AN EMPIRICAL EXPLORATION OF A JURY VETO

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Among the many contemporary dissatisfactions with American criminal justice are longstanding concerns relating to the scarcity of jury trials and the resulting lack of democratic oversight and control in the adjudicative process. A novel solution has recently been proposed in the form of a 'jury veto': perhaps a jury could be empaneled, prototypically if not exclusively by defense request, that would be empowered to select between the judicially-imposed sentence and a prosecutorial and defense alternative. We conduct the first empirical exploration of such a structure and find reason to believe it could lessen the disconnect between the American framing vision of citizen control and the current reality. In particular, we find sentencing preferences different from prevailing norms and resilient to the form of conviction (i.e., guilty plea versus trial verdict), but predictably influenced by anchoring, framing, and adjustment. This suggests a veto could improve criminal adjudications but will require careful structure, and we describe how further study of both citizen pools and legal actors could continue to probe this novel device.

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INTRODUCTION

For decades, scholars have bemoaned the paucity of jury trials in American criminal courtrooms, while Supreme Court Justices have both individually and collectively emphasized and lauded the intended jury role.¹ In the words of Justice Neil Gorsuch, writing for four Justices in 2019, "the 'people at large'" have been given the "constitutional authority to set the metes and bounds of judicially administered criminal punishments."² Naturally, the jury can set those bounds only if consulted, and that happens less and less frequently in our criminal adjudications.³ Similarly, in 2017, the Court declared the jury "a central foundation of our justice system and our democracy," "a necessary check on governmental power," and "an inspired, trusted, and effective instrument for resolving factual disputes and determining

^{1.} *See* Kiel Brennan-Marquez, Darryl K. Brown, & Stephen E. Henderson, *The Trial Lottery*, 56 WAKE FOREST L. REV. 1, 2–7 (2021) (gathering the significant literature and judicial opinion and proposing a trial lottery as partial improvement).

^{2.} United States v. Haymond, 588 U.S. 634, 646 (2019) (quoting Blakely v. Washington, 542 U.S. 296, 306 (2004)). In June of 2024, Gorsuch penned another paean to the American jury (this time for the Court), concluding that "[t]he Fifth and Sixth Amendments placed the jury at the heart of our criminal justice system." Erlinger v. United States, 602 U.S. 821, 831 (2024).

^{3.} See Criminal Federal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2022 (2022), ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/XFA6-LSFV]; Sarah Gibson et al., *CSP STAT Criminal*, NAT'L CTR. FOR STATE CTS. (2022), https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/csp-stat-criminal [https://perma.cc/MUS7-EVA4]; Brennan-Marquez et al., *supra* note 1, at 4–5, 7–9 (gathering data and sources).

ultimate questions of guilt or innocence."⁴ But the jury cannot function as "a tangible implementation of the principle that the law comes from the people" when it hardly ever meets.⁵

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Scholars have thus sought to change our dwindling-jury reality, including by better educating juries that do convene and by proposing institutional structures to ensure that more juries will convene.⁶ Here, we pick up on one particular suggestion, which is that "veto juries" be optionally convened following criminal sentencing and be given final authority to select the defendant's sentence.⁷ In particular, one of us has proposed that veto juries be permitted to choose among three possible outcomes: the sentence imposed by the judge following conviction, a sentence recommended by the prosecutor, and a sentence simultaneously recommended by the defense (where by 'simultaneous' we mean the latter two recommendations are blind to one another—neither actor knows what the other will recommend in selecting her own recommendation).⁸ The goal is to once again permit, in the words of the Supreme Court, juries to act as "circuitbreaker in the State's machinery of justice."⁹

In this exploratory work, we begin to empirically assess the potential utility of such veto juries. Specifically, as explained in detail herein, we developed a crime-vignette study and then administered it to roughly 300 hypothetical jurors using Amazon's Mechanical Turk,¹⁰ having them (several times) act as jurors summoned to impose a criminal sentence following a conviction and judicial sentencing. In developing the study, we had several questions in mind, a brief description of which will help to situate the project.

First, would these potential veto jurors recommend a sentence different than current sentencing norms? If so, not only would this be independently relevant to the current legitimacy of our systems of criminal adjudication, but such divergence would critically affect the rate at which veto juries would be invoked. Based upon both existing studies and personal knowledge, we expected potential jurors would

^{4.} Pena-Rodriguez v. Colorado, 580 U.S. 206, 210 (2017).

^{5.} Id.

^{6.} *E.g.*, Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823, 825 (2022) (proposing that juries be informed as to sentencing potentials); Brennan-Marquez et al., *supra* note 1, at 5–6 (proposing that a small number of guilty pleas go to trial regardless of party desire).

^{7.} Stephen E. Henderson, The Jury Veto, 40 YALE L. & POL'Y REV. 488, 495 (2022).

^{8.} *Id.* at 492–93.

^{9.} Blakely, 542 U.S. at 306.

^{10.} See Amazon Mechanical Turk, MTURK, https://www.mturk.com [https://perma. cc/9EPC-MR3E] (last visited Jan. 25, 2025). Amazon's microtask platform will be described herein. See infra n. 58–59.

diverge lower than contemporary sentencing norms, and found evidence in support.¹¹

Second, despite that general tendency, and even if veto jurors anchor—as a jury veto intends—to the judicially-imposed sentence,¹² would jurors thereafter adjust more receptively to the prosecution than to the defense, gravitating towards the imagined 'rightness' or grandeur of the State? We expected they would, but found only moderate support; for example, a better predictor might be other case-independent perceptions, such as a juror's preferred direction of adjudicative error allocation.¹³

Third, we wondered whether potential jurors would impose a 'trial penalty' on those convicted at trial, as compared with those convicted after guilty plea. Here, we were genuinely unsure what to expect, as our current adjudicatory systems impose such a penalty, but it seems almost routinely denounced, a sort of necessary evil.¹⁴ Interestingly, we found no support for such sentencing penalty, which is intriguing, even as any 'lack of finding' must be interpreted with caution.¹⁵

Relatedly, and finally, we wondered what factors would be most influential in determining which of the three sentencing options potential jurors would choose. Here, a complex pattern emerged, suggesting that crime type, particular sentence recommendations, and potential-juror

Id.

15. See infra Parts III, IV.C.

^{11.} See infra Parts III, IV.C.

^{12.} All such matters of jury veto function will of course be developed herein; here, we introduce our thoughts and expectations merely to set the stage.

^{13.} See infra Parts III, IV.B-IV.E.

^{14.} See, e.g., Norman L. Reimer & Martin Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019). In the words of Reimer and Sabelli,

Every day, in virtually every criminal court throughout the nation, people plead guilty solely as a consequence of a prosecutor's threat that they will receive an exponentially greater post-trial sentence compared to the pre-trial offer. The process is simple and the logic inexorable: the prosecutor conveys a settlement offer to the defense attorney-very often at the outset of the case before the defense has investigated or received discovery-threatening a post-trial sentence much greater than the pre-trial offer. The defense attorney-often before having had an opportunity to establish a relationship with the client-conveys that offer to her client who must choose between the opportunity and right to defend and the risk of adding years to the sentence if not decades after trial. That differential is known as the trial penalty, and this scene unfolds routinely in courtrooms across the country as if the Framers had intended this legalized coercion to be the fulcrum of the criminal justice system. The Framers did not so intend.

personal characteristics combine to influence selections, and further research will be necessary to suss out more particular contributing factors.¹⁶

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Ultimately, we leave the study as we began, but better informed: we are intrigued with the potential of a jury veto to improve our criminal adjudicative systems. This Article explains that potential as follows. In Part I, we more fully introduce the theory of jury veto, including to situate that theory and our empirical work within existing literature and criminal process. Part II then explains our study, including what we hoped to learn and the details of our survey instrument and its implementation. Part III then presents the data we obtained, and Part IV engages in statistical analyses thereof. Finally, Part V discusses both the implications and limitations of our study and provides guidance for future empirical work.

I. WHAT IS JURY VETO?

A 'jury veto' is a hypothetical construct in which juries would be convened to potentially override judicial sentences, while operating under significant binary or trinary constraints.¹⁷ The concept is designed around several core assumptions.¹⁸ The first assumption is that, in order to better align our adjudicative systems with our founding goals, we ought to more meaningfully incorporate citizen jurors into our criminal adjudications.¹⁹ Second, such adjudications are sharply resource constrained.²⁰ And third, group layperson decision-making is inherently resource expensive.²¹ Together, these assumptions mean that any systemic improvement must satisfy several competing considerations: it must be a system of layperson involvement having sufficient upside potential to be invoked, it must be practicable when invoked, and yet it must not too often be invoked-meaning invocation must also carry downside potential.²² By operating at the sentencing stage, a jury veto can integrate both with the relatively rare criminal trial and the overwhelmingly-more-common conviction by guilty plea.²³ And by channeling and strictly constraining jury discretion, the sentencing choice can not only be administrable, but it can respect the legislative

^{16.} See infra Parts III, IV.D.-IV.E.

^{17.} Henderson, *supra* note 7, at 500–04.

^{18.} Id. at 496–98.

^{19.} *Id.* at 497.

^{20.} Id.

^{21.} Id. at 498.

^{22.} Id.

^{23.} Id. at 499.

and judicial processes that brought matters to this decision point.²⁴ Further, such constraint can ensure that, in the mine-run of cases, both the State and the criminal defendant could lose, thereby working against over-invocation.²⁵ While prior work builds all of this out in detail,²⁶ for our purposes the concept might best be illustrated by example.

Imagine a jurisdiction punishes burglary with a sentence ranging from zero to ten years' imprisonment. (The crime of burglary may be subdivided into differing crimes by such factors as what type of building is entered, time of day, and whether weapons were involved, but such complication can be ignored for our illustrative purpose. We merely require a crime of conviction and resulting sentencing parameters.) Imagine further that, following acceptance of a guilty plea, a trial court sentences a particular defendant to a term of seven years. As things stand, that is the end of the matter barring a successful appeal. A jury veto, by contrast, would allow this defendant an unwaivable right to convene a jury to consider that sentence, with such jury selecting between three options: (1) the judicial sentence of seven years, (2) a prosecutorial recommendation, and (3) a defense recommendation.²⁷ The latter two recommendations would be made blind to each other, whereas the judicial sentence is, of course, a predetermined baseline. The prosecutorial and defense recommendations would be constrained by both rules and common sense. By rule, the prosecutorial recommendation could not exceed 150% (or some other established cutoff) of the statutory maximum, and only a unanimous jury would be permitted to select any recommendation exceeding the judicial seven years.²⁸ It is this greater-than-judicial-sentence potential that discourages defense over-invocation. Further, again by rule, the prosecutorial recommendation could not be less than any previously offered or threatened amount during plea bargaining, a rule introduced to discipline prosecutors in their negotiations.²⁹ By common sense, the defense recommendation would not exceed the judicial sentence, and a supermajority (say two-thirds) of the jury would be entitled to select the lesser defense recommendation.³⁰

So, again, imagine a defendant convicted of burglary and judicially sentenced to seven years based upon a statutory range of zero to ten.

^{24.} *Id.* at 500; *see also id.* at 504–06 (developing and stressing the point in the form of an imagined jury instruction).

^{25.} Id. at 500-01.

^{26.} See generally id.

^{27.} As to the right being unwaivable, see *id.* at 504.

^{28.} See id. at 501-02.

^{29.} See id. at 502-03.

^{30.} See id. at 503-04.

If convened, a veto jury supermajority might decrease the punishment anywhere from zero to less than seven, but only by selecting the particular defense request. Alternatively, a unanimous jury might increase the punishment anywhere from more than seven to fifteen, but only by selecting the particular prosecutorial request. Thus, while a prosecutor *could* recommend a sentence as high as fifteen years, she must consider that any such high request risks making the defense request appear the more just. And while the defense *could* recommend a sentence of nothing, she must consider the same risk of pushing the jury towards the higher judicial sentence or prosecutorial ask. In a case with some defense-sympathetic facts, then, the prosecutor might be content to recommend a seven-year sentence matching the judicial one, and the defense might request, say, five and half years. In that case, a jury supermajority could decrease the defendant's sentence to five and a half years; otherwise, it would remain at the judicially-imposed seven. Either way, the people have had some voice in a criminal adjudication in which our contemporary systems give them none. Of course, the jury veto proposal acknowledges the many logistical details to work out, including how to bring a veto jury up to speed following a guilty plea or bench trial.³¹ That further theoretical work is necessary, however, does not discourage our empirical task. First, many trials-even for very serious crimes-last only a matter of days, and by the time of sentencing far fewer issues may remain, meaning a summary jury process will not always be difficult.³² Second, and most importantly, our task here is exploratory: if it demonstrates potential promise, then it helps justify further thought about this hypothetical new criminal justice function. If it does not, by contrast, then perhaps such a construct would not be worth the candle.

To summarize veto jury functionality, it would operate as follows. Upon invocation, a citizen jury would be convened that would have up to three options.³³ First, a unanimous jury could select the judicially-imposed sentence, the prosecutorial ask, or the defense ask. Second, a supermajority jury could decrease the sentence down to the defendant

^{31.} See id. at 509.

^{32.} See, e.g., Jury Service: What to Expect When Answering the Call, U.S. CTS. (Oct. 17, 2023), https://www.uscourts.gov/news/2023/10/17/jury-service-what-expect-when-answering-call [https://perma.cc/4SLW-R5GS] ("'Most trials are only three to four days, and a very small percentage of Americans ever get the chance to serve on a jury,' said Anne Brabham, a jury administrator in the Northern District of Texas.").

^{33.} While Henderson considers whether there could be State (prosecutorial) invocation, *see* Henderson, *supra* note 7, at 522–24, for our purposes it is sufficient to imagine the prototypical defense invocation.

(or prosecutorial) ask. And, third, an otherwise 'hung' jury leaves intact the judicial sentence.

A. Situating a Veto Within Literature and Process

Decades of research in psychology and law predict possible influences on the decision-making of a veto jury, were one to be empaneled. While the very novelty of the concept means that a full literature review (on traditional jury decision-making, say) is neither appropriate nor helpful, a limited review will contextualize our work.³⁴

First, if one wishes to know what an average juror may deem a 'fair' punishment, data on imposed sentences might not be the best resource. The United States criminal justice system is widely acknowledged as one of the most punitive in the world.³⁵ While it is true that the public frequently voices support for 'tough on crime' policies, surveys also find significant confusion regarding both crime and punishment.³⁶ Surveys consistently show the typical US citizen believes that crime rates are rising even though, until recent fluctuations, rates have been on a steady decline for decades.³⁷ And when asked about carceral

^{34.} For an impressive attempt at synthesizing half a century of jury research, see Dennis J. Devine, JURY DECISION MAKING: THE STATE OF THE SCIENCE (2012).

^{35.} See, e.g., MICHAEL TONRY, SENTENCING FRAGMENTS: PENAL REFORM IN AMERICA, 1975-2025 vii (2016) ("No one admires American sentencing systems. They are arbitrary and unjust, they are much too severe, they ruin countless lives, and they have produced a shameful system of mass incarceration. Ten or 20 years ago, many people and most politicians would have dismissed those two sentences as polemic. Today they express mainstream views. Nearly everyone agrees."); Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/E98P-S4XH] ("Not only does the U.S. have the highest incarceration rate in the world; every single U.S. state incarcerates more people per capita than virtually any independent democracy on earth.").

^{36.} See, e.g., James D. Unnever & Francis T. Cullen, *The Social Sources of Americans' Punitiveness: A Test of Three Competing Models*, 48 CRIMINOLOGY 99 (2010) (disturbingly finding that racial animus might be the best explanation for Americans' punitive crime-control desires).

^{37.} See, e.g., Nicholas Hatcher & Robert Barba, Violent Crime Rate Falls Sharply After Pandemic Surge, WALL ST. J. (June 11, 2024), https://www.wsj.com/us-news/violent-crime-rate-falls-sharply-after-pandemic-surge-c8059d4b [https://perma.cc/6NX4-CWQ9] (noting decreases in violent crime, including to 50-year lows for murder, but also that increasing numbers of Americans see crime as a serious problem); John Gramlich, What the Data Says About Crime in the U.S., PEW RSCH. CTR. (Apr. 24, 2024), https://www.pewresearch.org/short-reads/2022/10/31/violent-crime-is-a-key-midterm-voting-issue-but-what-does-the-data-say/ [https://perma.cc/A9KD-DG8R] ("Americans tend to believe crime is up, even when official data shows it is down. In 23 of 27 Gallup surveys conducted since 1993, at least 60% of U.S. adults have said there is more crime nationally than there was the year before, despite the downward trend in crime rates during most of that period."); Maggie Koerth & Amelia Thomson-DeVeaux, Many Americans Are Convinced Crime Is Rising in the U.S. They're

sentences for offenders, respondents often underestimate actual time served.³⁸ A possible benefit of jury veto is thus to allow the system to better align with public desires. If individuals believe the current system too punitive, for example, this should be evident through support for defense recommendations.

A second major consideration is that juries of any form engage in decision-making under uncertainty. Where there is no right or wrong answer, where the task is novel and unpracticed, and where a judgment must nonetheless be made, decision-making is ripe for the use of cognitive heuristics or 'mental shortcuts.'³⁹ Lay actors in the legal system are naturally prone to these effects.⁴⁰ In a jury veto, each choice presented to the jurors represents a quantifiable value—months or years incarcerated—leading us to expect the employment of an anchoring and adjustment heuristic.

Anchoring refers to the human tendency to use any initial value or state as a *de facto* starting point.⁴¹ Decision makers then adjust from that value in reaching a decision and, unfortunately, rarely adjust sufficiently

39. See generally Amos Tversky & Daniel Kahneman, Judgment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974).

Wrong., FIVETHIRTYEIGHT (Aug 3., 2020), https://fivethirtyeight.com/features/manyamericans-are-convinced-crime-is-rising-in-the-u-s-theyre-wrong/ [https://perma.cc/ NYG3-HP99] ("We are *terrible* at estimating our risk of crime—much worse than we are at guessing the danger of other bad things.... We are certain crime is rising when it isn't; convinced our risk of victimization is higher than it actually is.").

^{38.} See, e.g., Julian V. Roberts et. al, Public Knowledge of Sentencing Practices and Trends, SENT'G ACAD. (Jan. 2022), https://sentencingacademy.org.uk/wp-content/ uploads/2023/08/Public-Knowledge-of-Sentencing-Practice-and-Trends.pdf [https:// perma.cc/P9QN-MFF4] (finding that respondents underestimated custody rates and durations for offenses like rape and burglary); THE SENT'G PROJECT, STILL LIFE: AMERICA'S INCREASING USE OF LIFE AND LONG-TERM SENTENCES 23 (2017), https:// www.sentencingproject.org/app/uploads/2022/10/Still-Life.pdf [https://perma.cc/Y3X2-V7V5] (reporting on a study of Texas jurors who believed a life sentence would mean 15 years when it would actually mean a minimum of 40); Robert Apel, Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence, 29 J. QUANTITATIVE CRIMINOLOGY 67 (2013) (finding that Americans tend to reasonably well predict what criminal penalties are statutorily allowed but not well predict the probability and magnitude of actual penalties); cf. MARK A. COHEN ET AL., DEP'T OF JUST., MEASURING PUBLIC PERCEPTIONS OF APPROPRIATE PRISON SENTENCES 78 (Oct. 2002), https:// www.ojp.gov/pdffiles1/nij/grants/199365.pdf [https://perma.cc/US3S-METG] (finding that the public "largely concurs with current sentencing decisions about incarceration and sentence length").

^{40.} See generally Piotr Bystranowski et al., Anchoring Effect in Legal Decision-Making: A Meta-Analysis, 45 L. & HUM. BEHAV. 1 (2021); Tom Spiegler, Does Anchoring Work in the Courtroom?, THE DECISION LAB, https://thedecisionlab.com/insights/ policy/does-anchoring-work-in-the-courtroom [https://perma.cc/26VT-25CW].

^{41.} See Dan Pilat & Sekoul Krastev, Why Do We Compare Everything to the First Piece of Information We Received?, DECISION LAB, https://thedecisionlab.com/biases/anchoring-bias [https://perma.cc/X4DG-5DR5] (last visited Jan. 22, 2025).

to the circumstances, meaning that initial value has a strong—and potentially undue (and even entirely illogical)—influence on the result.⁴² For a legal example, consider the calculation of damages in a civil trial. Research shows that jurors will anchor on whatever sum of money is first presented by the plaintiff's attorney and then adjust from that number.⁴³ The more that is requested, the higher the final compensation award will be. Even when the defense presents a much lower amount in rebuttal, the effects of the initial anchor are never entirely undone.⁴⁴ The same trend has been demonstrated with prosecutor and defense sentencing recommendations in mock criminal trials: the higher the prosecutor's sentencing recommendation, the higher the recommendation from that mock jury.⁴⁵

As originally proposed, the jury veto process has an explicit anchor: the judicial sentence.⁴⁶ Not only is the veto jury to be informed that a 'hung jury' means the judicially-imposed option will stand (a hung jury here being either non-unanimity in choosing a higher sentence or failure to reach a supermajority in choosing a lower sentence), but the jury is explicitly instructed to begin with the judicial sentence and 'depart' therefrom as justice demands.⁴⁷ In other words, the veto structure expects anchoring and therefore biases it towards the legislatively-authorized, judicially-determined sentence.

Of course, how closely jurors utilize such an anchor might depend upon their perception of the various legal actors. The research consensus is that most measurable juror biases (whether pro-prosecution or defense) are relatively poor predictors of ultimate verdicts *except* where evidence is ambiguous or unclear.⁴⁸ Biases *can* predict perceptions

^{42.} *Id.*; Tversky & Kahneman, *supra* note 39; Ward Farnsworth, The Legal Analyst: A Toolkit for Thinking About the Law 230–31 (2007).

^{43.} See generally Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCH. 519 (1996); FARNSWORTH, *supra* note 42, at 231.

^{44.} See generally Mollie W. Marti & Roselle L. Wissler, Be Careful What You Ask For: The Effect of Anchors on Personal-Injury Damages Awards, 6 J. EXPERIMENTAL PSYCH.: APPLIED 91 (2000).

^{45.} Christopher Stein & Michelle Drouin, Cognitive Bias in the Courtroom: Combating the Anchoring Effect in Criminal Sentencing, 52 U.S.F. L. Rev. 393 (2018).

^{46.} *See* Henderson, *supra* note 7, at 505 n.46. Although not directly relevant to our study of prospective juror behavior, it is worth noting that judges too are subject to arbitrary anchoring, *even when they are explicitly told that such anchoring is illegal. See* FARNSWORTH, *supra* note 42, at 232–34.

^{47.} See Henderson, supra note 7, at 504–07 (presenting a hypothetical jury instruction).

^{48.} See Leticia De Law Fuente et al., *Effects of Pretrial Juror Bias, Strength of Evidence and Deliberation Process of Juror Decisions: New Validity Evidence of the Juror Bias Scale Scores*, 9 PSYCH. CRIME & L. 197 (2003).

of particular evidence, judgments about witness credibility, and what certainty a juror imagines to constitute 'beyond a reasonable doubt.'⁴⁹ Pro-prosecution and pro-defense bias might therefore predict whether a juror would react more favorably to a veto recommendation from the prosecution or the defense.

Finally, our research considers two questions unaddressed by existing studies, because they are questions not presented to juries acting within our existing systems of criminal adjudication. Contemporary juries do not respond to guilty pleas, and they do not choose among a two- or threefold choice of sentences.⁵⁰ Thus, we can inquire whether potential veto jurors-who would be confronted with both situations-are inclined to differently treat trial convictions and guilty-plea convictions, and consider what else is most influential in their selecting from among the three sentence options. And while the latter trinary choice is definitionally novel to the jury veto, the former is of great interest to our current realities. As the Supreme Court has recognized, "criminal justice today is for the most part a system of pleas, not a system of trials."51 Thus, prosecutors routinely accept guilty pleas in exchange for favorable sentence recommendations and/or charge reductions, state and federal sentencing guidelines account for 'acceptance of responsibility' as a mitigating factor, and judges may grant further, discretionary leniency in that regard.⁵² All this could lead one to predict that individuals pleading guilty, as opposed to exercising their right to trial, might be perceived as deserving a lesser sentence. On the other hand, such a 'trial penalty' is routinely denounced in literature⁵³ and is anecdotally unpopular to decades of our students. Whether a defendant's pleading guilty to the crime influences lay perceptions of deserved punishment is an open question we thus seek to address.

- 52. E.g., U.S. Sent'g Guidelines Manual § 3E1.1 (U.S. Sent'g Comm'n 2023).
- 53. E.g., Reimer & Sabelli, supra note 14.

^{49.} See generally Brandon L. Garrett & Gregory Mitchell, Error Aversion and Due Process, 121 MICH. L. REV. 707 (2022); Gregory Mitchell & Brandon L. Garrett, The Impact of Proficiency Testing Information and Error Aversions on the Weight Given to Fingerprint Evidence, 37 BEHAV. SCI. & L. 195 (2019); Len Lecci & Bryan Myers, Individual Differences in Attitudes Relevant to Juror Decision Making: Development and Validation of the Pretrial Juror Attitude Questionnaire (PJAQ), 38 J. APPLIED SOCIAL PSYCH. 2010 (2008).

^{50.} There are rare exceptions, as potentially in the capital context or in one of the handful of jurisdictions employing some version of jury sentencing, but we are here considering the mine run. *See* Henderson, *supra* note 7, at 529–31 (considering jury sentencing).

^{51.} Lafler v. Cooper, 566 U.S. 156, 170 (2012).

II. OUR STUDY

Equipped with an understanding of how a veto jury would function and its theoretical place within our adjudicative systems, we are ready to describe our empirical study. In short, we developed a vignette study providing every respondent brief descriptions of three related crimes of varying severity: motor vehicle theft, burglary, and robbery.⁵⁴ Participants were told, both before and throughout their decision process, either that all case convictions were obtained through a trial or through the defendant pleading guilty.55 Participants were presented sentencing options for each crime.⁵⁶ where we used only a subset of three permutations in order to limit study complexity while still adequately representing the variations a veto jury might experience in our criminal justice system. The three permutations were these, here listed in no particular order: (1) the judicial sentence is longest, followed by the prosecutor recommendation and then the defense recommendation (a "judge-high" condition, or "J > P"); (2) the prosecutor recommends the longest sentence, followed by the judicial sentence and then the defense recommendation (a "prosecutor-high" condition, or "P > J"); and (3) the prosecutor recommends the judicial sentence and the defense is, again, the lowest (a "prosecutor-equal" condition, or "P = J").⁵⁷ Each participant evaluated all three crimes and experienced all three sentencing-recommendation scenarios.

At this point, different readers may wish different levels of detail. For those who would like to see all of the critical survey text, from our description of each crime event to our description of each sentencing process, we include that in the next subpart ("Textual Overview"). For those who prefer only a higher-level description, we include that in the following subpart ("Explanatory Overview"). Many will learn from both: gaining an appreciation for the survey by seeing its text and flow, and then reinforcing that understanding of structure and goals

^{54.} Crime type was thus a within-subject variable.

^{55.} Manner of conviction was thus a between-subjects variable; each subject received only one of the two conditions: trial or guilty plea.

^{56.} Sentencing options were thus a within-subject variable; each subject received a (randomly-ordered) combination of all conditions.

^{57.} In a defense-convened veto jury, the defense recommendation would never exceed nor equal the judicially-imposed sentence. Because the prosecution and defense recommendations are made blind to one another, the other possible permutations are: (1) the prosecution and defense make the identical recommendation, which is less than the judicial sentence; and (2) the judicial sentence exceeds the defense recommendation which, perhaps ironically, exceeds the prosecution's own. Unlike in that ordering, there is infinite potential for variation in the *magnitude* of sentence recommendations; as described herein, we used a consistent 20% variation for administrability.

by stepping back, so as not to miss the forest for the trees. Finally, in subparts C through F, we tackle design details, including the calculation of numerical parameters.

A. Textual Overview

To reach a broad sample of potential jurors, we used the microtask platform Amazon Mechanical Turk (MTurk).⁵⁸ Our study was advertised to MTurk "Master Workers" living in the United States who had an approval rating greater than 95% and who had completed more than 100 successful "Human Intelligence Tasks."⁵⁹ In order to screen for the core requirements of jury service,⁶⁰ potential respondents were first asked a series of three questions: "Are you a U.S. citizen?" (no/yes), "Are you 18 years or older?" (no/yes), and "Are you a fluent English speaker?" (no/yes). All three required an affirmative response in order to continue with the survey; for those continuing, we next obtained informed consent.

^{58.} Amazon Mechanical Turk, supra note 10. For more on microtasking, see Microwork, WIKIPEDIA, https://en.wikipedia.org/wiki/Microwork [https://perma.cc/ TX4D-4ESJ] (visited Nov. 20, 2024); Clive Reffell, How to Earn an Extra Income Through 20 Top Crowdsourced Microtasking Platforms, CROWDSOURCING WK., https://crowdsourcingweek.com/blog/how-to-earn-an-extra-income-through-topcrowdsourced-microtasking-platforms/ [https://perma.cc/ENC6-QH7P] (visited Nov. 20, 2024).

^{59.} Mechanical Turk Concepts, AMAZON WEB SERVS., https://docs.aws.amazon.com/ AWSMechTurk/latest/RequesterUI/mechanical-turk-concepts.html [https://perma. cc/Y3Q7-BXQP] (last visited Jan. 22, 2025). For those unfamiliar with Amazon's terminology, we—the survey creators—are "Requesters" who "use the Requester User Interface (RUI) to create tasks, check the status of . . . tasks, and accept or reject work performed on tasks." *Id.* A "Human Intelligence Task," or HIT, is "a single, self-contained task a Requester creates"—from identifying an image to completing our more complex survey instrument. *Id.* In particular, we requested MTurk workers to complete a survey we designed in Qualtrics, completion of which enabled compensation of \$2. *See id.*; Amazon Mechanical Turk, *Getting Great Survey Results from MTurk and Qualtrics*, MEDIUM (May 18, 2017), https://blog.mturk.com/getting-great-survey-results-frommturk-and-qualtrics-be1704ff9786 [https://perma.cc/ZC3V-SQZX]. MTurk "Master Workers are Workers who have demonstrated the ability to provide successful results for specific types of tasks across multiple Requesters." *Mechanical Turk Concepts*, *supra* this note.

^{60.} *See, e.g.*, 28 U.S.C. § 1865. A judge or clerk "shall deem any person qualified to serve on grand and petit juries in the district court unless he—(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district; (2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form; (3) is unable to speak the English language; (4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored." *Id.* § 1865(b).

Behind the scenes, the survey would at this point randomly assign the participant to one of two equal-sized pools: she would either participate in veto juries following guilty plea or following trial conviction. In other words, a given participant would *either* work sentencings following guilty-plea convictions *or* sentencings following trial convictions; no participant would see some of each.

It would now be time for instructions, and every participant would see this, where all emphasis is in the original:

We want you to imagine a criminal justice system that uses juries more broadly than our current systems in the United States. Currently, someone charged with a crime can ask that a jury decide on his or her guilt – the jury is then presented with evidence from both a prosecutor and from the defense, and the jury decides that the defendant is either "guilty" or "not guilty."

But what if a jury could also evaluate what a fair punishment would be for the defendant? In most of our present systems, jurors are not told about sentences and are given no information on punishment when deciding guilt.

We want you to imagine that you have been called to participate on a jury, **but after the case has already ended in a conviction** – your task will be to evaluate the punishment recommendations.⁶¹

Further instructions followed, but with slight deviation depending upon whether the convictions were by guilty plea or following trial, as indicated by the alternative text in square brackets:

In this study, you will be presented with four different cases. In each case, the defendant has [**plead guilty** to the crime] [been **found guilty at trial**]. You are a member on a jury that has been seated to evaluate the sentence recommendations.

Your task is to choose between three possible sentences for the defendant:

- 1. The sentence imposed by the judge,
- 2. The sentence recommended by the prosecutor,
- 3. The sentence recommended by the defense attorney.

You should select the option that you believe is the most just; your choice would – in the imagined world of this study – control the outcome, meaning the sentence you choose would be the sentence the defendant would receive and serve.

At this point it would be time for some practice, in order to educate the participant as to how both the survey and an underlying jury veto

^{61.} The complete survey is on file with the authors.

function. Every participant would read the following, where once again the only difference among participants would be the manner of conviction:

To give some sense of how these decisions might be made, please consider the following **practice scenario**.

The defendant in the case has been convicted of Assault.

According to the case files, the defendant drove to the home of his ex-wife's new boyfriend and demanded the boyfriend come out of the house. The two argued outside, and the defendant punched the individual, knocking him to the ground. The defendant then proceeded to kick the individual in his stomach. The boyfriend suffered a broken nose and a bruised rib.

Remember, the defendant has **[plead guilty** to the crime] [been **found guilty at trial**]. As explained earlier, the final step in the system is for a jury to decide how much time this defendant will serve in prison.

You are on the jury and are presented with three choices:

- A. Following conviction, the **judge** imposes a sentence of 5 years, 10 months in prison. With good behavior, the defendant could be paroled after 2 years, 9 months in prison.
- B. The **prosecutor** asks you to choose a sentence of 5 years in prison. With good behavior, the defendant could be paroled after 2 years, 4 months in prison.
- C. The **defense** asks you to choose a sentence of 2 years, 6 months in prison. With good behavior, the defendant could be paroled after 1 year, 2 months in prison.

Which sentence do you choose?

- 5 years, 10 months (parole eligible at 2 years, 9 months) the judge's sentence
- 5 years (parole eligible at 2 years, 4 months) the prosecutor's recommendation
- 2 years, 6 months (parole eligible at 1 year, 2 months) the defense's recommendation

As will be explained in detail below, we included parole eligibility because (1) most convicted persons serving prison sentences in America serve only a fraction thereof, (2) we would use realistic numbers representing sentences imposed and time served in our questions, and (3) it would be impossible to understand how long participants actually wanted convicted persons incarcerated without acknowledging this reality.⁶² For example, we did not want a participant engaging in the

^{62.} See infra Part II.C.

following type of reasoning: 'Well, I'd like this person to serve five years, but I know prisoners get out really early all the time, and so I'm going to select the highest sentence I can.' By including parole eligibility— and realistic numbers therefore—we hoped to more accurately discern participant preference.

After selecting one of those three recommendations, the participant would have the opportunity to impose an open-ended fair sentence free from the jury veto's trinary constraint:

Sticking with that same case where the defendant has been convicted of **Assault**, we want to know what you think is a fair sentence.

As a reminder: According to the case files, the defendant drove to the home of his ex-wife's new boyfriend and demanded the boyfriend come out of the house. The two argued outside and the defendant punched the individual, knocking him to the ground. The defendant then proceeded to kick the individual in his stomach. The boyfriend suffered a broken nose and a bruised rib.

Given the crime description, how many years and months do you think would be fair, regardless of the sentence recommendations from the previous page?

Please answer in years and months below.

Labeled answer boxes were provided that would accept a numerical response for years and a numerical response for additional months. In order to ensure the participant understood the import of her answer—including, as explained above, what length of incarceration was likely to actually follow from a chosen imposed sentence—the participant would next receive the following verification (for illustration, let us assume the participant had entered a numerical response of 4 years and 2 months):

To confirm, you chose 4 years and 2 months as the sentence.

This recommendation means the defendant would be eligible for parole in **2 years** and **0 months**.

If you wish to change your recommendation, please use the back button below.

The participant could iterate back and forth as many times as she wished in order to achieve a desired term of likely imprisonment. Once that was complete, it would be time for an attention check:

In the case you just decided, what was the charge?

- Possession of drugs
- Larceny/theft
- Assault

Finally as to the practice case, we made clear that such attention checks would continue throughout the survey:

The case you just decided was your practice case - now, you will be presented with three more cases and will be asked to make the same decisions.

Please read everything carefully because we will be testing your attention to detail!

It would now be time for some more behind-the-scenes logic. Every participant would receive three sets of questions: one relating to a motor vehicle theft, one relating to a burglary, and one relating to a robbery, but not necessarily in that order; the other two orderings, randomly assigned, were (1) burglary, robbery, and then theft, and (2) robbery, theft, and then burglary. And each participant would encounter the following three permutations spread across those three crimes: one in which the prosecutor sought a higher-than-judicial sentence, one in which the prosecutor sought the judicial sentence, and one in which the prosecutor sought a below-judicial sentence. (This makes for nine potential groupings, each of which were to receive equal participant count.⁶³)

So, a participant could receive the following three sets, which we will use to illustrate the survey's function. First, imagine the participant begins with the robbery and the prosecutor looks to get an increased sentence from the veto jury (and let's imagine this is a participant who is seeing convictions following guilty pleas):

The defendant in the case has been convicted of Robbery.

According to the case files, a 43-year-old woman was at a branch of the Commons Bank and Trust, using the ATM in the lobby at 9pm on a Thursday evening. Upon her leaving the lobby, the defendant approached the woman, demanded her money, and threatened her with a knife. The woman handed over the \$400 she had just received and the defendant ran off.

Remember, the defendant has **plead guilty** to the crime. As explained earlier, the final step in the system is for a jury to decide how much time this defendant will serve in prison.

You are on the jury and are presented with three choices:

- A. Following conviction, the judge imposes a sentence of 9 years, 5 months in prison. With good behavior, the defendant could be paroled after 5 years, 4 months in prison.
- B. The **prosecutor** asks you to choose a sentence of 11 years, 4 months in prison. With good behavior, the defendant could be paroled after 6 years, 5 months in prison.

^{63.} See Tables 1A-1C, infra Part II.C.

C. The **defense** asks you to choose a sentence of 7 years, 6 months in prison. With good behavior, the defendant could be paroled after 4 years, 3 months in prison.

Which sentence do you choose?

- 9 years, 5 months (parole eligible at 5 years, 4 months) the judge's sentence
- 11 years, 4 months (parole eligible at 6 years, 5 months) the prosecutor's recommendation
- 7 years, 6 months (parole eligible at 4 years, 3 months) the defense's recommendation

Following that selection, it would be time for the open-ended inquiry:

Sticking with that same case where the defendant has been convicted of **Robbery**, we want to know what you think is a fair sentence.

As a reminder: According to the case files, a 43-year-old woman was at a branch of the Commons Bank and Trust, using the ATM in the lobby at 9pm on a Thursday evening. Upon leaving the lobby, the defendant approached the woman, demanded her money, and threatened her with a knife. The woman handed over the \$400 she had just received and the defendant ran off.

Given the crime description, how many years and months do you think would be fair, regardless of the sentence recommendations from the previous page?

Please answer in years and months below.

The participant could adjust and iterate that response based upon the resulting time to parole eligibility and thus potential release from incarceration, at which point it would be time for the attention check:

In the case you just decided, from where did the victim get her money?

- A friend
- An ATM
- Her employer

Having completed the jury veto for a first crime, the participant would now be ready for her second; let's imagine the system has selected the motor vehicle theft to be next:

The defendant in the case has been convicted of Motor-Vehicle Theft.

According to the case files, the defendant snuck onto the driveway of a private residence after dark, entered an unlocked vehicle, and drove off.

Remember, the defendant has **plead guilty to the crime**. As explained earlier, the final step in the system is for a jury to decide how much time this defendant will serve in prison.

You are on the jury and are presented with three choices:

A. Following conviction, the **judge** imposes a sentence of 3 years, 10 months in prison. With good behavior, the defendant could be paroled after 1 year, 5 months in prison.

The prosecutor asks you to choose the same sentence as the judge.

B. The **defense** asks you to choose a sentence of 3 years, 1 month in prison. With good behavior, the defendant could be paroled after 1 year, 2 months in prison.

Which sentence do you choose?

- 3 years, 10 months (parole eligible at 1 year, 5 months) the judge's sentence and the prosecutor's recommendation
- 3 years, 1 month (parole eligible at 1 year, 2 months) the defense's recommendation

After making a selection, the participant would give her openended "fair" sentence, and then complete the attention check:

In the case you just decided, where did the defendant find the car?

- A driveway
- A mall parking lot
- An airport

Finally, it would be time for the third crime:

The defendant in the case has been convicted of Burglary.

According to the case files, a jewelry store was broken into at night. Glass cases were smashed, and approximately \$5,000 worth of jewelry was taken. No one was hurt.

Remember, the defendant has **plead guilty** to the crime. As explained earlier, the final step in the system is for a jury to decide how much time this defendant will serve in prison.

You are on the jury and are presented with three choices:

- A. Following conviction, the **judge** imposes a sentence of 6 years in prison. With good behavior, the defendant could be paroled after 2 years, 6 months in prison.
- B. The **prosecutor** asks you to choose a sentence of 4 years, 10 months in prison. With good behavior, the defendant could be paroled after 2 years in prison.
- C. The **defense** asks you to choose a sentence of 3 years, 10 months in prison. With good behavior, the defendant could be paroled after 1 year, 8 months in prison.

Which sentence do you choose?

- 6 years (parole eligible after 2 years, 6 months) the judge's sentence
- 4 years, 10 months (parole eligible after 2 years) the prosecutor's recommendation
- 3 years, 10 months (parole eligible after 1 year, 8 months) the defense's recommendation

Then would follow the open-ended sentencing and the final attention check:

In the case you just decided, what kind of store was burglarized?

- A convenience store
- A jewelry store
- A pet store

All substantive sentencing questions having been answered, it would be time to wrap up with a measure of covariates and gathering demographic information, both of which will be described below.⁶⁴

B. Explanatory Overview

Stepping back from that survey text, our instrument functioned as follows. After confirming eligibility and providing informed consent, participants were randomly assigned to one of two adjudicatory conditions: the convictions they would evaluate either resulted from the defendant pleading guilty or from a guilty verdict after courtroom trial. Participants were then provided a brief explanation of both the current American norm of judicial sentencing and the concept of a jury veto, after which they participated in an example case (concerning an assault) to illustrate both the jury veto concept and the survey design.

Because the veto is a novel concept and this is the first empirical exploration thereof, from this point the survey was designed to maximize information collection. Every participant was presented three 'stealing' scenarios of varying severity: a motor-vehicle theft (MVT), a nighttime burglary of an empty jewelry store, and a knifepoint robbery of a woman at an automated teller machine (ATM). The scenarios were presented in a counterbalanced order with each scenario occurring first, second, and third, and each scenario both preceding and following the other two scenarios, resulting in three possible crime order conditions to which participants were randomly assigned: (theft, burglary, robbery), (burglary, robbery, theft), and (robbery, theft, burglary).⁶⁵

^{64.} *See infra* Parts II.C.–II.F. The participant would also receive an alphanumeric code that enabled compensation of \$2.

^{65.} For an explanation of counterbalancing, see Zach Bobbitt, *What Are Order Effects?* (*Explanation & Examples*), STATOLOGY (Sept. 24, 2020), https://www.statology. org/order-effects/ [https://perma.cc/6MWF-4FUH].

The same counterbalancing technique was used to assign participants to a set of three sentencing options, either: (1) the judicial sentence is the longest, followed by the prosecutor recommendation and then that of the defense (a "judge-high" condition); (2) the prosecutor recommends the longest sentence, followed by the judicial sentence and then the defense recommendation (a "prosecutor-high" condition); or (3) the prosecutor recommends the judicial sentence and the defense is, again, the lowest (a "prosecutor-equal" condition). (These are three of the five logical permutations that might occur in a defense-initiated jury veto.66) To avoid confounding with crime scenarios, this sentence recommendation set was also randomly assigned. In other words, each respondent would see one of nine possible combinations, each of equal probability.67

Each vignette identified and described the crime of conviction, reminded whether that conviction was by trial or guilty plea, and then required participants to choose one of three sentence possibilities, always listed in the order of (a) judicial sentence, (b) prosecutor recommendation, and then (c) defense recommendation. Then, on a subsequent page, after being reminded of the crime and its circumstances, each participant indicated what open-ended sentence-in years and months-she felt "would be fair, regardless of the sentence recommendations from the previous page." After that entry, a 'parole calculator' informed participants of the release eligibility corresponding to their chosen sentence, and they were provided the opportunity to alter that sentence; participants could toggle back and forth between selecting a sentence and seeing its resulting parole eligibility as many times as they would like. Each crime scenario concluded with an attention check item, confirming that the participant remembered the criminal event (for example, "In the case you just decided, what kind of store was burglarized," or, "In the case you just decided, where did the defendant find the [stolen] car?"). Finally, the survey ended with a measure of risk-taking, attitudes towards erroneous convictions and acquittals, and demographics. Participants completing the survey each earned two dollars, paid through the MTurk system.

С. Sentence Recommendations

In order to provide realistic imposed sentences and sentencing recommendations, we relied upon a Bureau of Justice Statistics (BJS) report providing the 2018 'going state rate' for both sentence received

^{66.} See supra note 57.

^{67.} See Tables 1A-1C, infra Part II.C., for each condition.

and time served for each survey crime (MVT, burglary, and robbery).⁶⁸ In American systems, most convicted persons serve only a fraction of their carceral sentence prior to initial release.⁶⁹ For example, the BJS report calculates the average sentence imposed for a burglary as six years,⁷⁰ but 77% of people convicted of burglary served less than half that time before initial release.⁷¹ Thus, for participants to make informed decisions, the survey needed to include not only sentence length but also time to release eligibility. We used the BJS-calculated average fraction served for each of the three crimes (MVT = 37.1%, Burglary = 42.1%, and Robbery = 56.5%) to estimate that eligibility,⁷² and we included both sentence length and calculated release eligibility in every sentence or recommendation (i.e., judicial sentence and prosecutorial and defense recommendation).

Table 1 (comprising Tables 1A to 1C) details the sentencing options for each crime, which were computed according to a few simple principles.⁷³ First, both to mirror reality and to minimize degrees of freedom, we decided the judge would impose the BJS-average sentence length, and thus for release eligibility the judicial sentence would correspond to the BJS-average time served. Second, for the prosecutor, we assigned three options: she might ask for a longer sentence than the judge imposed (meaning one longer than the average outcome, as often happens via 'trial penalty' for a defendant refusing to plead guilty), she might ask for the judicial (average) sentence, or she might ask for something lower (meaning a sentence lower than the average, as happens via a relatively generous plea deal). For our purposes, we considered the BJS data on sentencing ranges and established a somewhat mild 20% spread between recommendations. For example, a prosecutor 'going

^{68.} See generally DANIELLE KAEBLE, U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, BUREAU OF STATS., TIME SERVED IN STATE PRISON, 2018 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf [https://perma.cc/TZF8-57W6].

^{69.} As explained in the BJS report, "[i]nitial release does not refer to first-time offenders but to offenders' first release from a given sentence (whether they are first-time offenders or not), as opposed to a re-release after a subsequent parole violation." *Id.* at 1.

^{70.} Id. at 4 tbl. 3.

^{71.} *Id.* at 3 tbl. 2. For robbery, the roughly corresponding numbers were an average sentence of 9.4 years, *id.* at 4 tbl. 3, but 66.4% of persons so sentenced were released before serving five years. *Id.* at 3 tbl. 2. For MVT, the average sentence was 3.8 years, *id.* at 4 tbl. 3, but 54% were released before serving a single year and 84.3% before serving two. *Id.* at 3 tbl. 2.

^{72.} Id. at 4 tbl. 3.

^{73.} Tables 1A to 1C appear together at the end of this Subpart.

high' would recommend a sentence 20% higher than that judicially imposed.

For the defense, again to minimize degrees of freedom, we made the simple decision to request 20% less than the next-lowest recommendation. In other words, when the prosecutor was high, the defense would request 80% of the judicially-imposed sentence. But when the prosecutor was low, the defense would request 80% of that. It is worth highlighting that our survey design did not attempt to capture how such recommendations would be made in an actual judicial system incorporating jury veto, decisions that may turn upon everything from particular case facts, to legal ethics, to local politics, to game-theoretic behaviors, and that are made blind to what the other actor—prosecutor or defense—will recommend.⁷⁴ Our experimental design was intended to reveal only how potential veto jurors might respond to numerically realistic sentencing options, leaving further complication to future work.⁷⁵

Table 1A – Sentence options and time to release eligibility for motor vehicle theft. "P > J" refers to the prosecutor-high condition; "P = J" refers to the prosecutor-equal condition in which the prosecutor recommends the judicial sentence; and "J > P" refers to the judge-high condition. The first number in each cell is the recommended sentence length; the second number is the corresponding time until release eligibility. Survey respondents were provided both the months presented here, as well as the equivalent time in years.

Survey	Judicial	Prosecutor	Defense
Condition	Sentence	Recommendation	Recommendation
P > J	46 months;	55 months;	37 months;
	17 months	20 months	14 months
P = J	46 months;	46 months;	37 months;
	17 months	17 months	14 months
J > P	46 months;	37 months;	30 months;
	17 months	14 months	11 months

^{74.} *See, e.g.*, Henderson, *supra* note 7, at 502 n.38 (acknowledging the risk that a system of jury veto would encourage perverse game theoretic behaviors); *id.* at 527–28 (considering whether a system of jury veto would perversely incentivize vague prosecutorial plea-bargaining threats).

^{75.} See infra Part V.B.

Survey	Judicial	Prosecutor	Defense
Condition	Sentence	Recommendation	Recommendation
P > J	72 months;	86 months;	58 months;
	30 months	36 months	24 months
$\mathbf{P} = \mathbf{J}$	72 months;	72 months;	58 months;
	30 months	30 months	24 months
J > P	72 months;	58 months;	46 months;
	30 months	24 months	20 months

Table 1B – Sentence options and time to release eligibility for burglary.

Table 1C – Sentence options and time to release eligibility for robbery.

Survey	Judicial	Prosecutor	Defense
Condition	Sentence	Recommendation	Recommendation
P > J	113 months;	136 months;	90 months;
	64 months	77 months	51 months
$\mathbf{P} = \mathbf{J}$	113 months;	113 months;	90 months;
	64 months	64 months	51 months
J > P	113 months;	90 months;	72 months;
	64 months	51 months	41 months

D. Risk Preference

In order to assess participant risk-taking preferences, every survey participant completed a self-control measure designed by John Cochran.⁷⁶ The seven-item measure is scored on a five-point Likert scale ranging from "Strongly disagree" to "Strongly agree,"⁷⁷ with items such as, "I like to test myself every now and then by doing something a little risky," and "I have never done anything dangerous just for the fun of

^{76.} John K. Cochran, *Moral Propensity, Setting, and Choice: A Partial Test of Situational Action Theory*, 37 DEVIANT BEHAV. 1, 6–7 (2016). Risk aversion might affect, for example, how concerned a sentencer would be with a given perceived risk of reoffending.

^{77.} See What is a Likert Scale?, QUALTRICS, https://www.qualtrics.com/experiencemanagement/research/likert-scale/ [https://perma.cc/4AW7-ZDSB] (last visited June 10, 2024). In particular, our participants chose from the following: Strongly disagree, Somewhat disagree, Neither agree nor disagree, Somewhat agree, and Strongly agree.

it."⁷⁸ The reported reliability for the measure is .81 on a 0 to 1 Cronbach Alpha scale;⁷⁹ our obtained Cronbach's alpha was .92, indicating excellent reliability.⁸⁰

E. Pro-Prosecution and Pro-Defense Bias

In order to assess pro-prosecution and pro-defense bias in our participants, we implemented two measures. Our first asked participants to choose which of two possible errors they "believe causes more harm to society": "erroneously convicting an innocent person" or "failing to convict a guilty person." A similar question has been posed during five iterations of the General Social Survey (GSS), an annual study of representative American adults conducted since 1972:⁸¹

All systems of justice make mistakes, but which do you think is worse?

To convict an innocent person[,]

or

To let a guilty person go free[.]⁸²

Results from the GSS data suggest approximately 74% of US adults feel wrongful convictions are worse than 'wrongful' acquittals.⁸³ Our

Id. "Reverse-coded" indicates the flipping of a previous 'positive' item into a 'negative' form in order to check for consistency among a respondent's answers. *See* Zach Bobbitt, *What is Reverse Coding? (Definition & Example)*, STATOLOGY (Dec. 15, 2021), https://www.statology.org/reverse-coding/ [https://perma.cc/8C7A-5TQP].

79. Cochran, *supra* note 76, at 7; *see also* Zach Bobbitt, *How to Report Cronbach's Alpha (With Examples)*, STATOLOGY (May 18, 2021), https://www.statology.org/how-to-report-cronbachs-alpha/ [https://perma.cc/R8FL-XQPC] ("Chronbach's Alpha is a way to measure the internal consistency of a questionnaire or survey.").

80. All survey results are on file with the authors.

^{78.} Cochran, *supra* note 76, at 6. The full seven items are as follows:
(1) "I like to test myself every now and then by doing something a little risky," (2) "Sometimes I will take a risk just for the fun of it," (3) "I sometimes find it exciting to do things for which I might get into trouble," (4) "I get a real kick out of doing things that are a little dangerous," (5) "I have never done anything dangerous just for the fun of it" (reverse-coded), (6) "Excitement and adventure are more important to me than peace and security," and (7) "I often have a strong urge to be wild and crazy."

^{81.} Your Voice Matters. Be Heard., THE GEN. SOC'Y SURV. (GSS), https://gss.norc. org/For-Survey-Participants [https://perma.cc/XM4H-89F4] (last visited June 10, 2024).

^{82.} *Worse Type of Judicial Mistake*, GSS DATA EXPLORER, https://gssdataexplorer. norc.org/variables/4002/vshow [https://perma.cc/RDC9-WSV3] (last visited June 10, 2024) (emphasis added).

^{83.} *Id.* The total number of persons across the five surveys (administered in 1985, 1990, 1996, 2006, and 2016) so thinking is 3,974, and the total number of persons thinking the opposite is 1,400; 3,974 divided by the quantity (3,974 plus 1,400) is 73.9%. *Id.*

sample was similar, with approximately 70% choosing that wrongful convictions caused more societal harm than acquittals of the factually guilty.⁸⁴

Our second measure asked participants to slide a bar on a scale ranging from 0 (absolutely no regret) to 100 (extreme regret) to indicate the amount of regret they would feel if, serving as a juror on a criminal trial, they (1) "voted 'Guilty' and found out afterwards the defendant was actually innocent," and (2) "voted 'Not Guilty' and found out afterwards that the defendant did commit the crime." We will incorporate these results in our statistical analyses below.⁸⁵

F. Demographics

We collected, in the following order, information regarding gender, ethnicity, education, income, marital status, zip code, age, and voter registration. We then asked individuals about their history with the criminal justice system through two questions: "Do you or someone close to you have a criminal history?," and "Have you or someone close to you been a victim of a serious crime?" (yes, me; yes, someone close to me; or no).

III. RESULTS

Of the 301 persons who consented and began the survey on MTurk, four did not complete it, leaving 297 possible responses. Eighteen of those did not succeed at all three attention checks, leaving us 279 responses to analyze.⁸⁶ Of those, 52.7% (N = 147) identified as female, 47.0% (N = 131) as male, and one individual identified as non-binary/ third gender. The majority identified as White (N = 236 or 84.6%), 7.5% identified as Black or African American (N = 21), 6.1% as Asian (N = 17), and five individuals identified as another ethnicity.

The education level of our sample was high: 14.3% (N = 40) reported a two-year degree, 41.9% (N = 117) reported a four-year degree, 10.0% (N = 28) reported a professional degree or doctorate, and another 18.6% (N = 52) reported at least some higher education. Forty-one persons reported a high school degree (14.7%), and only one

^{84.} Again, all survey results are on file with the authors. We forced a binary choice, not inquiring whether the two harms might be equal. Intriguingly, Brandon Garrett and Gregory Mitchell have found many to prefer that equality. *See* Garrett & Mitchell, *supra* note 49, at 721.

^{85.} See infra Part IV.D.

^{86.} Fifteen participants failed the motor vehicle theft attention check, one additional participant failed the burglary attention check, and two additional participants failed the robbery attention check.

respondent reported lesser education. Annual income was varied, with 8.6% (N = 24) reporting less than \$10,000; 10.8% (N = 30) reporting between \$10,000 and \$19,999; 15.1% (N = 42) reporting between \$20,000 and \$29,999; 13.3% (N = 37) reporting between \$30,000 and \$39,999; 15.1% (N = 42) reporting between \$40,000 and \$49,999; 11.5% (N = 32) reporting between \$50,000 and \$59,999; 6.8% (N = 19) reporting between \$60,000 and \$69,999; 4.7% (N = 13) reporting between \$70,000 and \$79,999; 3.9% (N = 11) reporting between \$80,000 and \$89,999; 2.9% (N = 8) reporting between \$90,000 and \$150,000; and 1.1% (N = 3) reporting more than \$150,000.

As for marital status, 39.4% (N = 110) identified as married, 1.8%(N = 5) identified as widowed, 14.3% (N = 40) identified as divorced, 0.7% (N = 2) identified as separated, and 43.7% (N = 122) reported never being married. Regarding age, no respondents reported being less than 25 years old, 17.2% (N = 48) were between the ages of 25 and 34, 38.0% (N = 106) between 35 and 44, 24.0% (N = 67) between 45 and 54, 16.5% (N = 46) between 55 and 64, and 4.3% (N = 12) were age 65 or older. Approximately 52.7% (N = 147) were registered Democrat, 20.4% (N = 57) Republican, 23.3% (N = 65) Independent, and 10 individuals (3.6%) were not registered to vote. As for domicile (determined by provided zip code and relying upon Python libraries thereof), forty-three states were represented, with the highest number reporting zip codes in California (N = 25 or 9.0%), Florida (N = 20 or 7.2%), Pennsylvania (N = 18 or 6.5%), New York (N = 17 or 6.1%), Michigan (N = 16 or 5.7%), and Texas (N = 15 or 5.4%).⁸⁷ No more than three respondents lived in any one city; 248 unique cities were represented. Finally, with respect to criminal justice, 19.0% indicated that they (N = 16 or 5.7%) or someone close to them (N = 37 or 13.3%)have a criminal history; and 28.7% indicated that they (N = 40 or 14.3%)or someone close to them (N = 40 or 14.3%) have been the victim of a serious crime.

As for sentencing preferences, the raw results of our study are depicted in the several figures below (statistical analyses will be in the next Part). Recall that each participant was presented with three crime vignettes (motor vehicle theft, burglary, and robbery) and a single mode of conviction (either the defendant pleaded guilty or was found guilty at trial). Further, each participant experienced the three permutations in sentence choice: one instance in which the prosecutor sought a higher than judicial sentence ("P > J > D"), one instance in which the prosecutor

^{87.} Only four respondents entered a zip code not recognized by the Python library.

sought the judicial sentence ("P = J > D"), and one instance in which the prosecutor sought a below-judicial sentence ("J > P > D"). Finally, for each crime vignette, each participant also independently assessed what would be an open-ended fair sentence for the crime.

Figures 1 through 3 display participants' sentencing choices for each crime: Figure 1 for the motor vehicle theft, Figure 2 for burglary, and Figure 3 for robbery. Within each figure is also mode of conviction, meaning-for example-that Figure 1A depicts sentencing choice for motor vehicle theft when the defendant pleaded guilty, and Figure 1B depicts sentencing choice when the motor-vehicle-theft defendant was convicted at trial.

Figure 1A – Sentencing choices for MVT following guilty plea. The three sentencing scenarios were a prosecutorial

recommendation higher than the judicial sentence (P > J > D), a prosecutorial recommendation equal to the judicial sentence (J = P > D), and a prosecutorial recommendation below the judicial sentence (J > P > D). The vertical axis displays how many respondents chose each option.



Figure 1B – Sentencing choices for MVT following trial conviction.



Figure 2A – Sentencing choices for burglary following guilty plea.



Figure 2B – Sentencing choices for burglary following trial conviction.



Figure 3A – Sentencing choices for robbery following guilty plea.



Figure 3B – Sentencing choices for robbery following trial conviction.



Figures 4 through 6 depict respondents' open-ended "fair" sentence for each crime, after which Figure 7 collects them all in a single graphic.

Figure 4 – Open-ended fair sentences for motor vehicle theft. The vertical axis displays how many respondents chose a sentence length. The average sentence imposed by those considering a conviction following guilty plea was 38.7 months imprisonment; the average sentence imposed by those considering a conviction following trial was 37.8 months imprisonment.



Figure 5 – Open-ended fair sentences for burglary. The average sentence imposed by those considering a conviction following guilty plea was 55.3 months imprisonment; the average sentence imposed by those considering a conviction following trial was 59.1 months imprisonment.



Figure 6 – Open-ended fair sentences for robbery. The average sentence imposed by those considering a conviction following guilty plea was 90.5 months imprisonment; the average sentence imposed by those considering a conviction following trial was 95.5 months imprisonment.



Figure 7 – Mean open-ended fair sentences for all three crimes in months. The error bars represent a 95% confidence interval about each mean, assuming our sample is representative of the greater population.



With that introduction, we dive into the statistical weeds. (And 'weeds' they must be, meaning the truly 'data averse' reader could choose to skip directly to Part V's explanatory Discussion.)

IV. STATISTICAL ANALYSIS

A. Analysis Strategy

In order to identify any outliers, we plotted histograms of participants' open-ended fair sentence lengths for each of the three crimes. We thereby identified a few individuals as extremes, either desiring unusually long sentences or no sentence for one or more crimes. While there might be legitimate argument for at least that latter set—a form of crime nullification for, say, nonviolent property crime,⁸⁸ or a strong preference for non-carceral punishments⁸⁹—those matters are beyond the scope of this study; therefore, these individuals were removed from the dataset just as a juror who threatens to nullify will be removed from an American trial jury.⁹⁰

We also considered frequencies for our demographic variables to ensure that each category would have sufficient representation. On account of low frequencies, we modified the grouping of level of education (combining less than high school with high school graduates, and professional degree with doctoral degree), ethnicity (combining American Indian/Alaska Native with other), age (combining 65-74 with 75-84), and marital status (creating three categories: married, have been married but not currently, and never married).

We next assessed whether the order in which crimes were presented or the order in which sentencing choices were presented influenced our dependent variable of sentence length.⁹¹ The order in which our

^{88.} See, e.g., Paul Butler, Racially Based Jury Nullification: Black Power in the Criminal Justice System, 105 YALE L.J. 677, 679 (1995) ("My thesis is that, for pragmatic and political reasons, the black community is better off when some nonviolent lawbreakers remain in the community rather than go to prison.").

^{89.} See, e.g., Erica Bryant, Why Punishing People in Jail and Prison Isn't Working, VERA INST. OF JUST. (Oct. 24, 2003), https://www.vera.org/news/why-punishing-people-in-jail-and-prison-isnt-working [https://perma.cc/J48Z-A9M2] ("If the goal is public safety, punishing people behind bars isn't the answer.").

^{90.} *See, e.g.*, United States v. Thomas, 116 F.3d 606 (2d Cir. 1997) (carefully analyzing both potential juror nullification and judicial inquiry therein).

^{91.} As a reminder, the scenarios were as follows: one in which the judicial sentence was longest (J > P > D), a "judge-high" condition), one in which the prosecutor suggestion was longest (P > J > D), a "prosecutor-high" condition), and one in which the prosecutor suggestion matched the judicial sentence (P = J > D), a "prosecutor-equal" condition).

participants saw the three crimes had a large impact on their decision.⁹² These findings suggest further investigation, as convened veto juries might (like grand juries) decide multiple cases. However, because this is the first study to test the concept, we treated the order effects as a confound;⁹³ therefore, in our first stage of analysis, we considered only the first crime evaluated by each participant.⁹⁴ Subpart B thus examines respondent sentencing choice (and therefore which legal actor, if any, they favored), after which Subpart C examines whether their openended fair sentencing determinations were affected by conviction mode and/or sentencing options (Subpart C).

Then, to create a full model to investigate the effects of our additional variables⁹⁵ as well as legal actor preference⁹⁶ and crime type, in the second stage of our analysis we treated the data as nested.⁹⁷ In particular, participant sentence choice was nested within the order in which the crimes were presented as well as the order in which the sentencing choices were presented, in Subpart D to determine predictors of sentencing choice and in Subpart E to determine predictors of fair sentence length.

^{92.} For those who appreciate the statistics of f-values (*see* Zach Bobbitt, *How to Interpret F-Values in a Two-Way ANOVA*, STATOLOGY (Dec. 30, 2022), https://www.statology.org/two-way-anova-f-value/ [https://perma.cc/D3TR-23DS]), for burglary sentences, there was a main effect for crime order (F(2, 268) = 7.75, p < .001) and an interaction between the crime and sentencing choice order (F(4, 268) = 6.50, p < .001). The same was true for robbery by sentencing choice order (F(4, 268) = 4.75, p = .001) and MVT by crime order (F(2, 268) = 3.05, p = .05).

^{93.} See Zach Bobbitt, What is a Confounding Variable? (Definition & Example), STATOLOGY (Feb. 19, 2021), https://www.statology.org/confounding-variable/ [https:// perma.cc/8B6E-526T] (A confounding variable is "[a] variable that is not included in an experiment, yet affects the relationship between the two variables in an experiment. This type of variable can *confound* the results of an experiment and lead to unreliable findings.").

^{94.} This approach thus treated both crime and sentencing choice as strictly betweensubjects variables.

^{95.} For example, risk and regret for convicting an innocent versus acquitting a guilty, forms of possible pro-prosecution and pro-defense bias.

^{96.} The choices being the judicial sentence, the prosecutorial recommendation, and the defense recommendation.

^{97.} See Zach Bobbitt, *What is a Nested Model? (Definition & Example)*, STATOLOGY (Dec. 23, 2021), https://www.statology.org/nested-model/ [https://perma.cc/ZFF4-A7YE] ("A nested model is simply a regression model that contains a subset of the predictor variables in another regression model.").

B. Sentencing Choice (Legal Actor Preference)

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Using just that subset of first crime evaluated by each participant, we used a Chi-Square test of independence to identify which legal actor's sentence the participants were most likely to choose: the judge's, the prosecutor's, or the defense attorney's.⁹⁸ For our burglary scenario (Table 2A), participant choice depended on the structure of the choices more than the legal actor behind each choice. For each sentencing condition, the sentence recommended by the defense attorney (i.e., the shortest sentence) was chosen approximately 42% to 47% of the time. Those participants not choosing the defense recommendation were significantly more likely to choose the middle sentence length: When the judicial sentence was in the middle at 72 months (the "prosecutor-high" condition of P > J > D), 45.2% of the participants sided with that judicial sentence; yet when the judicial sentence was 72 months but the prosecutor was in the middle asking for 58 months (the "judge-high" condition of J > P > D), 46.4% of the participants chose the prosecutor's recommendation.

Table 2A – Observed and expected frequencies for sentencing choice (legal actor preference) in burglary. Survey conditions (including for sentence chosen) are as described in Table 1, and N is number of respondents. Categories within the offer condition whose proportions differ from each other at the .05 level are denoted with different letters. $\chi^2(4) = 27.19$, $p \le .001$.

Survey Condition	S	Sentence Chosen						
P > J	J	Р	D					
Observed (Expected)	14 (5.7) ^a	4 (11.7) ^b	13 (13.7) ^b	31				
% Within Offer Condition	45.2%	12.9%	41.9%	100%				
P = J		$\mathbf{P} = \mathbf{J}$	D					
Observed (Expected)		18 (18.8)	16 (15)	34				
% Within offer condition		52.9%	47.1%	100%				
J > P	J	Р	D					
Observed (Expected)	3 (5.1)	13 (10.5)	12 (12.3)	28				
% within offer condition	10.7%	46.4%	42.9%	100%				

^{98.} See Zach Bobbitt, Chi-Square Test vs. ANOVA: What's the Difference?, STATOLOGY (Aug. 25, 2021), https://www.statology.org/chi-square-vs-anova/ [https:// perma.cc/ANF9-T6PD] ("The Chi-Square Test of Independence [is] [u]sed to determine whether or not there is a significant association between two categorical variables.").

Decisions in the robbery scenario (Table 2B) also demonstrated a strong showing for the defense recommendation, with this recommendation chosen by participants between 40% to 50% of the time. Those not choosing the defense showed the same trend as for the burglary condition. When the judge was in the middle, they chose the judicial sentence 34.4% of the time; likewise, the prosecutor's recommendation was chosen more often than the judicial sentence when the prosecutor was in the middle. Although this last difference was not significant, that may have been on account of a lack of power, since fully 50% of individuals in this condition sided with the defense (20% with the judge, 30% with the prosecutor).

Table 2B – Observed and expected frequencies for sentencing choice (legal actor preference) in robbery. $\chi^2(4) = 16.14$, $p \le .01$.

Survey Condition	S	Sentence Chose	en	N
P > J	J	Р	D	
Observed (Expected)	11 (5.9) ^a	8 (12.2) ^b	13 (13.9) ^{a,b}	32
% Within Offer Condition	34.4%	25%	40.6%	100%
P = J		$\mathbf{P} = \mathbf{J}$	D	
Observed (Expected)		18 (16.9)	12 (13)	30
% Within offer condition		60%	40%	100%
J > P	J	Р	D	
Observed (Expected)	6 (5.5)	9 (11.4)	15 (13)	30
% within offer condition	20%	30%	50%	100%

The MVT scenario (Table 2C) showed more variability in choices between conditions, with defense recommendation support ranging from 23% to 47%. But those not siding with the defense again trended towards the middle: the judge's sentence was chosen significantly more often than expected (56.7% of the time) when the judicial sentence (46 months) was in the middle. When the judicial sentence was the highest, participants split almost equally across all three options.

Table 2C – Observed and expected frequencies for sentencing choice (legal actor preference) in motor vehicle **theft**. $\chi^2(4) = 24.58, p \le .001$.

Survey Condition	S	Sentence Chosen						
P > J	J	Р	D					
Observed (Expected)	17 (9.1) ^a	6 (10.4) ^b	7 (10.4) ^b	30				
% Within Offer Condition	56.7%	20%	23.3%	100%				
P = J		$\mathbf{P} = \mathbf{J}$	D					
Observed (Expected)		17 (20.8)	15 (11.1)	32				
% Within offer condition		53.1%	46.9%	100%				
J>P	J	Р	D					
Observed (Expected)	11 (9.1)	9 (10.4)	10 (10.4)	30				
% within offer condition	36.7%	30%	33.3%	100%				

Overall, these findings suggest respondents are preferring sentences shorter than those actually judicially-imposed by favoring the defense recommendation. Upward adjustment is apparent in the decision-making process of those not selecting the lowest sentence, but participants tended to the 'middle' option when there were values above and below, as opposed to specifically tracking the prosecutor. This tendency to 'go low but then pick a newly offered middle' is consistent with the "compromise effect," and so we may be witnessing that heuristic, as we will explain in more detail in the Discussion.99

C. Open-Ended Fair Sentence Length

Again using the subset of first crime evaluated by each participant, a two (conviction mode¹⁰⁰) by three (sentence option¹⁰¹) Analysis of Variance (ANOVA) was performed for each crime type (MVT, burglary, and robbery), with respondents' open-ended fair sentence as

^{99.} See FARNSWORTH, supra note 42, at 224 ("[T]he compromise effect . . . [is] the attraction people feel to a middle option, even if its 'middleness' is the result of arbitrarily surrounding it with other choices.").

^{100.} Conviction mode was either guilty plea or trial conviction.

^{101.} The three sentencing options were prosecutor high (P > J > D), prosecutor equal (P = J > D), and judge high (J > P > D).

the outcome measure.¹⁰² For burglary (Table 3A), there was no effect for the mode of conviction (guilty plea or trial conviction), but there was for the sentence option. Those who saw the prosecutor-high request chose a fair sentence length a year and a half longer on average than those who saw the judge-high condition. Mirroring the findings from the Chi-Square independence tests showing that just under half of these participants chose the defense attorney's recommendation,¹⁰³ the length of sentence the participants felt was fair was much closer to the defense recommendation of 46/58 months than to the prosecutor's 58/72/86 months or the judge's 72 months.

Table 3A – Open-ended fair sentences for burglary by conviction mode and sentence option. N is number of respondents, M is mean open-ended fair-sentence length in months, and *SD* is standard deviation. ANOVA is Analysis of Variance with its corresponding variables, SO is the sentence option (prosecutor high, prosecutor equal, or judge high), and CM is conviction mode (guilty plea or trial conviction). When deciding an open-ended fair sentence, respondents were able to see the typical time to parole eligibility corresponding to that sentence length. * p < .05

ion	P > J			$\mathbf{P} = \mathbf{J}$			J > P			ANOVA			
Convict Mode	n	М	SD	n	М	SD	n	М	SD	Effect	<i>F</i> ratio	df	η^2
Trial	13	58.7	16.4	18	55.1	26.6	18	40.4	16.6	SO	3.42*	2, 87	.07
Plea	18	60.6	35.3	16	47.3	26.2	10	44.1	15.8	СМ	0.02	1, 87	.00
Total	31	59.8	28.6	34	51.4	26.3	28	41.7	16.1	SO × CM	0.48	2, 87	.01

A similar trend was observed for robbery (Table 3B): no effect of trial versus plea as the method of conviction, but a strong effect for sentence option. The prosecutor-high condition (P > J > D) resulted in almost a three-year extension on respondents' open-ended fair sentence compared to the judge-high condition. It is again worth noting that when participants were generating their own sentences, the range was on the low side: approximately 72 to 103 months. In the robbery

^{102.} See Bobbitt, *Chi-Square Test vs. ANOVA: What's the Difference?, supra* note 98 ("[A]n ANOVA is used to determine whether or not there is a statistically significant difference between the means of three or more independent groups."). 103. *See supra* Part IV.B.

scenarios, the defense recommendations were either 72 or 90 months; the prosecutor recommended 90, 113, or 136 months; and the judicial sentence (matching the actual BJS average) was 113 months.

ction	P > J			$\mathbf{P} = \mathbf{J}$			J > P			ANOVA			
Convi Mode	п	М	SD	n	М	SD	n	М	SD	Effect	<i>F</i> ratio	df	η^2
Trial	17	98.1	52.9	20	95.8	24.0	10	58.2	31.9	SO	6.93*	2,86	.14
Plea	15	107.7	18.3	10	82.9	34.2	20	79.0	37.4	СМ	0.59	1,86	.01
Total	32	102.6	40.3	30	91.5	27.9	30	72.1	36.5	SO× CM	1.59	2, 86	.04

Table 3B – Open-ended fair sentences for robbery by conviction mode and sentence option. * p < .01

For our MVT scenario (Table 3C), we had a much smaller range in sentence recommendations (33.3 months to 36.4 months), and no differences were significant. Once again, the range of sentences our participants considered 'fair' closely mirrored the defense recommendation (either 30 or 37 months) and not the prosecutor recommendation (either 37, 46, or 55 months) or the judicial sentence (46 months).

Table 3C – Open-ended fair sentences for motor vehicle theft by conviction mode and sentence option.

ction	P > J			$\mathbf{P} = \mathbf{J}$			J > P			ANOVA			
Convi Mode	п	М	SD	n	М	SD	n	М	SD	Effect	<i>F</i> ratio	df	η^2
Trial	14	40.1	10.8	19	36.2	19.6	12	36.6	7.8	SO	2.34	2, 86	.03
Plea	16	32.6	15.1	13	29.0	17.0	18	36.3	15.9	СМ	0.62	1, 86	.01
Total	30	36.1	13.6	32	33.3	18.6	30	36.4	13.1	SO× CM	0.52	2, 86	.01

These results suggest that prospective jurors do in fact deem the judicially-imposed sentence as too harsh. However, adjustments in fair sentence lengths received mixed support. We observed some adjustment toward the prosecutor when the prosecutor recommended the longest sentence. However, this result was tempered by the length of other recommended sentences and the crime type. Finally, respondents demonstrated no preference in conviction type: respondents did not deem one mode of conviction (i.e., guilty plea or trial conviction) as any more or less deserving of punishment than the other.

D. Sentencing Choice (Legal Actor Preference) Models

Turning to our full data set, study participants' sentence choices were nested within the order of sentence options presented and the order of the three crime types in order to consider what predicted selecting the defense attorney recommendation (the most-often-sided-with legal actor) as compared to the prosecutor recommendation or judicial sentence.¹⁰⁴ For each crime, we performed a three-step, entry model logistic regression, with the manipulated variables (conviction mode, sentence options) and their interaction entered on Step 1. Step 2 added the personality variables (pro-prosecution bias, pro-defense bias, societal harm decision, and risk-taking),¹⁰⁵ and Step 3 used a conditional approach to add significant demographic variables (age, gender, ethnicity, education, income, marital status, voter registration, experience with the justice system, and experience as a crime victim). The dependent variable was the sentence option chosen, with defense attorney as the referent category.

Table 4 shows that choosing the defense attorney's sentence recommendation for the burglary was influenced by the sentence option: those in the prosecutor-equal condition (P = J > D) were over three times more likely to choose the defense attorney's recommendation than those in the prosecutor-high condition (P > J > D). The other factors that mattered were pro-prosecution and pro-defense bias. Looking at Table 4, the pro-prosecution and pro-defense effects look very small, but recall the regret scale was 0 to 100. Interpreting the effect, if we had an individual who felt regret of 70/100 for convicting an innocent person compared to someone who felt regret of 90/100 for the same, that second individual is 21 times more likely to choose the defense attorney's recommendation. Additionally, those in our sample who were currently married were approximately 2.5 times less likely to side with the defense than those who had never married. No other variables were significant predictors of the sentence decision.

^{104.} For those who like statistics, we compared the log likelihood scores for the fixed effects model with only the conviction mode and sentence option conditions included as predictors, to a model that added the random effects of order of sentence options and order of crime type. *See* Zach Bobbitt, *How to Interpret Log-Likelihood Values (With Examples)*, STATOLOGY (Aug. 31, 2021), https://www.statology.org/ interpret-log-likelihood/ [https://perma.cc/VM2L-GJRG]. The addition of the random effects did not improve model fit for any crime type; with that finding, binary logistic regressions were conducted and the nested variables were not included.

^{105.} For descriptions of the survey instrument in these regards, see infra Part II.A.

Table 4 – Binary logistic regressions seeking predictors for selecting the defense recommendation in the burglary scenario. N = 275, B is the logistic regression coefficient, and OR is the odds ratio. * $p \le .05$, † $p \le .01$, ‡ $p \le .001$

		Step	1		Step	2	Step 3		
Variable	В	OR	95% CI for OR	В	OR	95% CI for OR	В	OR	95% CI for OR
Constant	-1.13‡	0.32		-2.06*	0.13		-1.52	0.22	
Conviction mode (trial = ref)	0.82	2.26	0.92, 5.56	0.90	2.46	0.94, 6.44	0.80	2.21	0.82, 5.96
P = J $(P > J = ref)$	0.84	2.32	0.93, 5.78	1.14*	3.11	1.17, 8.29	1.12*	3.07	1.14, 8.27
J > P $(P > J = ref)$	0.91*	2.47	1.04, 5.88	0.91	2.50	0.98, 6.33	0.77	2.16	0.83, 5.62
Conviction mode \times P = J	-0.68	0.51	0.15, 1.71	-1.02	0.36	0.10, 1.32	-0.92	0.40	0.11, 1.49
Conviction mode × J > P	-1.13	0.32	0.09, 1.11	-1.35*	0.26	0.07, 0.98	-1.07	0.34	0.09, 1.36
Risk-taking scale				0.05	1.06	0.80, 1.39	0.01	1.01	0.76, 1.34
Societal harm				-0.63	0.53	0.28, 1.04	-0.49	0.61	0.31, 1.20
Pro-defense bias				0.03†	1.03	1.01, 1.04	0.03†	1.03	1.01, 1.05
Pro- prosecution bias				-0.02‡	0.98	0.97, 0.99	-0.02‡	0.98	0.97, 0.99
Married (never married = ref)							-0.92†	0.40	0.22, 0.73
Divorced/ widowed (never married = ref)							-0.32	0.73	0.34, 1.55

For robbery, Step 1 was not significant, and while Step 2 was significant, the only variables that had an influence were pro-prosecution bias and pro-defense bias. The addition of Step 3 did not improve the model for the robbery crime. For MVT, none of the steps created a predictive model.

Overall, these results concerning predictors of sentence choice (and thus legal actor) are somewhat mixed and will require future

research. While MVT choices were not adequately accounted for by any combination of our variables, the most consistent influence for burglary and robbery was the pro-prosecution or pro-defense bias of respondents. However, the burglary condition also shows some effects of anchoring and adjustment: in the condition where there was only a lesser sentence to depart towards (i.e., the prosecutor recommendation was the judicially-imposed sentence), the jurors were more likely to adjust in that direction and choose the defense attorney recommendation, when compared to conditions in which there were higher and lower options to the judicial-sentence anchor.

E. Open-Ended Fair Sentence Length Models

Finally, to see the full effects of our variables on open-ended fair sentence length decisions, we employed a hierarchical linear regression with our nested variables entered on the first step, our manipulated variables entered on the second step, and using a conditional approach to add significant demographic variables. The novelty of the jury veto makes this analysis more exploratory in nature, and we wanted our final model to be as parsimonious as possible.

Table 5A shows the first two steps and the final step for the burglary scenario. In the final model, the offer condition was very influential: compared to the prosecutor-high condition, both prosecutor-equal (P = J > D) and judge-high (J > P > D) conditions predicted significantly shorter fair sentences. In addition, increased regret for acquitting a guilty person predicted longer sentences, and regret for convicting an innocent person predicted shorter sentences. For demographic variables, those never married were more lenient than our participants currently married, and registered Democrats were more lenient than the grouping of Independents and unregistered individuals.

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Table 5A – Hierarchical logistic regressions for openended fair sentence lengths in burglary. N = 275, B is the unstandardized beta, SE is the standard error, and β is the standardized beta. * $p \le .05$, † $p \le .01$, * $p \le .001$

Variable	Step 1			Step 2			Final Step		
	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β
Constant	58.80 (5.40)	48.16, 69.43		68.67 (5.67)	57.52, 79.83		84.11 (9.23)	65.94, 102.29	
Offer order	-2.44 (1.87)	-6.12, 1.24	08	-2.52 (1.80)	-6.06, 1.03	08	-2.60 (1.74)	-6.01, 0.82	08
Crime order	1.12 (1.85)	-2.52, 4.75	.04	1.46 (1.78)	-2.05, 4.96	.05	2.24 (1.73)	-1.16, 5.64	.07
Conviction mode				-3.85 (2.93)	-9.62, 1.93	08	-3.45 (2.85)	-9.06, 2.17	07
P > J vs. P = J				-8.76 (3.57)*	-15.79, -1.74	17	-9.99 (3.43) [†]	-16.74, -3.24	19
P > J vs. J > P				-16.89 (3.60) [‡]	-23.97, -9.81	32	-16.02 (3.45) [‡]	-22.81, -9.23	30
Regret: Convict innocent							21 (.08)†	-0.38, -0.05	15
Regret: Acquit guilty							.17 (.05)‡	0.07, 0.27	.19
Independent/ Unregistered vs. Democrat							-6.37 (2.87)*	-12.03, 72	13
Married vs. Never Married							-7.54 (2.83) [†]	-13.11, -1.97	15

For robbery (Table 5B), the final model showed a large difference between the prosecutor-high and judge-high conditions, with the latter again predicting much shorter open-ended fair sentences. The pro-prosecution and pro-defense bias variables were also significant predictors, showing the same trends as we saw with the burglary scenario. No other variables added to the final model's predictive ability.

Variable		Step 1			Step 2		Final Step			
	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β	
Constant	91.49 (7.34)	77.05, 105.93		99.15 (7.88)	77.05, 105.93		104.71 (12.13)	80.83, 128.60		
Offer order	-2.83 (2.54)	-7.82, 2.17	07	-2.62 (2.48)	-7.49, 2.26	06	-2.72 (2.40)	-7.44, 2.00	07	
Crime order	3.25 (2.51)	-1.69, 8.18	.08	3.01 (2.45)	-1.82, 7.83	.07	4.21 (2.39)	-0.48, 8.91	.10	
Conviction mode				-3.85 (4.03)	-11.77, 4.08	06	-2.95 (3.95)	-10.73, 4.84	04	
P > J vs. P = J				-0.29 (4.94)	-10.01, 9.43	.00	-2.09 (4.79)	-11.52, 7.33	03	
P > J vs. J > P				-16.50 (4.91) [‡]	-26.16, -6.83	23	-19.09 (4.48) [‡]	-28.50, -9.69	27	
Regret: Convict innocent							-0.31 (0.12) [†]	-0.54, -0.08	16	
Regret: Acquit guilty							0.31 (0.07) [‡]	0.17, 0.45	.25	

Table 5B – Hierarchical logistic regressions for open-ended fair sentence lengths in robbery. * $p \le .05$, † $p \le .01$, ‡ $p \le .001$

For the MVT scenario (Table 5C), the offer condition showed no effects. However, the societal harm question, political party affiliation, and marital status were significant predictors of fair sentence length. Specifically, longer sentences were predicted from those who felt it worse for society to acquit a guilty person than to convict an innocent, from Republicans (compared to Independent and unregistered individuals), and from those currently married compared to those never married.

Table 5C – Hierarchical logistic regressions for open-ended fair sentence lengths in motor vehicle theft. * $p \le .05$, † $p \le .01$, * $p \le .001$

Variable	Step 1				Step 2		Final Step		
	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β	B (SE)	95% CI for B	β
Constant	43.07 (3.36)	36.45, 49.68		43.65 (3.74)	36.29, 51.02		42.91 (3.81)	35.40, 50.42	
Offer order	-0.10 (1.16)	-2.39, 2.18	01	-0.11 (1.17)	-2.41, 2.19	01	-0.44 (1.13)	-2.66, 1.78	02
Crime order	-2.18 (1.15)	-4.44, 0.08	11	-2.15 (1.16)	-4.42, 0.13	11	-2.13 (1.12)	-4.33, 0.07	11
Conviction mode				-0.75 (1.90)	-4.49, 2.99	02	0.41 (1.86)	-3.25, 4.06	.01
P > J vs. P = J				-0.83 (2.32)	-5.39, 3.73	03	-0.76 (2.23)	-5.15, 3.64	01
P > J vs. J > P				0.02 (2.31)	-4.54, 4.57	.00	-0.25 (2.23)	-4.64, 4.13	.16
Worse to convict innocent vs. acquit guilty							5.47 (2.01) [†]	1.51, 9.42	.16
Independent/ Unregistered vs. Republican							5.59 (2.32)*	1.03, 10.15	.15
Married vs. Never Married							-4.50 (1.87)*	-8.18, -0.82	14

In summary, respondents again seemed prone to a framing adjustment 'towards the middle': when there were two recommendations below the judicially-imposed sentence, respondents' open-ended fair sentence lengths were shorter; when there was one recommendation above and one below, the fair sentence length was longer. Additionally, robbery and burglary sentences were influenced by pro-prosecution and pro-defense biases, predicting longer and shorter sentences, respectively.

V. DISCUSSION

The core insight of a jury veto—which is that we might be able to return to better citizen control over our systems of criminal adjudication by convening juries employing cabined-discretion sentencing—is novel and untested. This study was the first to explore the concept, and it makes several contributions.

The 'highest-level' contribution is simply that novelty. Perhaps jury vetoes are desirable and perhaps they are not, perhaps they are administrable and perhaps they are not, and perhaps they would make a very significant difference in sentencing and perhaps they would not. The only way to learn such things is to probe the concept both theoretically and empirically. By going first, then, we have taken that first empirical stab, and future work can build upon this foundation we will share a few thoughts on such future work as we go.¹⁰⁶

Our study also makes several more concrete contributions. The first is that US citizens may have preferences that are not well reflected in current, predominant sentencing structures. The study scenarios incorporated actual sentencing ranges and time served thereon, and participants consistently preferred amounts that were on the lower end of the range for each crime type examined. This preference was observed not only in selections between judicial sentences and prosecutorial and defense recommendations, but also in numerical recommendations provided by participants themselves. Taken together, these findings suggest that providing citizens a mechanism to adjust criminal sentences may shorten them, demonstrating the potential utility of structures like jury veto to bring punishment for crime more in line with citizen expectation, thereby making it more consonant with the American founding resolve of citizen-controlled criminal justice.¹⁰⁷ And this suggests that if a jury veto did exist, it might be relatively often invoked. Of course, there are significant limitations in our findings, including a very narrow range of sampled crimes (three property crimes of increasing severity). It is also worth noting that the utility of jury veto does not depend upon any such downward adjusting tendency: if empaneled samples of the American people instead wished longer sentences, they could achieve those as well, because the directionality of change is not hard-wired-though it would be limited by particular system design and then by judicial sentencing and prosecutorial recommendation. In any event, the points here are the limited ones that (1) based upon our findings, veto juries might meaningfully deviate

^{106.} See also infra Part V.A.

^{107.} See Brennan-Marquez et al., supra note 1, at 7.

downward from existing sentencing norms, and (2) independent of any novel adjudicatory structures, our study therefore contributes to the literature on American sentencing preference.

Another contribution of our study relates to juror decision-making. Because jury veto is decision-making under uncertainty, we expected and witnessed—anchoring and adjustment effects. Under the jury veto's original conception, the judicial sentence is to be urged as an explicit anchor for juror deliberation.¹⁰⁸ In retrospect, our study could have better highlighted this judicial anchor: while it did always appear first among alternatives, its numerical value could have been better separated *from* those alternatives by both 'space' and explicit instruction.¹⁰⁹ Future studies should inquire whether this leads to stronger anchoring, as such anchoring is intended as a measure of appropriate respect for both legislative sentencing ranges and judicial application thereof.

As for adjustment, while by comparing the trends in Tables 2 and 3 we observe participants favoring the legal actor offering the lowest sentence, we also observe a tendency to sometimes favor suggestions by the prosecutor. One implication is that, as would be expected, the structure of the jury veto process may alter its outcome. When participants were required to select from three options (judicial sentence and prosecutorial and defense recommendation), there was little opportunity for adjustment given the 20% deviations of our study. But when participants decided for themselves what the sentences should be, significant adjustment was possible and, in some conditions, prevalent. The potential for the structure of a jury veto process to shape adjustment behavior mirrors effects of structural changes to civil litigation that curtail adjustment behaviors.¹¹⁰ Again, our exploratory study was limited to 20% deviations, and so interpretation of the results must be tentative. But the general implication presents an important trade-off between rigid structures for jury vetoes (e.g., selection among several recommendations) and more flexible variants (juries deciding their own

^{108.} See Henderson, supra note 7, at 505 n.46.

^{109.} Henderson's hypothetical jury instruction includes the following, where the crime of conviction was forgery and the judicial sentence was 9 years on a range of 2 to 10: "First, you must each begin with the sentence enacted by Judge X following Mr. Hayes' conviction: 9 years in prison. That sentence is a lawful one, within the bounds of 2 to 10 years set by our legislature for the crime, and arrived at following consideration of the facts and circumstances of this case and how they are similar to—and different from—other instances of this crime. So, that is where you must begin, both in your own mind and in your collective deliberations: at 9 years." *Id.* at 505–06.

^{110.} *See, e.g.*, Jennifer K. Robbennolt & Christina A. Studebaker, *Anchoring in the Courtroom: The Effects of Caps on Punitive Damages*, 23 L. & HUM. BEHAV. 353, 357 (1999) (examining "the anchoring and adjustment and the reactance effects of placing caps on punitive damages").

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sentence). Flexible structures would offer juries greater control and nuance, but they would undermine deference to legislative and judicial decisions, they might result in undesired variability between cases that legal actors see as relevantly alike, and they would certainly make deliberations lengthier and potentially preclude resolution. So, system design of a jury veto has important trade-offs, and our study begins to flesh them out.

As far as citizen bias towards a particular actor's guidance (judge, prosecutor, or defense lawyer), our results give some reason to believe potential veto jurors might be inclined towards prosecutorial recommendation, but further study will be required to better understand any such tendency. Our results tend to show an inclination 'to the middle,' which may reflect an overall tendency to below-actual criminal sentences combined with a tendency to see a 'prosecutor high/defense low' scenario as the judge having already performed that work. In other words, in our scenario of equal prosecutorial and judicial recommendation, a general 'go lower' tendency favors selecting the defense recommendation. And in our scenario of a judicial recommendation higher than a prosecutorial recommendation that is in turn higher than a defense recommendation, a general 'go lower' tendency might favor the prosecution middle. But when the judicial anchor sits between a prosecution high and a defense low, perhaps respondents inferred the judge has already 'gone low' by deviating from prosecutor wish, and therefore adjustment is less necessary. Again, further study will be needed to flesh this out, both to query to what extent we are simply witnessing the heuristic compromise effect,¹¹¹ and whether the manner of presentation minimizes or maximizes any general institutional-actor preference. In other words, if potential jurors have a general tendency to favor one actor (e.g., the prosecutor), is that

^{111.} See FARNSWORTH, supra note 42. Farnsworth explains as follows: In the classic experiment the subjects were instructed to choose cameras from a catalogue. If they were given two choices—a midlevel model and a low-end one—they divided about evenly between them. [Whereas our respondents tended to prefer the 'low-end' defense recommendation.] But the subjects who were given a third choice a high-end model—showed quite different tendencies. Of course some preferred the fancy camera, but the interesting result was that they tended to abandon the low-end version: of those picking between the middle and low model, 72 percent picked the middle choice. The addition of the new option at the top dragged people from the bottom to the middle.

Id. at 224; *see also id.* at 224–25 (explaining legal studies demonstrating framing bias). Hence, a 'go low' binary tendency then pulling to the middle in trinary cases could be something else, or it could be this mental shortcut in action.

(desirably?) blunted if all three recommendations are first conveyed through the judge, or even if all arguments are somehow conveyed through the judge? And can a study accurately capture the prominence of a robed judge sitting atop a relative throne, situated higher than everyone else in a courtroom, and a prosecutor who gets to 'represent the United States of America here today'? As far as anchoring and framing preference, then, our study hints towards a prosecutorial preference but leaves mostly unanswered questions.

A very intriguing contribution of our study concerns conviction type: whether defendants pleaded guilty or were found guilty by trial did not produce a consistent effect that we could detect. Across repeated tests and multiple crime types, participants did not appear to differentiate between the two conviction modes. This finding contrasts with other scholarly work that reveals a clear penalty for defendants who exercise their right to a jury trial and then lose.¹¹² Any interpretation of a lack of differences between experiment conditions should be made with caution. Still, this raises important questions not only for future investigation of hypothetical jury-controlled sentencing, but for the entire notion of a 'pleading discount' or 'trial penalty' upon which American criminal justice routinely operates. Perhaps juries disfavoring one procedural type of guilty defendant over another is limited to specific types of crime or some other variable, or perhaps the concept may be entirely unfounded. We strongly encourage further research here.

Finally, in our exploratory study, jury vetoes appear to be contingent on the type of crime and the order in which crimes are presented. If confirmed by further research, then veto juries convened to hear multiple cases should perhaps be limited by crime type and in number of cases. More generally, this might educate the wisdom of any jury sitting through multiple cases, as is routine in the grand jury context.

A. Limitations and Future Directions

In the course of our discussion, we have already mentioned both several study limitations (e.g., narrow range of crimes and non-explicit judicial anchor) and future directions for study (e.g., better detecting any citizen preference in institutional actor). Here, we highlight two more limitations and then summarize how work might move forward.

First, our study was conducted online as a randomly controlled experiment with limited description of the underlying crimes. This

^{112.} E.g., Jeffery T. Ulmer & Mindy S. Bradley, Variation in Trial Penalties Among Serious Violent Offenders, 44 CRIMINOLOGY: AN INTERDISC. J. 631 (2006).

design permitted us to examine the causal relationships between our variables of interest in a manner feasible for participants to complete during the time of experiment. At the same time, that environment was artificial and devoid of the jeopardy and detail associated with actual criminal legal proceedings, even those of a summary variety. Future work could more accurately simulate the criminal adjudicatory environment.

Second, our work is silent regarding how sentencing recommendations would be made by prosecutors and defense attorneys, and how the mere potential for an after-judicial-sentence invocation would alter earlierin-time decisions, not only by those legal actors but also by judges. The work presented here begins with a judicial sentence and incorporates sentencing recommendations that are fully formed and are ready to be presented to a veto jury. The decision-making process that legal actors must traverse to arrive at this point-from charging decisions to plea offers to innumerable decisions besides-and then the formulation of particular sentencing recommendations, is thus not studied. Such research would inform the potential utility of veto juries, but it will not be easy to conduct, including because it will require participants with legal training and (ideally) experience. While any citizen working on Amazon's Mechanical Turk could be summoned as a juror tomorrow, it is of course a much smaller pool of persons who are licensed and experientially ready to act as judges, prosecutors, and defense attorneys. Perhaps law students might form a sufficiently representative pool, but in the American model of one-size-fits-all legal education, more winnowing may be realistically necessary.

Beyond those two matters, we think the most compelling finding of our work might be the lack of difference in perceived desert and/or need for punishment between pleading guilty and being found guilty at trial. This non-finding requires additional scrutiny and verification, but its importance to our systems of justice goes far beyond hypothetical new adjudicatory constructs like a jury veto, and thus it is ripe for consideration. More specific to those veto juries, our study limitations included the narrow set of crimes, the limited details provided about each crime, only three sentencing choices, and only 20% deviations therein. Future data collections should consider a broader set of crime types containing crime details that might differently sway a veto jury (e.g., sexual assault), and an increasingly rich set of sentencing options.

Finally, for those picking juries or interested in that task, it is worth noting that our respondents never married tended to be more lenient sentencers, as did registered Democrats. These surely match the instincts of many a trial attorney (and even less participatory 'armchair quarterbacks'), but further work could determine how robust such connections are across differing crime types and other factors.

CONCLUSION

With juries playing little role in American criminal justice, we sought to understand how expanding their role in sentencing could operate. In particular, we empirically tested the novel concept of jury veto, which allows juries a cabined purview over sentencing decisions after guilt is determined (whether by trial or guilty plea). Although our study could not recreate the immensely variable factual circumstances of crime and the adjudication thereof, our results demonstrate that such a mechanism might better harmonize punishment for crime with citizen expectation. Participants in our experiment expressed sentencing preferences that consistently diverged from actual sentencing practice. Further, the participants' recommendations appeared to be robust against any trial penalty, when such penalty is a routine, daily occurrence. Jury veto is thus worthy of further exploration and debate as theorists, empiricists, and criminal justice practitioners-and, ideally, all Americans-contemplate how to improve our systems of criminal justice.