez v. Colorado*. There the Court held that

> where a juror makes a clear statement that indicates he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.[313]

In each of these three contexts, the Court recognized the potential for racism and bigotry to taint the jury's verdict and determined that a constitutional remedy is required. Specifically, with respect to bigoted use of peremptory challenges, the Court set forth the *Batson* procedure. With respect to non-unanimity rules used to cabin the impact of minority jurors selected, the Court struck them down and instead required unanimous jury verdicts. With respect to alleged bigotry in juror deliberations, the Court created an exception to non-juror-impeachment rules that allowed for examining those deliberations. Similarly, there is just as manifest a problem of pervasive juror prejudice in, among other ways, racism and bigotry, that threatens defendants' constitutional rights. Just as the Court has prudently recognized in these other contexts, there needs to be a practically viable solution to remedy the potential constitutional perils that may befall the defendant. That best remedy, given the practical realities, is recognizing the defendant's unilateral right to opt for bench trial.

C. *Objections*

There are two persisting doctrinal objections. First, the argument on waiver pays insufficient attention to the constitutional importance of a jury

309. *Id.* at 1394 (citations omitted).
310. *Id.* at 1395.
311. *Id.* at 1395–97.
312. *Id.* at 1397.
313. Pena-Rodriguez, 137 S. Ct. 855, 869 (2017).

trial. Second, one might grieve that even if a constitutional response to pervasive prejudice is required, the remedy of unilateral optionality is not and there are other alternative solutions. I consider each of these complaints in turn.

Waiver. Here the objector's complaint is that a jury trial is of constitutional importance such that it should not be subject to the defendant's waiver. But this is belied by our constitutional jurisprudence and our practice. The Court made clear in *Patton v. United States*[314] that a jury trial *can be waived* under the right circumstances.[315] Moreover, our practice exhibits no special fealty to jury trial—the vast majority of criminal cases do not go to trial and are instead either dismissed or resolved by plea.[316] Indeed, the Court in *Santobello v. New York*[317] recognized the importance of plea bargaining:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.[318]

And in every jurisdiction, there are plenty of bench trials as well. The only question for us is under what conditions waiver should be allowed. I have argued that as a doctrinal matter, it should be treated like the rights to counsel and compulsory process, subject to unilateral waiver—because none of these rights are prima facie necessary for there to be a proceeding against the defendant.

Alternative Solutions. Here, the objector's grievance is that the doctrine does not require the particular solution of offering the defendant the unilateral option to choose; perhaps an examination of the prosecutor's good faith reasons for withholding consent or judicial determination of appropriateness of the bench trial could suffice. However, the constitutional harm of pervasive juror prejudice demands an efficacious remedy—one that can actually ensure defendants have impartial, competent factfinders determining their cases. These two alternatives cannot ensure that.

An examination of a prosecutor's reasons would be a meaningless exercise. Under such a regime, a prosecutor could always simply state, perhaps pretextually, that the government has an interest in public involvement in the determination of guilt or innocence through jury trial. No further reasons would be necessary, and that incantation would be enough to block the defendant's

314. 281 U.S. 276 (1930), *abrogated on other grounds by* Williams v. Florida, 399 U.S. 78 (1970).

315. *Id.* at 298.

316. *See, e.g.*, Covey, *supra* note 172, at 1238 (reporting that more than 95% of all state and federal felony convictions are obtained by guilty pleas).

317. 404 U.S. 257 (1971).

318. *Id.* at 260.

exercise, even if there was a genuine problem with pervasive juror prejudice. Some prosecutors may appropriately acknowledge juror prejudice and consent to waiver, but a defendant's right to impartial adjudication cannot depend on the adverse prosecutor's good faith. And even if an examination of a prosecutor's motives is somehow more searching, that too will likely be ineffectual—as it has become in the *Batson* context.[319]

Requiring judicial determination is similarly inefficacious. There are many reasons, including that the court may be subject to various pressures. But consider an operational reason: suppose a judge makes the determination that juror prejudice should allow for a bench trial. Upon making such a determination, suppose the defendant revokes the request for a bench trial and instead insists on an impartial jury trial. Because of the court's determination of juror prejudice, the defendant would seemingly be entitled to delay of the trial (and perhaps eventual dismissal). Of course, in theory, this is no trouble—if there is pervasive juror prejudice, then the trial should be delayed or dismissed. But, as noted,[320] the extreme nature of this remedy renders it disfavored and unlikely. And because this result is a downstream consequence of the judicial determination allowing for a bench trial, then it stands to reason that courts will similarly be chary in determining that a bench trial is allowed.

To block this maneuver, courts could fashion a mechanism where if the defendant initiates a demand for a bench trial, then the defendant cannot revoke it and opt for jury trial. But this smacks of disingenuousness and should be disfavored. While the court can condition the request for jury trial for purposes of administration (for example with time limits and notices), that is not the purpose of this rule. The purpose of such a rule is simply to insulate the court from making an unpopular, but legally warranted, decision that the defendant's jury trial right is unsatisfiable.

The Court need not punt to the legislatures or lower courts to fashion a misshapen tool of a remedy. The Court is empowered to fashion an appropriate solution to meet the constitutional need. The Court did so in *Miranda v. Arizona*,[321] where it told law enforcement precisely the warnings that needed to be communicated to those subjected to custodial interrogation.[322] Here, the simplest answer is the correct one, and the Court should embrace it. Placing the

319. *See* Morrison, *supra* note 167, at 34 ("[T]he chances of a judge being able to divine an attorney's true intent in exercising a strike are remote.").

320. *See supra* Section III.B.2.

321. 384 U.S. 436 (1966).

322. *Id.* at 467–79. The Court invited legislatures to craft other means to accomplish the same goal but set forth this solution as a default to be displaced by other action that would remedy the constitutional harm. *Id.* at 478–79. It can do the same here. *See* Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants As Private Attorneys General*, 88 COLUM. L. REV. 247, 286 (1988) (discussing the obligation of the judiciary to fashion deterrent remedies in criminal law).

choice of factfinder in the defendant's hands is the most efficacious remedy to ensure that the defendant can circumvent the perils of pervasive juror prejudice.

CONCLUSION

Among the gravest perils a defendant faces in the criminal process is that those who are rendering the verdict will have already adjudged the defendant guilty or at least favor doing so. That is anathema to justice. Recognizing this, the Constitution enshrines the right to a neutral adjudicator in the Sixth Amendment—that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[323] However, foisting adjudication by jury on the defendant may do more harm than good. Jurors are often biased against the defendant for any number of reasons, including the nature of the allegations against the defendant, the demeanor and reputation of the defendant, or the jurors' own bigotry and racism. And there may be no way to rid the jury pool of these biases. This Article has argued that the way to solve this problem, while a partial solution, is to give defendants a unilateral right to opt for a bench trial. Indeed, because the potential dangers strike at the core of a defendant's due process rights, recognizing the right to bench trial is constitutionally required. To this end, this Article proffers a comprehensive, multimodal argument: Theoretically, the only practicable solution to potential pervasive juror prejudice is the right to bench trial. Historical and empirical evidence confirm that the problem of pervasive juror prejudice is widespread, that prosecutors may capitalize on such juror prejudice, and that our other available solutions are ineffective. Finally, as a matter of doctrine and precedent, the Sixth Amendment must be read to recognize such right to waive bench trial.

Is this enough? Definitely not. Our criminal justice system is undergoing a long-overdue reckoning. Recent events along with powerful activism have laid bare that the criminal justice system is built upon a foundation interwoven with pathologies—racism, xenophobia, misogyny, homophobia, transphobia, classism, and other irrationalities.[324] There are at least two strategies in

323. U.S. CONST. amend. VI.

324. *See, e.g.*, Laura Cohen, *Prosecutors, Power, and Justice: Building an Anti-Racist Prosecutorial System*, 73 RUTGERS U. L. REV. 1309, 1310 (2021) ("George Floyd's death set off a tsunami of protests around the country and the world. Even as millions took to the streets to demand an end to state-sanctioned violence against Black people, however, the killing continued. Ahmaud Arbery in Georgia. Daniel Prude in Rochester. Breonna Taylor in Louisville. Daunte Wright in Brooklyn Center, Minnesota . . . ."); Jenny E. Carroll, *Safety, Crisis, and Criminal Law*, 52 ARIZ. ST. L.J. 769, 772–73 (2020) ("Just as COVID-19 has ravaged Black, Brown, and poor communities, so too has over-policing and police violence hovered like a uniformed human plague over the same marginalized communities. . . . This Essay bears witness to the shifting definitions of safety, danger, and community wrought by the concurrence of a pandemic and the killings of Breonna Taylor, Rayshard Brooks, George Floyd, and others."); Emily St. James, *The Time To Panic About Anti-Trans Legislation Is Now*, VOX (Mar. 24, 2022, 10:20 AM), https://www.vox.com/first-person/22977970/anti-trans-legislation-texas-idaho [https://perma.cc/FJ8G-P2S9]; Natasha Ishak, *State-Level Republicans Are Going All In on*

reforming the criminal justice system—wholesale revolution or focused incremental changes. This Article's proposal is squarely of the second strategy. It suggests a concrete change of one feature of our criminal justice system with the goal of better preserving defendants' rights and improving actual prosecutions now. But pursuing such a change is not out of contempt for the first, more ambitious strategy. Rather, I suggest pursuing both strategies together, with the recognition that wholesale revolution will take time (and failures), and that focused changes can aid in approximating justice in individual cases, for real people facing jeopardy.

Extreme Anti-Trans, Anti-Abortion Laws, VOX (Mar. 20, 2022, 5:10 PM), https://www.vox.com/2022/3/20/22987539/anti-trans-anti-abortion-laws-texas-florida-idaho [https://perma.cc/5RC6-YYF7].