Bring Back Community Decision-Making

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In this time and in this country, we need decision-making that comes from the community. Although the Constitution guarantees judgments by juries, over time, power has shifted to institutional players such as the police, prosecutors, judges, and lawyers. Juries decide less than four percent of criminal cases and less than one percent of civil cases. Almost invariably, citizens only exercise power in our government through voting. However, citizens possess so much more power. This paper shows the mechanisms contributing to the shift toward institutional decision-making and away from community determinations. It then sets forth a path to bring back the constitutional power of people. The daily regulation of our community by politicians shows that now more than ever, community authority is imperative.

People possess the right to have questions of their liberty and monetary disputes decided by their community. Further, community members have the power to decide these issues as jury members.[1] People have concurrently lost both rights—the right to a jury trial when accused or aggrieved and their right to decide important issues as members of a jury when community members are accused or aggrieved. This shift of authority has had an especially devastating impact on people of color, women, and the poor.

Current Criminal and Civil Justice Systems

The heart of the current criminal justice system is plea bargaining. Plea bargaining, which eliminates community decision-making, is littered with significant problems

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[1] Suja A. Thomas, The Missing American Jury: Restoring the Fundamental Constitutional Role of the Criminal, Civil, and Grand Juries (2016).

related to bias, conflicts, and lack of competence and resources. When prosecutors decide to charge a person with a crime, they often do not investigate and heavily rely on police reports. Often based on these uninvestigated charges, prosecutors force defendants into a "plea deal" by, in most circumstances, telling a defendant that they will receive a much longer sentence if they want the community—the jury—to decide. For example, Brian Banks, whose story of innocence was featured in a movie, faced five years in prison if he pled guilty versus up to life in prison if he insisted on a jury trial.[2] The result of coerced decisions like this: Ninety-five percent of criminal defendants plead guilty[3]—some of whom, like Banks, are innocent. These defendants' prison terms and criminal records are based primarily on determinations by prosecutors who are ninety-five percent white[4] as well as by police who also do not reflect the community.[5] All of this contributes to the mass incarceration of Black people in this country—without a diverse, constitutionally enshrined group of people making these decisions.

In the civil system, other procedures prevent access to community decision-making. In a high percentage of consumer and employment cases, for example, forced arbitration moves cases to paid-by-the-case decision-makers. Over fifty-five percent of workers are subject to such mandatory arbitration.[6] And more than fifty percent of credit cards require mandatory arbitration.[7] In these settings, with arbitrators dependent on repeat business from corporations, consumers and employees are less likely to win and corporations are favored. Further, seventy-four percent of arbitrators in the American Arbitration Association (AAA), a major arbitration group, are white men.[8] Arbitrators are typically judges and lawyers—some of the wealthiest members of communities who also may have very different demographic characteristics from many people in the community. These attributes of the decision-makers could be helping companies win. Consumers won only a third of their cases before the AAA versus over eighty percent in small claims court.[9] Employees won only twenty-two percent of their cases before the AAA versus thirty-three percent in federal court and fifty percent in state court.[10]

Even when cases go to court, judges may dismiss factually intense cases before they reach trial. Here, the community through the jury misses the opportunity to make important determinations. Civil rights cases, including Title VII employment discrimination cases, Title II public accommodation cases, and § 1983 excessive force cases, have been impacted greatly. For example, cases with racist comments can be dismissed by judges without

[2] *Brian Banks*, Cal. Innocence Project.
[3] *#GuiltyPleaProblem*, Innocence Project.
[4] Reflective Democracy Campaign, Tipping the Scales: Challengers Take on the Old Boys' Club of Elected Prosecutors (2019).
[5] Mike Maciag, Governing, Diversity on the Force: Where Police Don't Mirror Communities (2015).
[6] Alexander J.S. Colvin, Econ. Pol'y Inst., The Growing Use of Mandatory Arbitration (2018).
[7] *Id*.
[8] *2019 B2B Dispute Resolution*, Am. Arb. Ass'n, Int'l Ctr. for Disp. Resol.(2020); Paige Smith, *Lack of Arbitrator Diversity Is an Issue of Supply and Demand*, Bloomberg L. (May 15, 2019) (women and people of color are twenty-six of the roster).
[9] Andrea Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 Cal. L. Rev. 1 (2019).
[10] *Id*.

community input on what constitutes discrimination.[11] A study by the Federal Judicial Center found that over seventy percent of employers' motions for summary judgment in employment discrimination cases are granted in full or in part.[12] Juries also rarely decide cases where consumers allege public businesses engaged in race discrimination, such as contentions of following in stores based on race, because those cases are usually dismissed before trial.[13] Excessive force cases are dismissed as well.[14] So, the community is precluded from deciding many civil rights matters.

Criminal Justice Changes

Much can be done to shift decision-making back to the community in criminal cases. Specifically, the following measures to increase deliberate decision-making will help prevent the rush to judgment that hinders community input. First, prior to issuing charges, prosecutors should be required to investigate—to talk to witnesses and to examine evidence. They should not rely on police reports. Second, in places where grand juries decide whether defendants are charged, prosecutors should present cases to those community decision-makers before proceeding with any plea deal. Third, prosecutors should give all *Brady* exculpatory material to a defendant to consider before pleading guilty.[15] Moreover, penalties for exercising the right to a jury trial should be removed. Prosecutors should present the same charge/sentencing to those who want a jury trial as they present to those who plead guilty. In the absence of those same options for a defendant taking the jury trial, upon the request of the criminal defendant, the prosecutor should be required to give the jury the alternative option to convict on the charge(s) that were originally presented for the plea deal.[16] These patently reasonable steps to slow the rush to judgment and eliminate the penalty for the jury trial give the community the greatest opportunity to fulfill its constitutional role.

Civil Justice Changes

The civil side can also be reformed to give the community back its authority. Assuming that Congress does not legislate to take away the broad authority to arbitrate, the Equal Employment Opportunity Commission should be given additional resources to file

[11] Sandra Sperino & Suja A. Thomas, Unequal: How America's Courts Undermine Discrimination Law (2017).

[12] Memorandum from Joe Cecil & George Cort, Federal Judicial Center, to Judge Michael Baylson, Senior District Judge, E.D. Pa., Table 4 (Aug. 13, 2008); *see also* Amanda Farahany & Tanya McAdams, *Analysis of Employment Discrimination Claims for Cases in Which an Order was Issued on Defendant's Motion for Summary Judgment in 2011 and 2012 in the U.S. District Court for the Northern District of Georgia*, Just. at Work (Sept. 18, 2013).

[13] *See generally* Suja A. Thomas, *The Customer Caste: Lawful Discrimination by Public Businesses*, 109 Cal. L. Rev. (forthcoming 2021). Note that while settlement can contribute to fewer jury trials, where settlement is pushed along because of non-community devices, settlement also can be problematic.

[14] Scott v. Harris, 550 U.S. 372 (2007).

[15] Nat'l Ass'n of Crim. Def. Laws., The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (2018).

[16] Suja A. Thomas, *What Happened to the American Jury? Proposals for Revamping Plea Bargaining and Summary Judgment*, 43 A.B.A. Litig., No. 3 (2017). Fifth, in the absence of the same options, prosecutors should cap the difference to a quarter of the sentence if one pleads guilty versus the sentence if one takes the jury trial and is convicted. Some other countries have these requirements. Fair Trials, The Disappearing Trial: Towards a Rights-Based Approach to Trial Waiver Systems 56 (2017).

hundreds of cases to ensure that discrimination laws in employment are more vigorously enforced. Similarly, the Civil Rights Division of the Department of Justice should be tasked with bringing many more discrimination cases. With the government involved with significant cases, enforcement of the civil rights laws becomes more likely, and where settlement does not occur, the community could be involved in deciding these important cases.

To counter the courts' blockage of the enforcement of Title VII and Title II of the Civil Rights Act of 1964, the executive should issue an order stating that such laws have been too narrowly interpreted and asking the courts to broadly interpret the language in the statutes and leave factual issues to jury determinations. Based on its authority to enforce laws, the executive should also encourage judges to defer to any judge on the same case who thinks there is sufficient evidence of a civil rights violation for the case to proceed to trial.[17] This deference can begin the process of re-examining our treatment of these important, factually intense cases.

To counter the selections in the past of many federal judges who were prosecutors or represented corporations, the executive should also proceed to select judges who reflect the community and have more diverse backgrounds, such as representation of defendants in criminal cases and plaintiffs in civil rights cases. These more diverse selections would likely lead to judges giving more cases to the community to decide.[18]

Conclusion

The current jury system is not perfect. For example, jury pools are not sufficiently diverse and peremptory challenges are exercised to exclude appropriate decision-makers. As we start to move back to community decision-making, reform of this jury system can accompany reform of the systematic problems described here.

[17] Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 Fordham L. Rev. 2241 (2018).
[18] Christina L. Boyd, *Representation on the Courts? The Effects of Trial Judges' Sex and Race*, 69 Pol. Res. Quar. 788 (2016).