1 INTRODUCTION

The grand jury's failure to indict Darren Wilson – a Ferguson, Missouri police officer – for fatally shooting Michael Brown in 2014 provoked a nationwide outcry, sparking days of protests, riots, and arrests all over the country. Foremost among the denunciations was an expressed dismay that the community would not have an opportunity to determine Wilson's fate in an open, public trial. Even the embattled officer expressed hope that his resignation from the police force would help the community heal.

Less than one week later, this anger flared up in New York City – and all over the country – when the public learned that a Staten Island grand jury had failed to indict NYPD officer David Pantaleo in the choking death of Eric Garner during an arrest. Protests, rallies, "die-ins," and traffic tie-ups broke out in Manhattan, all over the United States, and in major cities worldwide. Once again, the public was outraged that the community had not received a chance to weigh Pantaleo's actions in a court of law and determine guilt or innocence through jury trial. This desire for community-determined justice was so widespread that soon after the Staten Island grand jury's decision, the New York attorney general asked the governor for the power to investigate and prosecute killings of unarmed civilians by law enforcement officials. Additionally, the U.S. Justice Department announced that it would open a civil rights inquiry into Garner's death.

Following these two grand jury declinations to indict, there was a call to bypass the grand jury's role entirely in the case of Tamir Rice, a twelve-year-old Cleveland boy fatally shot by Officer Timothy Loehmann. Outrage at the boy's death prompted requests to have the

prosecutor charge the officer for homicide without the use of the grand jury, despite the fact that Ohio law mandates grand jury issuance of indictments. Concerns about the secrecy and the lack of public accountability inherent in the grand jury proceeding, as well as a need for more transparency and a more expedient route to an open, public trial, helped motivate this desire to eliminate the institution entirely.

In a similar vein, once the news of Trayvon Martin's death (2012) began to spread, both local community members in Florida and the greater public nationwide were infuriated that George Zimmerman was not initially charged with any crime. The public was equally perturbed that Zimmerman was released on bail after his eventual indictment for second-degree murder. The simmering anger was such that the public citizenry, both local and national, directed the prosecutors to evidence of Zimmerman's falsehoods regarding his access to funds, eventually uncovering a secret internet fundraising scheme that netted Zimmerman and his wife close to $200,000. This discovery resulted in the revocation of Zimmerman's bail, to the satisfaction of much of the populace, both local and far flung, satisfaction that later dissolved into more anger when Zimmerman was re-released at a much higher bail.

Likewise, New Yorkers expressed intense wrath about Bernard Madoff's pretrial release. Confined to supervised house arrest at his luxurious Park Avenue apartment, Madoff could barely shuttle to and from his court appearances without being hounded by angry investors and fellow New Yorkers. News of his limited-bail release sparked outrage worldwide as victims of his Ponzi scheme expressed resentment about Madoff's freedom after his commission of fraud on a vast scale. Equal rage and dismay was aired when Madoff's guilty plea was announced, as victims and bystanders alike desired a full jury trial, both to formally broadcast the details of Madoff's financial misdeeds and to provide for a more public expiation and punishment.

Similar dismay was voiced by both the local and national communities when the news broke that Dominique Strauss-Kahn, then-Managing director of the International Monetary Fund was granted bail after his indictment for sexually assaulting a hotel chambermaid, despite his high risk of flight. Although Strauss-Kahn was halted at the airport, ready to flee the country, and arrested there, he was still permitted to reside in his posh Upper East Side penthouse while electronically monitored, serving

an extremely upscale version of house arrest. The disquiet continued when Strauss-Kahn's case was ultimately dismissed for lack of credible evidence, with many community members arguing that the alleged victim's untruths about her background should not undermine her accusations against Strauss-Kahn, who had a long history of harassing and sexually assaulting women.

This type of community and countrywide frustration is nothing new, of course. Earlier indicators of this pattern of citizen outrage were present in the 1990s. The socially historic explosion of fury at the not-guilty verdicts handed down in the LAPD/Rodney King and O. J. Simpson trials, from very different segments of the Los Angeles populace, highlighted the local community's great frustration about its inability to truly participate in the decision-making and adjudication of these high-profile cases.

Although the high-profile cases of Garner, Brown, Zimmerman, Madoff, and Strauss-Kahn are recent and spectacular, they serve to expose a recurring problem with our criminal justice system. Indeed, much of this outrage, politicking, and commentary points to one primary question: What role *should* the community play in deciding matters of criminal justice? Today, society, media, and politicians pay close attention to the latest high-profile crime, but the general public usually finds itself at a great remove, watching the system from the sidelines. Our current model of criminal justice marginalizes the local populace to mere bystanders during criminal adjudication, thus creating fear, confusion, and anxiety over how crime is addressed. As a result, punishment for crimes continues to increase and prison populations mushroom, despite the lowest crime rates in over forty years.

Much of this unease and misunderstanding can be attributed to the modern community's exile from the justice system. In the past thirty years, the local public has been almost entirely eliminated from the criminal justice process, as approximately 95 percent of all criminal indictments are disposed of by guilty plea. This virtual elimination of the criminal jury trial has resulted in a system in which justice is dispensed by courts, bureaucrats, and prosecutors, with little room for the community's voice. These backroom criminal procedures completely upend the way our criminal justice system was originally constituted. Not only does our current system eviscerate the Sixth Amendment jury

trial, but it also makes a mockery of constitutional criminal justice, which was specifically designed to incorporate the local public.

How, then, to return to the correct path without overturning the current structure of our justice system? In other words, how do we offer "we the people" a way back into the criminal justice process, granting them their *constitutional right* to decide an offender's punishment, and give them a stake in regulating their own society? One potential path is to create space within our current criminal process for the community's voice, whether this means recognizing the Sixth Amendment's role in sentencing, creating plea juries, inserting a community representative into pretrial detention procedures, or other innovative procedures that allow the greater participation of citizens.

Interjecting the community's voice into criminal justice, of course, can raise the difficulty of distinguishing the jury from the maddened public during a highly publicized trial, such as those of Casey Anthony and O. J. Simpson. In these circumstances, often the public – local and nationwide – desires a different outcome than what the jury decides. Here, however, it's a simple answer: we need juries to defy the larger, often more emotional community when justice requires it, playing a mediating role between the raw sentiments of the populace and the need for community input. The community – whether in the form of petit juries, plea juries, or bail juries – must play a similar, buffering role in nontrial situations.

This responsibility of mediating the outrage of the public is precisely the role that the drafters of the Sixth Amendment envisioned for jury members, particularly after the public outcry following events such as the Boston Massacre trial. Instead of mob justice, the jury, or other, similar bodies of selected community representatives, builds a bridge between the sometimes-raw emotions of the general public and a more careful, considered selection of local citizens who take their job as delegates very seriously.

Circling around, over, and through this, the Sixth Amendment right to a jury trial plays a critical part in helping incorporate the community back into the criminal justice system. Although the Supreme Court has repeatedly reaffirmed the Sixth Amendment jury trial right in a variety of contexts, this most critical of rights is still being pushed to the wayside by our system of hidden criminal adjudication, where decisions

concerning life and liberty are made far from the public sphere and the public eye.

With the help of the Sixth Amendment, we can reverse this trend by focusing on the community, assisted by the integration of practical ways to return the people's voice to the criminal justice process. Conveniently, such an undertaking – fostering citizen participation and investment in the criminal justice process – will also assist in returning us to the type of criminal adjudication originally envisioned by the Founders of this nation. The community-based criminal procedures I advocate were in the past believed so important that they were enshrined in our Constitution and our Bill of Rights, and have been routinely reaffirmed by the modern Supreme Court.

In response to these problems, this book sets forth a new, community-based approach to twenty-first-century punishment and criminal justice, providing a way to make our criminal process more transparent and inclusive of all. Using the lens of the Sixth Amendment jury trial right, this book will offer fresh and much-needed ways to incorporate the citizenry into the procedures of criminal justice, thereby resulting in greater investment and satisfaction in the system. I hope to demonstrate the power of the Sixth Amendment paradigm by applying it to all aspects of criminal adjudication, from bail to jail and beyond.

A primary goal of this book is to expose some of the various challenges the American criminal justice system faces from its ongoing failure to integrate the community's voice. For instance, the victim's rights movement has gained prominence and power in criminal justice over the past twenty years, often at the expense of the rights of both the defendant and the community, both of whose roles are shrinking. Equally troubling, the collapse of the jury trial into an assembly-line system of guilty pleas, relying on backroom bargaining between prosecutors and defense attorneys, not only shortcuts constitutional criminal process, but also has almost entirely shut out the local community. Finally, the resulting shift of power from jury trials to plea and sentencing hearings (and, indeed, inflexible state and federal sentencing systems) has again eliminated the community from the feedback loop, creating a criminal justice system in which the local public is denied any input or participation, causing frustration, anger, and resentment.

Careful scrutiny of the problems arising from the criminal justice system's shift to hidden adjudication and the concomitant suppression of the public voice leads to two distinct questions, each of which has been given insufficient attention until now. First, how does the criminal justice system in this country approach the issue of community rights? Second, how should community rights be recognized, if at all, in a criminal justice system situated within a liberal democracy?

This book tries to answer both of these questions, taking a careful look at how the community is involved in the criminal justice system and arguing why there is a strong need for more participation by the local public, for the benefit of all. Ultimately, I show that the people's right to participate in the criminal justice system via the petit jury – a right all too often overlooked – is critical to truly legitimize the criminal process and ensure its democratic nature.

The book proceeds in three major parts. Part I, entitled "History in the Crucible: Rediscovering the Original Community Right in Criminal Justice," delves into the historical aspects of the jury trial right, illustrating how the original jury trial right was a community right, not an individual one as we commonly envision it. I argue that although the Court's recent decisions relying on the collective right to jury trial have caused a rethinking of sentencing and punishment, the Court has failed to buttress its reasoning with proper historical and scholarly support. This is a major oversight, as the Court's current understanding of sentencing and punishment relies upon the scope, meaning, and provenance of the jury trial right. In response, Part I provides a missing historical and constitutional justification for the Court's fidelity to the community as arbiter of punishment and traces the evolution of the jury trial right through the modern day.

Chapter 2, entitled "The Collective Jury Right and the Sixth Amendment," offers a textual-historical reading of the Sixth Amendment, based on seventeenth- and eighteenth-century legal theory, linguistic usage, and colonial and Revolutionary practices, and concludes that the jury trial right was originally the community's right, not an individual right. This chapter explores the historical evolution of the right to a jury trial and the community's role in imposing punishment, tracing it from its early beginnings in England through its full fruition in the post-Revolution and Constitutional drafting periods.

Within this chapter, I also explain why this collective jury trial right should still be recognized today.

Chapter 3, "The Supreme Court and the Reaffirmation of Community," discusses the ascendance of the Sixth Amendment jury trial right and explains why the Court has been so focused on the role of the jury as the representative voice of the community. This chapter illustrates how the Supreme Court has laid groundwork for a vast criminal procedure policy shift by gradually "rediscovering" the Sixth Amendment jury trial right, a right it continues to reaffirm in its latest terms. The third chapter explores this function of the community and expands upon why these founding origins have structured the legitimacy of recent reforms in criminal law and sentencing.

Part II of the book, entitled "Old Becomes New: Sixth Amendment Jury Rights and Twenty-First Century Criminal Procedure," provides the theoretical and philosophical heart of the book. In it, I explore what motivates this community jury trial right, both historically and today, and what it means to be part of a community in the criminal justice context. This part explores the jurisprudential underpinnings of the Court's latest decisions, focusing on the jury trial right, investigating the retributive and restorative aspects of criminal justice that animate these holdings. In addition, this part also delves into the contested and complicated definitions of *community* as applied to criminal justice, and teases out the negatives and positives that linger within.

Chapter 4, "Retribution, Restorative Justice, and the Sixth Amendment Jury Right," studies the jurisprudential underpinnings of the Court's latest decisions focusing on the jury trial right. Here, I flesh out my argument that these late twentieth- and early twenty-first-century sentencing decisions suggest a punishment philosophy based on expressive, restorative retribution. This theory of punishment is grounded both in the historical jury right to decide all punishments and in community determinations of blameworthiness. As I will show, expressive, restorative retribution not only helps explain why the Supreme Court has become the champion of the Sixth Amendment jury trial right at a time when most indictments are settled through guilty pleas, but also gives us a blueprint to help navigate future challenges in the criminal justice system.

In Chapter 5, entitled "Defining Community in the Twenty-First Century: Cities, Counties, and Collective Action," I investigate the

significance and fluidity of the term *community*. In our dynamic twenty-first-century digital world, community has many functional and social meanings. The criminal jury setting, however, has long defined notions of "the community" in geographical terms, limiting the term to local human peers of the defendant, often the model members of the relevant community. In a world with newly defined online crimes and online communities, the notion of "community rights" and the means to incorporate the community into criminal justice decision-making needs to be premised on more than just traditional conceptions of the community. This chapter explores the various forms that community can take in today's criminal justice system, and discusses as well the problems that can arise from relying on an amorphous "community" to dispense justice.

The final and most substantive part of the book, Part III, "Theory into Practice: Origins and Community in Modern Criminal Procedure," takes this newly expanded understanding of the history and theory of the jury trial right and applies it to several forms of modern criminal procedure and punishment, including pretrial detention, guilty pleas, bench trials, post-prison sentences, victim's rights procedures, and jury nullification. Since so much of criminal practice and punishment now revolves around nontrial process, I explain why the Court's focus on juries and communities should apply to any type of criminal process that imposes punishment, whether it happens before, during, or after adjudication.

Chapter 6, "Bail, Jail, and the Community Voice," analyzes how the reality of pretrial detention in today's criminal justice system means that punishment is often imposed by nonjury, nonjudicial actors, such as bail bondsmen, probation officers, and correction officials. This is far from the aggressive public oversight imagined by the Framers of the Constitution and fails to comply with the spirit of the Sixth Amendment jury trial right, which requires collective decisions on the imposition of punishment. The terrible conditions in local and county jails frequently turn pretrial detention into a form of punishment, despite the fact that the offender has not yet been adjudicated. Accordingly, I conclude that some subsection of the local public should take some part in deciding whether an offender should be granted or denied bail, particularly in issues involving community safety.

In Chapter 7, "Infusing Community through Criminal Procedure: The Plea Jury," I address a critical question: How important is the jury trial right in a world of guilty pleas? This chapter explores the ways in which the Court's new jury-centered philosophy of punishment affects the procedures of the guilty plea. I contend that although the Court focused its analysis on community participation in juries, there is nothing in *Apprendi-Blakely* or its progeny to suggest that this type of participation should be limited only to the criminal trial. Accordingly, I argue that the logical next step is the incorporation of the community into the guilty plea procedure, through the use of a plea jury, and I describe one potential way this integration could be achieved.

Chapter 8, "Eradicating the Bench Trial," addresses the constitutional and theoretical problems with bench trials. This chapter contends that one important way we should exercise the community jury trial right is by eliminating bench trials. Bench trials occupy a peculiar middle ground in the realm of the jury trial right. Neither a full waiver of the jury trial such as by guilty plea, nor a carefully regulated criminal procedure such as a full jury trial, the bench trial is a strange beast. As such, it requires a full reevaluation under our new understanding of the community jury right.

In Chapters 9 and 10, I discuss how the use of expressive restorative retribution as a philosophy of punishment provides a concrete policy of community involvement and participation, similar to what was practiced during the Constitutional era. Taking a page from the past, these two chapters argue that community involvement can help structure ancillary sentencing, giving guidance not only to the players in the criminal justice system, but also to the legislative and executive branches as well.

Chapter 9, "Restoring the Offender to Society," explains how the community jury trial right should apply to all pre-sentence proceedings, including pre-sentence reports, persistent felony offender statutes, prior convictions, and probation (or suspended sentences).

Similarly, Chapter 10, "Back-End Sentencing: The Sixth Amendment and Post-Prison Procedures," investigates the often-lengthy aftereffects of a modern sentence and includes all aspects of supervision to which the offender is subject, such as parole, post-release supervision, fines,

and restitution. I conclude that these back-end sentencing proceedings, which can increase the length and the burden of an offender's sentence, must also be considered in the wake of *Apprendi-Blakely*.

In Chapter 11, "Jury Nullification and Victim Rights: Going Past Procedure," I discuss two extraordinary procedures seen in the criminal adjudication process: jury nullification and victim's rights. Although profoundly dissimilar in most ways, both jury nullification and victim's rights have one important commonality they both go beyond the normal envisioning of the criminal adjudication process, tipping the scales in balance of their unique and sometimes quite-powerful voices. Both can also be seen as the extreme culmination of the community voice expanded to its greatest power, having extensive power over either the actual offense found or the punishment imposed.

The book winds up in Chapter 12 with a look toward the future of criminal procedure if the community jury trial right is fully understood and applied to all aspects of the criminal justice system. I conclude that although the implementation of community participation within criminal adjudication might be challenging, over all, it will have positive consequences for both our understanding of and our comfort level with the processes of criminal justice.