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RECHARGING THE JURY: THE CRIMINAL JURY'S CONSTITUTIONAL ROLE IN AN ERA OF MANDATORY SENTENCING

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> [L]et it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread to the utter disuse of juries in questions of the utmost concern.[1]

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[1] 4 WILLIAM BLACKSTONE, COMMENTARIES *350.

INTRODUCTION

More than 200 years ago, William Blackstone warned that we must protect the criminal jury not from "open attacks," but from "secret machinations" that on their face seem convenient and benign.[2] He argued that the delays and "inconveniences" of the criminal jury were a fair price for free nations to "pay for their liberty."[3]

Even though the Framers of the Constitution disagreed about a great many things in Philadelphia, they concurred with Blackstone's estimation of the criminal jury. From the outset, the criminal jury was designed to be part of our elaborate system of checks and balances, placing a check on the legislature and executive to ensure that no one received criminal punishment unless a group of ordinary citizens agreed. Thus, even before the Sixth Amendment guaranteed "the right to . . . an impartial jury,"[4] the criminal jury was enshrined in the Constitution as a check on the government. Article III—the framework for the judiciary—provides that the "the Trial of all Crimes . . . shall be by Jury."[5]

Today, however, the jury's role as a check on the government's power has become far more limited. The criminal process in the United States has become largely an administrative one, with the police, prosecutors, and judges overseeing the criminal laws with little intervention by the people. The rise of plea bargaining is, of course, part of the reason for the administrative regime we now have. But it is merely the most obvious cause; it is not the only one.

In fact, a much more subtle development—a "secret machination"—has eroded the jury's and, consequently, the judiciary's power to check the government. Over the past few decades, the federal government and many states have embraced mandatory minimum sentences and binding sentencing guidelines. There has been a barrage of criticism of mandatory minimums and sentencing guidelines for limiting the discretion of judges and increasing the power of prosecutors.[6] But what has been all but ignored is the effect of these

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[2] *Id.*

[3] *Id.*

[4] U.S. CONST. amend. VI.

[5] *Id.* art. III, § 2, cl. 3.

[6] *See, e.g.*, KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78-103 (1998) (arguing that limiting judges' sentencing discretion dilutes the moral validity of criminal laws and leads to an unprincipled sentencing jurisprudence); Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 926 (1991) (noting that sentencing

sentencing laws on the jury's ability to check the legislature and the executive. Yet it is only by considering the effect these laws have had on the judiciary writ large—judges *and* juries—that it is possible to see the full impact these laws have on the constitutional order.

The focus has been on judges alone because the most obvious effect of these laws (and the intent in passing them) is to limit the discretion of judges. Moreover, it is neither intuitive nor immediately apparent why or how mandatory sentencing laws intrude on the jury's function to a greater extent than the sentencing regime that existed before such guidelines. After all, even before the advent of sentencing guidelines, judges were making critical factual determinations that were used to increase defendants' sentences. Commentators have pointed to this fact to argue that the jury's factfinding powers in criminal cases were compromised long before the age of sentencing guidelines and mandatory minimum sentences.[7] Consequently, determinate sentencing laws seem to have done little to affect the jury's existing role.

But this analysis holds only if the jury performs solely the role of factfinder in a criminal proceeding. In fact, the jury does much more

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reform creates a "prosecutor's paradise" wherein prosecutors wield wide discretion); Bradford C. Mank, *Rewarding Defendant Cooperation Under the Federal Sentencing Guidelines: Judges vs. Prosecutors*, 26 CRIM. L. BULL. 399, 402-04 (1990) (listing problems arising from increasing prosecutorial discretion); Michael Tonry, *Mandatory Minimum Penalties and the U.S. Sentencing Commission's "Mandatory Guidelines,"* 4 FED. SENTENCING REP. 129, 132 & 133 n.12 (1991) (citing REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 23, 37-38 (1990)) (discussing a survey of district court judges that found a common complaint with the Federal Sentencing Guidelines to be the elimination of judicial discretion).

[7] *See, e.g.*, Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1126-27, 1134 (2001) (finding that, at common law and in the Nation's early history, judges had broad discretion in sentencing); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506-13 (2001) (describing the decline of mandatory penalties and the increase of judicial discretion to set penalties in the late eighteenth and early nineteenth centuries and arguing that this history shows that juries have played a "low-level gatekeeping" role for years (quoting Jones v. United States, 526 U.S. 227, 244 (1999))); *see also* Apprendi v. New Jersey, 530 U.S. 466, 544 (2000) (O'Connor, J., dissenting) (noting that, in light of the Court's acceptance of discretionary sentencing, "it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require" a limit on determinate sentencing schemes). *But see* Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387, 454 (2002) (drawing a distinction between determinate sentencing and discretionary sentencing based on the fact that positive laws imposing punishment are "by definition a matter of fault" and arguing that the jury must make these fault determinations).

than that.[8] Unlike their civil counterparts, criminal juries have the constitutional power not merely to find facts, but also to apply the law to those facts.[9] Criminal juries have the power to issue a general verdict of "guilty" or "not guilty" under the law, based on whatever facts they find. And when the verdict is "not guilty," the jury's decision is *unreviewable.* This power translates into the power to nullify the law. If the criminal jury believes that a law should not apply in a particular case because its application would be unjust, the jury has the power to ignore that law, regardless of the law's language. In other words, jurors have the kind of ameliorative power Aristotle deemed critical for producing equitable results.[10]

This power to mitigate or nullify the law in an individual case is no accident. It is part of the constitutional design—and has remained part of that design since the Nation's founding. In an age in which we have grown accustomed to bureaucratic rationality and the administrative state, this power seems strangely out of place. But it serves a valuable function. Roscoe Pound praised the jury's power to mitigate or temper the letter of the law in the name of justice as "the great corrective of law in its actual administration."[11] Judge Learned Hand similarly observed that:

> The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements

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[8] *See* United States v. Gaudin, 515 U.S. 506, 514 (1995) (rejecting the argument that the jury is a "mere factfinder").

[9] *Id.* at 513 (acknowledging "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts").

[10] ARISTOTLE, NICOMACHEAN ETHICS, bk. 5, ch. 10, pt. 1137b, ll. 17-24, at 144-45 (Terence Irwin trans., 1985) (n.d.).

[11] Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910); *see also* 4 ROSCOE POUND, JURISPRUDENCE § 116, at 20, 25 (1959) ("The chief reliance of the common law for individualizing the application of law has been the power of juries to render general verdicts.").

> and a trial by a judge preserves neither, at least to anything like the same degree.[12]

This power to issue an unreviewable general verdict despite the letter of the law introduces a critical check on the government before it can impose criminal punishment and provides a mechanism for correcting overinclusive general criminal laws.

This powerful safety valve can operate, however, only if the jury retains control over laws that dictate criminal punishment. For almost 200 years, this went unquestioned—that is, until the advent of mandatory sentencing schemes like the Federal Sentencing Guidelines and mandatory minimum sentencing laws. These laws dictate criminal punishment upon the finding of particular facts, yet these general laws are being applied by judges, not by juries. As a result, prosecutors can seek review of trial judges' decisions, thereby preventing judges from individualizing punishment and tempering the law in particular cases if doing so violates the letter of the law itself. This is something prosecutors could not do if juries applied these laws.

Remarkably, this enormous intrusion on the jury's power has gone virtually unnoticed. Courts and commentators have been lulled into acceptance of this regime, insofar as it relates to the jury, because their view of the jury as a factfinder has prevented them from seeing how these sentencing laws differ from the previous discretionary sentencing regime. Legislators, too, seemed to enact these mandatory sentencing laws believing that their only effect was on judges, not juries. But to describe the effect of mandatory sentencing laws on judges tells only half the story.

This Article tells the other half. It is the effect of these laws on judges and juries in tandem—the *judiciary*—that makes them so troubling. The operation of these laws prevents the judiciary from ensuring in each case that a criminal law properly applies. To the extent that the correction of overinclusive laws is a key component of our constitutional order—and the jury's unreviewable power to acquit despite the letter of the law suggests that it is, at least in criminal cases—criminal proceedings come up short when these laws are applied by judges instead of the jury. Because of the mandatory nature of these laws and prosecutors' ability to seek review when judges depart from them, trial judges lack the necessary discretion and flexibility to ensure that these laws make sense in individual cases. This story has

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[12] United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775-76 (2d Cir.), *rev'd on other grounds*, 317 U.S. 269 (1942).

been told many times by commentators. What has been ignored, however, is the fact that the Constitution provides a ready-made safety valve for precisely this problem. Juries by design, with their unreviewable power to acquit, can act as a check on overinclusive or overrigid criminal laws. To be sure, this is an imperfect check, especially given the limited information the jury now receives at trial.[13] But even with its limitations, the jury retains the power to individualize laws to some extent and to ensure an equitable result, regardless of the legislature's language or its view ex ante about what should apply as a general matter.

This Article considers whether and when the legislature should have the power to close this safety valve by placing the authority to apply laws that trigger criminal punishments with judges instead of juries. This question is especially timely. During the past few years and culminating in a pair of cases decided at the end of the 2002 Term, the Supreme Court has addressed the question of how much freedom legislatures should have in identifying so-called sentencing factors that trigger punishment and in having those laws applied by judges instead of juries. And the Court will consider the issue again this Term in *Blakely v. Washington*.[14] Thus far, however, a majority of the Court has been unwilling to use these cases to reinvigorate the jury's—and thus the judiciary's—structural constitutional role.

Initially, it looked as if the Court was on a path that would strengthen the jury. In 2000, the Court decided the landmark case of *Apprendi v. New Jersey*,[15] in which the Court held that any fact (other than recidivism)[16] that has the legal effect of increasing a penalty

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[13] The jury is typically not told the sentencing consequences of its guilty verdict, nor is it told that it has the power to acquit against the evidence. *See infra* text accompanying notes 155-60, 206; *see also* PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 213 (1995) (noting that jury nullification can bring community standards to bear on criminal codes, but that this safety valve is an imperfect one in part because some juries might be unaware of their nullification power).

[14] 47 P.3d 149 (Wash. Ct. App. 2002), *cert. granted*, 72 U.S.L.W. 3280 (U.S. Oct. 20, 2003) (No. 02-1632).

[15] 530 U.S. 466 (2000).

[16] In *Almendarez-Torres v. United States*, 523 U.S. 224, 226 (1998), the Court held, in a 5-4 decision, that the legislature could make recidivism a sentencing factor even if that factor increased the defendant's sentence above the maximum permitted for the charged offense. The Court in *Apprendi* distinguished *Almendarez-Torres* based on the fact that "there is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof." 530

above a statutory maximum punishment is an offense element that must be proved to a jury beyond a reasonable doubt, regardless of whether the legislature has labeled that fact a sentencing factor.[17] *Apprendi* was seen by some as a "watershed" opinion[18] because the Court indicated for the first time a willingness to place a substantive limit on the legislature's freedom to allocate facts between sentencing and trial.[19]

U.S. at 496. For a defense of treating recidivism differently based on an estoppel theory, see Note, *Awaiting the Mikado: Limiting Legislative Discretion to Define Criminal Elements and Sentencing Factors*, 112 HARV. L. REV. 1349, 1362-66 (1999).

[17] In *Apprendi*, the Court considered a New Jersey statutory scheme that permitted a judge to enhance a defendant's sentence for an underlying offense based on the judge's finding that the defendant committed the crime with "a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation, or ethnicity." 530 U.S. at 469 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 1995) (repealed 2001)). Under this "hate-crime" statute, a judge could increase a sentence even above the statutory maximum for the underlying conviction. *Id.* at 491.

[18] *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting); *see also* Douglas A. Berman, *Appraising and Appreciating* Apprendi, 12 FED. SENTENCING REP. 303, 303 (2000) ("*Apprendi* is indisputably a significant decision for modern sentencing reforms."); Erwin Chemerinsky, *Supreme Court Review: A Dramatic Change in Sentencing Practices*, TRIAL, Nov. 2000, at 102 (calling *Apprendi* "one of the most important U.S. Supreme Court decisions in years"); Nancy J. King & Susan R. Klein, Après Apprendi, 12 FED. SENTENCING REP. 331, 331 (2000) ("This due process rule is properly labeled 'watershed,' as it is bound to change the course of criminal litigation significantly . . . ." (footnote omitted)); J. Stephen Welch, Apprendi v. New Jersey: *Watershed Ruling for the New Millennium?*, S.C. LAW., Mar./Apr. 2001, at 37, 37 (noting that *Apprendi* "may truly be such a 'watershed' ruling").

[19] Although the Court at one time indicated a willingness to place substantive limits on the legislature's ability to define offense elements for burden-of-proof purposes, the Court quickly backed away from that position. *Compare* Mullaney v. Wilbur, 421 U.S. 684, 703-04 (1975) (rejecting a Maine law that distinguished between murder and manslaughter for sentencing purposes but placed the burden of proving heat of passion on the defendant), *with* Patterson v. New York, 432 U.S. 197, 206-07, 210 (1977) (allowing the legislature broad freedom to distinguish between offense elements and affirmative defenses). Until 1999, the Supreme Court seemed on a path to grant legislatures similar freedom in allocating facts between trial and sentencing. *See Almendarez-Torres*, 523 U.S. at 243-47 (1998) (holding that a legislature could make recidivism a sentencing factor even if the recidivism factor increased the defendant's sentence above the maximum permitted for the charged offense); McMillan v. Pennsylvania, 477 U.S. 79, 85 (1986) (upholding a mandatory minimum sentencing provision and, relying on *Patterson*, concluding that, "in determining what facts must be proved beyond a reasonable doubt[,] the state legislature's definition of the elements of the offense is usually dispositive"). In 1999, the Court began expressing constitutional doubts about whether a legislature could constitutionally treat a fact (other than recidivism) as a sentencing factor if it increased a statutory maximum. *See* Jones v. United States, 526 U.S. 227, 232-39 (1999) (construing the federal carjacking statute to avoid constitutional questions and finding that the factor at issue was an element of the crime rather than a sentencing factor). But it was not until *Apprendi* that the

But the content of that substantive limit—and therefore the protection for the jury—remained in doubt. In particular, it was unclear whether the Court would extend its logic to mandatory sentencing guideline schemes like the Federal Sentencing Guidelines or mandatory minimums.[20] As the dissent in *Apprendi* pointed out, there was little to distinguish the statutory scheme at issue in that case from a sentencing guideline regime that also effectively increases the maximum sentence allowed.[21] At the same time, however, the Court's stated test was limited to facts that increased a penalty above a *statutory maximum*, not to facts that increased a Guidelines maximum or that dictated a mandatory minimum sentence.[22] After *Apprendi*, then, the Court was at a true crossroads in terms of the jury's future.

During the 2002 Term, the Court seemed to put to rest a reading of *Apprendi* that would give broader protection to the jury's structural role. At first glance, it may have appeared that the Court's commitment to the jury was actually growing stronger. In *Ring v. Arizona*,[23] the Court relied on *Apprendi* to strike down Arizona's death penalty scheme.[24] Under Arizona law, the jury's verdict finding Ring guilty of first-degree felony murder authorized a maximum punishment of life imprisonment. A death sentence could not be imposed under state law until "at least one aggravating factor [was] found to exist beyond a

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Court's *holding* placed a constitutional limit on the legislature's freedom to allocate facts between trial and sentencing. 530 U.S. at 491-97.

[20] In his concurrence in *Apprendi*, Justice Thomas indicated that he would take *Apprendi* further. Specifically, Justice Thomas stated his view that "authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)." 530 U.S. at 501 (Thomas, J., concurring). He noted that he is "aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment." *Id.* at 521. Although Justice Thomas reserved the question, it would appear that his proposed standard would call into question the Sentencing Guidelines because they permit a judge to increase a sentence based on her particular factual findings. *Id.* at 522-23, 523 n.11.

[21] *Id.* at 531 (O'Connor, J., dissenting).

[22] Because a rule based on a statutory maximum could be easily evaded, Justice O'Connor's dissent "suspect[ed] that the constitutional principle underlying [the Court's] decision is more far reaching." *Id.* at 543. In particular, she worried that "[t]he actual principle underlying the Court's decision may be that any fact (other than a prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543-44. Justice O'Connor therefore read the Court's opinion as calling into question "all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations," including the Sentencing Guidelines. *Id.* at 544.

[23] 536 U.S. 584 (2002).

[24] *Id.* at 589.

reasonable doubt."[25] The Court held that, pursuant to the constitutional jury guarantee, that fact had to be found by a jury, not a judge.[26] With this holding, the Court made clear that *Apprendi* applies in capital prosecutions no less than in other prosecutions. Indeed, to reach the result it did in *Ring*, the Court overruled its decision in *Walton v. Arizona*[27] and effectively declared at least five states' capital schemes unconstitutional.[28]

Standing alone, *Ring* perhaps could have been read to lend further support to the predictions that *Apprendi* would usher in an age of greater jury power. But in an opinion released the same day as *Ring*, the Court established limits beyond which *Apprendi* would not go. In *Harris v. United States*,[29] the Court held that the Constitution does not require juries to find facts that trigger mandatory minimum punishments.[30] The Court reasoned that judges alone can make those determinations because "the jury's verdict has authorized the judge to impose the minimum with or without the finding."[31] Four justices—the Chief Justice and Justices O'Connor, Scalia, and Kennedy—could not distinguish mandatory minimum sentencing from the previous discretionary regime in which judges selected a penalty within a statutory range. "If the facts judges consider when exercising their discretion within the statutory range are not elements," the plurality reasoned, "they do not become as much merely because legislatures require the judge to impose a minimum sentence when those facts are found—a sentence the judge could have imposed absent the finding."[32] Because that minimum sentence could be imposed "with or without

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[25] State v. Ring, 25 P.3d 1139, 1152 (Ariz. 2001).

[26] *Ring*, 536 U.S. at 609.

[27] 497 U.S. 639 (1990).

[28] In addition to Arizona, Colorado, Idaho, Montana, and Nebraska "commit both capital sentencing factfinding and the ultimate sentencing decision entirely to judges." *Ring*, 536 U.S. at 608 n.6. The capital scheme in four additional states (Alabama, Delaware, Florida, and Indiana) may also be unconstitutional in light of *Ring* because the jury renders only an advisory verdict and the judge possesses the ultimate capital sentencing authority. *Id.*

[29] 536 U.S. 545 (2002).

[30] *Id.* at 568-69.

[31] *Id.* at 557. The Court decided a third case last Term involving the jury's structural role. In *United States v. Cotton*, the Court held that the prosecution's failure to include in the indictment a fact that increases a statutory maximum did not "affect the fairness, integrity, or public reputation" of the proceeding. 535 U.S. 625, 633-34 (2002) (citing Johnson v. United States, 520 U.S. 461, 470 (1997)). As this Article explains, the Court underestimates the importance of the jury in reaching such a conclusion.

[32] *Harris*, 536 U.S. at 560.

the factual finding[,] the finding is by definition not 'essential' to the defendant's punishment."[33] Thus, because the plurality could not envision how a mandatory minimum regime intruded on the jury's power to a greater extent than the previous sentencing regime, it upheld the mandatory minimum law. And its logic would seem to condone the Sentencing Guidelines, for the Court noted that "[w]ithin the range authorized by the jury's verdict . . . the political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings."[34] Justice Breyer provided the fifth vote, and he, too, made clear that in his view the legislature has broad power to channel judicial discretion through mandatory minimums and sentencing guidelines.[35]

Taken together, *Ring* and *Harris* establish that the Court will find the constitutional jury guarantee satisfied as long as the defendant's sentence does not exceed the statutory maximum sentence authorized by the jury's verdict. In *Ring*, the maximum sentence authorized by the jury's verdict under Arizona state law was life imprisonment.[36] To receive a death sentence, additional factfindings were required, and therefore, the Court held that those findings had to be made by the jury.[37] Consistent with this view, *Harris* found that a mandatory minimum sentence falling within the maximum sentence authorized by the jury's verdict satisfied the Constitution.[38] According to the Court, then, the jury guarantee is essentially defined by the legislature's choice of maximum punishment.

This Term the Court will consider what happens when a legislature has established two sentencing ceilings: the maximum originally attached to the substantive offense and the ceiling established by later-enacted, legally binding sentencing guidelines. In *Blakely*, the

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[33] *Id.* at 561. For a similar argument, see Frank R. Herrmann, *30=20: "Understanding" Maximum Sentence Enhancements*, 46 BUFF. L. REV. 175, 190-97 (1998) (describing—and embracing—this type of positivist argument in support of defining facts as elements if they increase a statutory maximum). *See also* Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 308-09 (1992) (defining the positivist argument but criticizing its procedural consequences). The Court has also used this positivist line of logic in its decisions concluding that states can determine what parole procedures they will use. *See id.* at 330.

[34] *Harris*, 536 U.S. at 567.

[35] *Id.* at 569-70 (Breyer, J., concurring).

[36] *Ring*, 536 U.S. at 597.

[37] *Id.* at 609.

[38] *Harris*, 536 U.S. at 568-69.

petitioner entered a plea of guilty to one count of second degree kidnapping with a deadly weapon and one count of second degree assault.[39] These are "class B" felonies under Washington state law, and such felonies carry a maximum punishment of ten years.[40] But the Washington state legislature passed another statute that governs these offenses, the Sentencing Reform Act of 1981,[41] which establishes a grid of presumptive sentences based on the seriousness of the offense and the criminal history of the offender. Under this binding, duly enacted law, the standard sentencing range for Blakely's kidnapping offense was forty-nine to fifty-three months, and the range for the assault count was twelve to fourteen months.[42] The Washington Sentencing Reform Act dictates that a court "shall impose"[43] a sentence within these standard ranges unless it finds "substantial and compelling reasons justifying an exceptional sentence."[44] The Act then sets forth factors that may justify a "substantial and compelling" reason to give a sentence above the standard range. The trial court found (by a preponderance of the evidence) such statutorily enumerated factors in Blakely's case and imposed a sentence of ninety months.[45] Blakely argued in his petition for certiorari to the Supreme Court that this increase violated the Court's statutory maximum rule as described in *Apprendi* and *Ring* because the facts to which he pleaded guilty did not authorize a sentence of ninety months under the state's guideline regime.[46] The Court in *Blakely* will therefore need to explain whether there is a constitutional difference between the statutory maximum at issue in *Apprendi* and the statutory ceilings created by mandatory sentencing guidelines. A decision from the Court could therefore have enormous implications for all legally binding sentencing guidelines.[47]

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[39] Petition for Certiorari, *Blakely v. Washington*, No. 02-1632, 2003 WL 22427993, at *3-4.

[40] Respondent's Brief in Opposition, *Blakely v. Washington*, No. 02-1632, 2003 WL 22427994, at *7.

[41] WASH. REV. CODE § 9.94A.310 (recodified as amended at § 9.94A.510 (2001)).

[42] Petition for Certiorari, *Blakely v. Washington*, *supra* note 39, at *4.

[43] WASH. REV. CODE § 9.94A.120(1) (recodified as amended at § 9.94A.505(1)-(2) (2001)).

[44] *Id.* § 9.94A.120(2) (recodified as amended at § 9.94A.505(2)(b) (2001)).

[45] Petition for Certiorari, *Blakely v. Washington*, *supra* note 39, at *4-5.

[46] *Id.* at *11.

[47] Although the petitioner in *Blakely* has attempted to argue that a ruling in his favor would not call into question the Federal Sentencing Guidelines—because, according to Blakely, those guidelines are promulgated by a judicial commission instead of Congress and are therefore not "statutory" maximum sentences, *id.* at *16-17—the Court may well find this distinction unpersuasive. *See infra* note 342 (explaining why

The Court's bright-line, statutory maximum test offers little guidance, however, to the questions posed by mandatory guideline regimes (such as the one at issue in *Blakely*) because the Court's test lacks a theory of the jury's role to support it. What, exactly, is the constitutional difference between a law that authorizes a mandatory minimum sentence upon the finding of a particular fact and a law that authorizes a maximum sentence upon the finding of a particular fact? Why is the jury's involvement critical in the latter situation but not the former? Similarly, why should it matter that the maximum sentence is contained in a statute as opposed to a legally binding sentencing guideline? One looks in vain for answers to these questions in the Court's opinions, for the Court has thus far failed to wrestle with the antecedent question of what, precisely, is the jury's constitutional function. Instead, the Court's answer has been a formal one: as long as the sentence received by the defendant falls within the range authorized by statute for the facts found by the jury, it is permissible.

And although there is already a burgeoning literature analyzing the meaning of *Apprendi*,[48] none of it approaches the problem as a

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the Sentencing Guidelines might pose an even greater constitutional concern than sentencing laws enacted by a legislature).

[48] *See, e.g.*, Stephanos Bibas, Apprendi *and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311 (2001) (responding to criticism of Nancy King and Susan Klein and reiterating argument that defendants are disadvantaged under *Apprendi*); Bibas, *supra* note 7, at 1115-23 (arguing that *Apprendi* makes defendants worse off because of its operation under the system of Federal Sentencing Guidelines and plea bargaining and endorsing a test that gives legislatures freedom to allocate facts between sentencing and trial); Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002) (advocating a presumption that juries decide all facts that increase punishment absent a compelling reason why they should not make such a determination); Huigens, *supra* note 7 (arguing that the proper line between offense elements that must go to the jury and sentencing factors that must go to the judge should be determined based on whether the facts pertain to moral questions of fault, and if they do, those facts are offense elements that should go to the jury); Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295 (2001) (disagreeing with Stephanos Bibas's argument that defendants are worse off under *Apprendi* when they plea bargain); King & Klein, *supra* note 7 (advocating a multi-factor test for identifying the few instances when legislatures should not be allowed to draft around *Apprendi*'s rule); Andrew M. Levine, *The Confounding Boundaries of "*Apprendi*-Land": Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377, 400-54 (2002) (arguing that there is no logical basis under *Apprendi* for not treating Guidelines factors or factors imposing a mandatory minimum as offense elements); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating* Apprendi, 12 FED. SENTENCING REP. 320 (2000) (describing *Apprendi*'s holding as narrow and discussing its effect on federal drug prosecutions); Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The* Apprendi *Debate*, 12 FED. SENTENCING REP. 197 (2000) (arguing that *Apprendi* will have unintended, negative consequences on defendants because defendants will have to produce

question of separated powers and the jury's role within that structure.[49] But only by considering the problem from this angle can a

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evidence on an increasing range of issues that might be prejudicial before a jury and because the decision will limit judges' ability to go beyond plea agreements); Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243, 248-53 (2001) (disagreeing with an approach that would read *Apprendi* to require either a return to the prior discretionary regime or a jury determination on all Sentencing Guidelines questions and instead arguing that further due process protections should apply whenever judges sentence defendants, including the right to confront witnesses, a proof beyond a reasonable doubt standard for the prosecutor, and an opportunity for the defendant to appeal the judge's decision); Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775, 779-84, 802-05 (2002) (arguing that *Apprendi* hurts defendants because it enhances prosecutorial power and advocating code reform as an alternative approach); B. Patrick Costello, Jr., Comment, Apprendi v. New Jersey*: "Who Decides What Constitutes a Crime?" An Analysis of Whether a Legislature is Constitutionally Free to "Allocate" an Element of an Offense to an Affirmative Defense or a Sentencing Factor Without Judicial Review*, 77 NOTRE DAME L. REV. 1205 (2002) (arguing that *Apprendi* should be reconsidered and that the Court should allow judges to increase sentences beyond statutory maxima); Jason Ferguson, Casenote, Apprendi v. New Jersey*: Should Any Factual Determination Authorizing an Increase in a Criminal Defendant's Sentence Be Proven to a Jury Beyond a Reasonable Doubt?*, 52 MERCER L. REV. 1531 (2001) (describing possible readings of *Apprendi* without taking a position on the appropriate standard for identifying offense elements); Andrew J. Fuchs, Note, *The Effect of* Apprendi v. New Jersey *on the Federal Sentencing Guidelines: Blurring the Distinction Between Sentencing Factors and Elements of a Crime*, 69 FORDHAM L. REV. 1399, 1419-38 (2001) (arguing that *Apprendi* should be read narrowly and not be read to invalidate the Sentencing Guidelines); Robert S. Lewis, Note, *Preventing the Tail from Wagging the Dog: Why* Apprendi *'s Bark is Worse than Its Bite*, 52 CASE W. RES. L. REV. 599, 601-07, 612-26 (2001) (arguing that *Apprendi* follows from the Supreme Court's prior cases, which barred judges from sentencing above a statutory maximum based on factors determined by a preponderance of the evidence); Elizabeth A. Olson, Comment, *Rethinking Mandatory Minimums after* Apprendi, 96 NW. U. L. REV. 811, 825-42 (2002) (arguing that the analysis in *Apprendi* should apply to mandatory minimums); Freya Russell, Casenote, *Limiting the Use of Acquitted and Uncharged Conduct at Sentencing:* Apprendi v. New Jersey *and Its Effect on the Relevant Conduct Provision of the United States Sentencing Guidelines*, 89 CAL. L. REV. 1199 (2001) (arguing that the reasoning of *Apprendi* dictates that courts cannot use the relevant conduct provision of the Sentencing Guidelines to increase the Guidelines range for an offense); Stephanie B. Stewart, Note, Apprendi v. New Jersey*: Protecting the Constitutional Rights of Criminals at Sentencing*, 49 U. KAN. L. REV. 1193, 1201-17 (2001) (praising the bright-line test adopted in *Apprendi* but observing the uncertainty of how it will affect upward departures under the Sentencing Guidelines); Analisa Swan, Note, Apprendi v. New Jersey, *The Scaling Back of the Sentencing Factor Revolution and the Resurrection of Criminal Defendant Rights, How Far is Too Far?*, 29 PEPP. L. REV. 729, 746-85 (2002) (arguing that *Apprendi* should be narrowly construed because of the potential for a broad reading to disrupt a multitude of state and federal sentences).

[49] Although Stephanos Bibas has written a brief essay on his view of how *Apprendi* affects "institutional allocations of power," he ignores the jury's structural role in that analysis because he believes it is "anachronistic" to focus on the jury. Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 474 (2002). In his view, "the real institutional competition" is "among legislatures, sentencing commissions, judges, and prosecutors." *Id.*

coherent picture of the jury and its relationship to sentencing laws emerge.

Part I of this Article sets the stage for this analysis by describing the critical check on state power that the criminal jury is designed to provide under our constitutional structure and, more importantly, explaining *how* the jury is designed to fulfill that purpose. In particular, it shows that the constitutional architecture allows the jury to check the operation of general laws in individual cases when justice so requires. This vision of the jury's function is consistent with the view of the jury both at the Nation's founding and throughout subsequent history. While the courts have chipped away at the margins of the jury's power to check general laws and individualize their application, the jury's core power to acquit against the evidence without facing review has remained intact.

Part II explains the threat mandatory sentencing guidelines pose for the jury's role. Specifically, this Part describes how the Federal Sentencing Guidelines not only impede the jury's role at trial, but also undercut the indirect effect the jury has on plea negotiations.

Part III offers an alternative proposal to the Supreme Court's test for determining when a fact must be found by a jury and cannot be labeled a mere sentencing factor. This Part argues that the key determinant should be whether a binding law links the presence or absence of a fact with a prescribed amount of punishment and limits judicial discretion to depart from that legislative judgment by allowing the government to seek review of the judge's decision. As this Part explains, it is this legislative judgment that upsets the constitutional balance of powers and undercuts the valuable role the jury serves. Thus, under this analysis, juries, not judges, must apply mandatory sentencing laws.

I. THE ROLE OF THE JURY IN THE CONSTITUTIONAL STRUCTURE OF SEPARATED POWERS

Determining the constitutional role of the jury is, admittedly, not a straightforward task. The text of the Constitution provides little guidance as to what a trial by jury entails—save to point out that the jury is responsible for the trial of all "[c]rimes"[50] and "criminal prosecutions."[51] Unfortunately, the question of what is a "crime"

[50] U.S. CONST. art. III, § 2, cl. 3.

[51] *Id.* amend. VI.

admits of no easy answer.[52] If the definition of a criminal law was straightforward in the eighteenth century, it is far less clear today.

This Part therefore seeks the constitutional meaning of trial by jury by looking at the constitutional structure, the historical roots of the jury, and the subsequent history of the jury guarantee.[53] Section A begins by discussing how the jury protects liberty under the constitutional structure. The way we conceptualize how the jury protects liberty is critical to understanding the relationship between the jury and sentencing laws. Section A will show that a strong power both to find facts and to check general laws imposing criminal punishment is at the core of the jury's function and that this power has firmly established historical roots. Section B then traces the development of the jury's constitutional role up to the advent of mandatory sentencing laws.

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[52] The dictionaries published at the time of the Framing do not even bother defining "crime" or "criminal." *See, e.g.*, GILES JACOB, A NEW LAW DICTIONARY (8th ed., London, H. Woodfall & W. Strahan 1762) (neglecting to define these terms); 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY (3d ed., London 1783) (same). These "omissions" perhaps suggest that the words' meanings required no definition or elaboration. *See* John W. Poulos, *Liability Rules, Sentencing Factors, and the Sixth Amendment Right to a Jury Trial: A Preliminary Inquiry*, 44 U. MIAMI L. REV. 643, 698 (1990) (suggesting that "the [F]ramers had such a clear conception of 'crime' in mind that the word needed neither debate nor definition"). At the Constitutional Convention, the Committee on Detail originally phrased the relevant language in Article III as "trial of all criminal offenses." Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 969 (1926). On the floor of the Convention, however, a motion was approved without debate to change the language to "trial of all crimes." *Id.* Felix Frankfurter and Thomas Corcoran surmised that the intention behind the change was to exclude petty offenses from the constitutional requirement. *Id.*; *see also* Schick v. United States, 195 U.S. 65, 70 (1904) (stating that the change from "criminal offenses" to "crimes" was meant to exclude petty criminal offenses from the jury trial requirement). *But see id.* at 98 (Harlan, J., dissenting) ("A crime is a criminal offense and a criminal offense is a crime."). "Offence" was defined at the time as "an Act committed against a Law, or omitted where the Law requires it, and punishable by it." JACOB, *supra*.

[53] There are, of course, many ways to go about the task of interpreting the Constitution. It is not the aim of this Article to resolve the fundamental question of how best to do so. Rather, I look to the most generally accepted sources of meaning: the text, structure, original history, and subsequent history. Because these lines of inquiry all point to the same conclusion, it is not necessary to resolve which methodology should supercede the others. *See* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1194-1209 (1987) (presenting "a typology of constitutional argument" based on five different approaches); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 577-90 (2001) (arguing that constitutional interpretation is based on text, history, and structure).

A. *The Jury's Function in the Constitutional Structure*

Even before the addition of the Bill of Rights, Article III established that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[54] The placement of the criminal jury in Article III highlights that the criminal jury is not a constitutional afterthought, but a central institution in the operation of the government.[55] Article III makes clear that the jury is to play the judicial role of trying criminal cases.[56] The addition of the Sixth Amendment confirms the importance of a local jury in all "criminal prosecutions."[57]

This constitutional language highlights that the jury serves a key function in all criminal cases. To gain a fuller appreciation of what that function is, however, it is necessary to move beyond the text and look at the power vested in the criminal jury through its authority to issue a general verdict and through the operation of the Double Jeopardy Clause. As the Supreme Court has acknowledged, "Juries at the time of the Framing could not be forced to produce mere 'factual findings,' but were entitled to deliver a general verdict pronouncing the defendant's guilt or innocence."[58] Accordingly, the Supreme Court has always respected "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts."[59] Because the Double Jeopardy Clause shields *absolutely* a jury's general verdict of acquittal from review, the jury has necessarily been given the power to decide the law as well as the facts in criminal

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[54] U.S. CONST. art. III, § 2, cl. 3.

[55] *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1196 (1991) (stating that the Article III mandate of trial by jury is "a command no less mandatory and structural" than the other commands of Article III); *see also* Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 689 (1995) [hereinafter Paulsen, *Some Modest Proposals*] (asserting that the jury is understood as the "single most important check on overweening government power" and "a vital institution for putting the People in charge of the administration of government"); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 291 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*] (noting that "[t]he power of juries has a stronger claim to legitimacy than does that of judges" because "the jury's interpretive supremacy is substantively conferred by the Constitution").

[56] *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . .").

[57] *Id.* amend. VI. The Sixth Amendment specifies that "the accused shall enjoy the right to . . . an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." *Id.*

[58] United States v. Gaudin, 515 U.S. 506, 513 (1995).

[59] *Id.*

cases. And this unreviewable power to acquit gives it a check on the government. The jury is, by design, like the other checks and balances in the government: "further protection against arbitrary action."[60]

As to the executive, a jury verdict of acquittal is an absolute check against executive action to punish an individual for a criminal offense.[61] Once a jury has acquitted a defendant, the Double Jeopardy Clause prohibits the executive from prosecuting the individual again for the same offense. Thus, the jury requirements established in Article III and the Sixth Amendment "constitute specific assignments of a 'trump everyone' power to juries in criminal cases, for purposes of a particular criminal case only."[62]

The jury's unreviewable power to issue a general verdict of acquittal further acts as a check on judges. While judges have the power to block government action against the individual even when the jury agrees with that action—that is, the power to overturn jury convictions to protect a defendant[63]—they cannot impose a conviction when the jury disagrees.[64] The verdict of not guilty "'is, in every respect, absolutely

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[60] Duncan v. Louisiana, 391 U.S. 145, 156 (1968). For an economic analysis of why it is valuable to give the jury this power to check the government and prevent rent-seeking, see KEITH N. HYLTON & VIKRAMADITYA S. KHANNA, TOWARD AN ECONOMIC THEORY OF CRIMINAL PROCEDURE 42-44 (Boston Univ. Sch. of Law, Law and Economics, Working Paper No. 01-02, 2002), *available at* http://www.bu.edu/law/faculty/papers/pdf_files/HyltonKhanna033001.pdf.

[61] Nancy King has likened this power to the executive's power to pardon. *See* Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 455 (1998) ("Neither [jury] acquittal nor pardon establishes a precedent for any other case, neither can be overturned by the judiciary nor by Congress, and both can achieve the same result: the release of a person guilty of a criminal offense as defined by the legislature." (footnotes omitted)). King also observed that "[t]he jury's check on punishment is . . . similar to the power of the executive to *refuse* to prosecute: both are assumed to be beyond the reach of judicial order or legislative mandate." *Id.*

[62] Paulsen, *The Most Dangerous Branch*, *supra* note 55, at 289. Indeed, because of these provisions, Michael Stokes Paulsen, one of the most vocal advocates for a strong executive, argues that "[t]he power of juries has a stronger claim to legitimacy" on the executive "than does that of judges." *Id.* at 291.

[63] *See* FED. R. CRIM. P. 29(c) (outlining the steps for a defendant's motion for judgment of acquittal after a guilty verdict). To be sure, the standard for reviewing jury convictions is deferential. But the judge nevertheless has some power to check juries that convict for improper reasons. *Id.* As a result, the broad discretionary power that rests with juries is essentially a one-way ratchet that allows the jury to protect the defendant's liberty, not to threaten it.

[64] *See* Kepner v. United States, 195 U.S. 100, 124-26 (1904) (holding that the Double Jeopardy Clause does not permit a criminal acquittal to be overturned).

final.'"[65] Thus, judges cannot issue directed verdicts of guilty in criminal cases or overturn jury acquittals.[66] Nor can they require a special verdict in a criminal case that allows the jury to decide only the facts and prevents the jury from applying the law to those facts.[67] As the First Circuit explained, underlying these rules "is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic."[68]

The jury's unreviewable power to apply the law to the facts before it also serves as a potent check on the legislature. It allows the jury to ignore the letter of the law when it believes justice so requires.[69] Unlike the civil jury, whose factual findings and applications of law can be overturned, the criminal jury enjoys constitutional protection of both. The Fifth Amendment's Double Jeopardy Clause protects the jury's general verdict of acquittal, whether it is because the jury disagrees that the facts establish legal guilt or because the jury believes that, although the defendant is guilty under the letter of the law, she

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[65] Sparf v. United States, 156 U.S. 51, 149 (1895) (Gray, J., dissenting) (quoting People v. Croswell, 3 Johns. 337, 368 (N.Y. Sup. Ct. 1804)).

[66] *See* United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977) (explaining that, because the jury's "overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government[,] . . . a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict"); *see also Sparf*, 156 U.S. at 105 (finding a directed guilty verdict to be inappropriate); United States v. Garaway, 425 F.2d 185, 185 (9th Cir. 1970) (per curiam) (holding that a directed verdict is improper even when the evidence is undisputed); United States v. Spock, 416 F.2d 165, 180 (1st Cir. 1969) ("In a criminal case a court may not order the jury to return a verdict of guilty, no matter how overwhelming the evidence of guilt.").

[67] *See* United States v. Gaudin, 515 U.S. 506, 513-14 (1995) (explaining that the jury's general verdict allows it to decide questions of law); *Sparf*, 156 U.S. at 80-81 (finding a special verdict inappropriate); *Spock*, 416 F.2d at 181 ("'It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.'" (quoting GEORGE B. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905))); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury Trial in the United States*, 61 U. CHI. L. REV. 867, 912-13 (1994) ("[N]ineteenth-century disputants agreed that . . . judges should not require juries to return 'special verdicts' in criminal cases" because doing so "would have forced juries into too narrow a factfinding role."). Special verdicts have been permitted in two instances: (1) when "the determination of a particular fact will be crucial to sentencing the defendants," *Spock*, 416 F.2d at 182 n.41, and (2) in treason cases, *id.*

[68] *Spock*, 416 F.2d at 182.

[69] Juries in eighteenth-century England had a similar power to apply the law—a power long part of the English jury system—and used it to mitigate the harshness of the law. *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800, at 313-15 (1985) (discussing how juries in eighteenth-century England mitigated capital offenses).

should not be deemed morally blameworthy because of some higher principle of justice.[70] The criminal "jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[71] As a result, the jury has broad power to apply—and, if it deems necessary, nullify—the law.[72]

History confirms this reading. Although capturing the "original understanding" of any provision of the Constitution can be difficult, the jury guarantee presents a situation in which there was broad consensus about its importance and function. Even before the Constitution was ratified, it appears that the jury was esteemed precisely because it could provide a key check on the government by the people in order to protect individual liberty. And that sentiment carried forward to the constitutional debates.

When the colonists came to North America, they immediately began "enact[ing] local laws to preserve and exercise their right to [jury] trials."[73] To a large extent, the provision for jury trials went

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[70] *See* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1012-17 & nn.41-57, 1033-34, 1034 n.99 (1980) (commenting on the jury's "prerogative to acquit against the evidence").

[71] *Gaudin*, 515 U.S. at 514.

[72] *See* Westen, *supra* note 70, at 1016-17 (concluding that the absence of directed verdicts in criminal trials allows juries to nullify the law); *see also* Harris v. Rivera, 454 U.S. 339, 346 (1981) (noting that the jury has "unreviewable power . . . to return a verdict of not guilty for impermissible reasons"); Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 131-32 ("[A]t some level, at least, nullification is implicit in the constitutional notion of trial by jury, because nothing else explains why a criminal defendant has a right to resist a directed verdict of conviction, why he has a right to insist on a general verdict . . . and why neither he nor the prosecutor has the right to challenge a verdict for factual inconsistency." (footnotes omitted)).

[73] Andrew Joseph Gildea, *The Right to Trial by Jury*, 26 AM. CRIM. L. REV. 1507, 1508 (1989). The only existing recorded law from the first five years of the Plymouth Colony, for example, is a list of criminal offenses and a provision for jury trials in all criminal cases. *Id.* Other colonies inserted similar jury trial provisions in their governing documents. *Id.* at n.7. Not all of the colonists, however, were equally concerned with jury trials at the outset. *See* LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 24-27 (1993) (recounting the minimal role that juries played in some colonies during the seventeenth and eighteenth centuries).

It should also be noted that, in seventeenth- and eighteenth-century England, jurors "became the first line of defense against the abuses of royal officials." Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 384. In several prominent cases, such as *Bushell's Case* and the *Seven Bishops' Case*, the jury refused to convict, establishing their independence from judicial instructions and resisting pressure to render verdicts of conviction. *Id.*; *see also* Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 171 (1964) (noting the "popularity of

hand-in-hand with the establishment of the colonies themselves. The colonists did not envision a jury trial as merely a paper ideal or a fact-finding process. They viewed the jury as an essential protector of their liberty against government overreaching.

The case of John Peter Zenger provides an illustration of the strong role assumed by juries in the United States.[74] In 1734, the royal governor in New York sought to punish Zenger for publishing criticism of the administration.[75] After three grand juries refused to indict Zenger, the governor prosecuted him on the basis of an "information."[76] At the trial, Zenger's lawyer argued that the petit jurors "ha[d] the right, beyond all dispute, to determine both the law and the fact"[77] and could conclude that the truth of Zenger's criticisms could be the basis of an acquittal, even though the law on the books stated that truth was not a defense to libel. The jurors used their power to return a general verdict to acquit. The case was highly publicized; an account of the trial was produced in pamphlet form and widely circulated throughout the colonies.[78] It "impressed thousands of Americans with the importance of the right to jury as a bulwark against official oppression"[79] and "'revolutionized America.'"[80] It was one of many cases in which a jury essentially nullified the law of seditious libel,[81] and it demonstrated the jury's power to decide cases based on its notions of fundamental law.[82]

In the 1760s and 1770s, criminal juries routinely wielded their power against the Crown. Criminal grand juries refused to indict "persons accused either of political offenses such as rioting or of violating imperial statutes such as the revenue laws."[83] John Reid has

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the jury in eighteenth century England, where it was regarded as a check on the manipulation of the law as an instrument of royal despotism").

[74] Alschuler & Deiss, *supra* note 67, at 871.

[75] Ironically enough, one of his criticisms was that the governor disposed of trial by jury at will. *Id.* at 872.

[76] Harrington, *supra* note 73, at 393.

[77] Sparf v. United States, 156 U.S. 51, 146 (1895) (Gray, J., dissenting).

[78] Harrington, *supra* note 73, at 393-94.

[79] J. GUINTHER, THE JURY IN AMERICA 30 (1988).

[80] RICHARD B. MORRIS, FAIR TRIAL 91 (1953) (quoting Gouverneur Morris).

[81] Alschuler & Deiss, *supra* note 67, at 874.

[82] *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 31-32 (2001) (describing the jury's power to enforce fundamental law).

[83] JOHN PHILLIP REID, IN A DEFIANT STANCE 45 (1977). Juries were used offensively as well. Criminal juries convicted customs officials who used violence to repel

explained that juries were one of the legal institutions that the colonists used "to oppose or harass the enforcement of that part of British imperial law that American whigs viewed as unconstitutional."[84]

Given the importance of the jury, it is no surprise to learn that one of the aggravating factors leading to the American Revolution was the perception that the Crown had been attempting to emasculate colonial juries.[85] Among the jury-related events leading to the American Revolution, some of the greatest instigators were the various Acts of Parliament that deprived colonists of their right to jury trial. For instance, although the Stamp Act earned its infamy as an instance of taxation without representation, colonists were also outraged that violators of the Act were to be tried in admiralty courts in London, thereby depriving them of a local jury.[86] John Adams and the Town of Braintree decried the Stamp Act for "mak[ing] an essential Change in the Constitution of Juries," noting that it was "directly repugnant to the Great Charter itself."[87]

Thus, when the First Continental Congress passed the 1774 Declaration and Resolves,[88] which encouraged colonists to boycott English goods, it attacked these Acts for "depriv[ing] the American subject of trial by jury . . . and [for being] subversive of American rights."[89] The document declared that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."[90] In 1775, the Second Continental Congress listed England's interference with the right to trial by jury among its grievances in the Declaration of the Causes and Necessity of Taking Up Arms.[91] The Declaration of Independence in 1776 restated many

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whig mobs. *Id.* at 56-59. Colonists also filed civil cases before colonial juries to harass customs agents. *Id.* at 28-40.

[84] *Id.* at 72.

[85] *See* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries To Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 123 (1998) (stating that England's "threats—and actual attempts—to bypass . . . juries helped bring about the Revolution").

[86] Gildea, *supra* note 73, at n.17.

[87] *Instructions*, DRAPER'S MASS. GAZETTE, Oct. 10, 1765, *reprinted in* 1 PAPERS OF JOHN ADAMS 140, 142 (Robert J. Taylor ed., 1977).

[88] Declaration and Resolves of the First Continental Congress (Oct. 14, 1774), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 1 (Charles C. Tansill ed., GPO 1927).

[89] *Id.* at 4.

[90] *Id.* at 3.

[91] Harrington, *supra* note 73, at 395.

of the complaints in the first two Declarations, including the "depriv[ation] in many Cases, of the Benefits of Trial by Jury."[92]

The right to jury trial, then, was a key concern of Revolutionary America. The jury was seen as much more than a factfinder; it was a valuable check on government action—including duly enacted criminal laws. John Adams explained:

> As the Constitution requires, that, the popular Branch of the Legislature, should have an absolute Check so as to put a peremptory Negative upon every Act of the Government, it requires that the common People should have as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature.[93]

The general verdict, he proclaimed, not only gives jurors the right, but the duty "to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[94]

By the time "the delegates to the Constitutional Convention gathered in 1787, the fundamental nature of a citizen's right to jury trial in a criminal case was deeply embedded in the national consciousness."[95] As Bill Nelson has observed, "For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights."[96] Each state guaranteed the right to trial by jury in a criminal case, as had the Articles of Confederation.[97] Indeed, because "its excellences are so well understood," it was not thought "necessary to be very prolix in pointing them out."[98]

The right to a jury trial in criminal cases was one of the rare subjects on which both the Federalists and the Anti-Federalists agreed. Alexander Hamilton noted in Federalist No. 83 that "[t]he friends and adversaries of the plan of the convention, if they agree in nothing

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[92] THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

[93] John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771), *in* 1 LEGAL PAPERS OF JOHN ADAMS 228, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

[94] *Id.* at 230.

[95] Gildea, *supra* note 73, at 1514.

[96] WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 96 (1994).

[97] *Id.*; Harrington, *supra* note 73, at 396.

[98] 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 515 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) [hereinafter 2 ELLIOT'S DEBATES].

else, concur at least in the value they set upon the trial by jury."[99] All, he noted, "are satisfied of the utility of the institution."[100] As he put it, the distinction is, at most, between the Federalist view that it is "a valuable safeguard to liberty" and the Anti-Federalist view that it is "the very palladium of free government."[101] As a result, guaranteeing a jury in criminal cases drew no objection at the Federal Convention or in the state ratification debates.[102]

Even with an elected government, there was agreement that the people should have another check on government action in the criminal context, an area in which the government's power is at its apex. Only by interposing the people directly between the state and the individual charged with a crime could the people guarantee that the new government would not mimic the tyranny of its predecessor.[103] As Alexis de Tocqueville observed, the jury was "a political institution . . . one form of the sovereignty of the people."[104] "The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage."[105]

The Framers continued to believe that the criminal jury was much more than "a utilitarian fact-finding body."[106] Instead, a common

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[99] THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[100] *Id.*

[101] *Id.*

[102] Gildea, *supra* note 73, at 1516. The debate centered instead on whether and how to *expand* the right to trial by jury. The Anti-Federalists demanded a constitutional guarantee of civil jury trials and the right to have jurors drawn from the vicinage. 2 ELLIOT'S DEBATES 109-14; *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 59-61 (Herbert J. Storing ed., 1981); 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587, 628 (Max Farrand ed., rev. ed. 1966); *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents*, PA. PACKET & DAILY ADVERTISER, Dec. 18, 1797, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST, *supra*, at 145, 159-61.

[103] "For the [R]evolutionary and [F]ounding generations, the criminal jury reliably stood between the individual and government, protecting the accused against overzealous prosecutions, corrupt judges, and even tyrannical laws." JEFFREY ABRAMSON, WE, THE JURY 87 (1994).

[104] ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 283 (Phillips Bradley ed., Knopf 1945) (1835).

[105] *Id.*

[106] Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1249 (1995); *see* Jon M. Van Dyke, *The Jury as a Political Institution*, 16 CATH. LAW. 224, 233-37, 240 (1970) (describing Supreme Court cases that endorse a view of the jury's role as more than a mere factfinder); *see also* Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal*

theme expressed at that time compared the jury's power to that of a voter, checking the government and its laws.[107] Just as the people check laws in their capacity as voters, "no Man can be condemned of Life, or Limb, or Property or Reputation, without the Concurrence of the Voice of the People."[108] The Maryland Farmer, an Anti-Federalist, described the jury as "*the democratic branch of the judiciary power*—more necessary than representatives in the legislature."[109]

The distinction drawn between jurors and judges stemmed from the fact that jurors were a form of direct popular sovereignty, whereas judges were still mere agents of the people.[110] Some thought judges were "always ready to protect the officers of government against the weak and helpless citizen."[111] Others deemed judges "untrustworthy, . . . exposed to bribes, . . . fond of power and authority, and . . . the dependent and subservient creatures of the legislature."[112] The multi-member jury drawn from the people was therefore thought a necessary safeguard against "the compliant, biased, or eccentric

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Juries, 61 GEO. WASH. L. REV. 723, 736-37 (1993) (noting that a mere factfinding function for the criminal jury would make it an "imperfect check[] on the possible abuse of power by legislators, prosecutors, or law enforcement officials" because abuse of power in the criminal context may include not only the prosecution of the innocent, but also "prosecution under an unjust law, prosecution of a defendant against whom application of a facially just law would nonetheless cause injustice, or bad faith prosecution of a defendant for conduct that violates no law" (footnote omitted)).

[107] John Adams noted that "[t]he Rights of Juries and of Elections, were never attacked singly in all the English History. The same Passions which have disliked one have detested the other." Adams, *supra* note 93, at 229. Tocqueville, too, recognized the parallel, arguing that, "in order that society may be governed in a fixed and uniform manner, the list of citizens qualified to serve on juries must increase and diminish with the list of electors." TOCQUEVILLE, *supra* note 104, at 283-84; *see also* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 218-21 (1995) (describing the Framers' vision of juries as avenues for political participation).

[108] Adams, *supra* note 93, at 229.

[109] *Essays by a Farmer (IV)*, MD. GAZETTE, Mar. 21, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 36, 38 (Herbert J. Storing ed., 1981). Indeed, the jury has been deemed the "lower judicial bench." JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950). Akhil Amar has argued that this analogy to the voter holds in interpreting the Fifteenth Amendment, which he claims "restore[s] much of the original political vision underlying juries that the Fourteenth Amendment had warped." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 274 (1998).

[110] *See* Kramer, *supra* note 82, at 38-44 ("The legislature and the judiciary are . . . the people's 'servants.' . . . If conflicts arise . . . it is 'the people' who constitute the authoritative 'tribunal' to whom such conflicts must be submitted.").

[111] *Essay of a Democratic Federalist*, *supra* note 102, at 61.

[112] LYSANDER SPOONER, TRIAL BY JURY 124 (London, Sampson Low, Son, & Co. 1852).

judge."[113] It was deemed "essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department."[114]

The jury was the means by which "the people" were injected into the affairs of the judiciary.[115] Thomas Jefferson felt the jury was so critical that he claimed, "[w]ere I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."[116] The jury, in other words, was to check the law in a particular case to ensure justice.

Given their constant struggles with the Crown and the perceived difficulties with judges in England, the Framers wanted the common man's (and, at that point, the jurors were all men) views to be heard before the state's power over criminal laws could deprive an individual of her liberty and brand her with the stigma of a conviction. Even though the Constitution was creating an independent judiciary, there still existed a concern that judges would favor the government over

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[113] Duncan v. Louisiana, 391 U.S. 145, 156 (1968). Nor, as it turns out, was the Framers' inclusion of this extra check on the government an unnecessary one. Indeed, right on the heels of the Constitution's drafting, the government passed the Alien and Sedition Acts, and federal judges enforced them. Thus, publishers prosecuted under the Acts tried to plead their First Amendment defense directly to juries in order to "appeal to the sense of the community," Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *reprinted in* 11 THE PAPERS OF JAMES MADISON 298-99 (R. Rutland & C. Hobson eds., 1977), instead of to the federal judges appointed by the administration. Amar, *supra* note 55, at 1150-51, 1209.

[114] Letter from the Federal Farmer to the Republican, No. 4 (Oct. 12, 1787), *in* 2 THE COMPLETE ANTI-FEDERALIST 245, 249 (Herbert J. Storing ed., 1981) [hereinafter Federal Farmer, Oct. 12]. As a leading Anti-Federalist tract, the Federal Farmer, observed:

> If the conduct of judges shall be severe and arbitrary, and tend to subvert the laws, and change the forms of government, the jury may check them, by deciding against their opinions and determinations, in similar cases. It is true, the freemen of a country are not always minutely skilled in the laws, but they have common sense in its purity, which seldom or never errs in making and applying laws to the condition of the people, or in determining judicial causes, when stated to them by the parties. The body of the people, principally, bear [sic] the burdens of the community; they of right ought to have a controul in its important concerns, both in making and executing the laws, otherwise they may, in a short time, be ruined.

Letter from the Federal Farmer to the Republican, No. 15 (Jan. 18, 1788), *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 315, 320 [hereinafter Federal Farmer, Jan. 18].

[115] Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd & William H. Gaines, Jr. eds., 1958).

[116] *Id.*

the people themselves. After all, in order to be nominated and confirmed, federal judges would need to be sufficiently well-connected to government officials.[117] They would not necessarily have any connection to the community in which they would sit. They would likely develop an allegiance with the government that appointed them and that appeared before them repeatedly. As Justice Gray explained a century later:

> There may be less danger of prejudice or oppression from judges appointed by the President elected by the people, than from judges appointed by a hereditary monarch. But, as the experience of history shows, it cannot be assumed that judges will always be just and impartial, and free from the inclination, to which even the most upright and learned magistrates have been known to yield—from the most patriotic motives, and with the most honest intent to promote symmetry and accuracy in the law—of amplifying their own jurisdiction and powers at the expense of those entrusted by the Constitution to other bodies. And there is surely no reason why the chief security of the liberty of the citizen, the judgment of his peers, should be held less sacred in a republic than in a monarchy.[118]

Even if the people's representatives agreed that certain behavior should be criminalized, the Framing generation wanted the people themselves to have a final say in each case.[119] In criminal trials—trials that, at their core, are trials of the human condition and morality—the jury would allow the morality of the community and its notions of fundamental law to inform the interpretation of the facts and, in some cases, to overcome the rigidity of a general criminal law.[120] That the jurors may have no expertise in questions of legal interpretation was

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[117] *See* AMAR, *supra* note 109, at 87 (noting that "federal judges would be appointed by the central government and might prove reluctant to rein in their former benefactors and current paymasters").

[118] Sparf v. United States, 156 U.S. 51, 176 (1895) (Gray, J., dissenting).

[119] As Theophilus Parsons stated in the Massachusetts Convention of 1788:

> Let [a man] be considered as a criminal by the general government, yet only his own fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.

2 ELLIOT'S DEBATES, *supra* note 98, at 94.

[120] Jeffrey Abramson states it well:

> The jury served freedom not only by getting the facts right but also by getting the people right. Local citizens were empowered to control the actual administration of justice—thus, the jury was our best assurance that law and justice accurately reflected the morals, values, and common sense of the people asked to obey the law.

ABRAMSON, *supra* note 103, at 28.

not a cause for concern.[121] The purpose of the jury was to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity.

Thus, the criminal jury's structural power to check general criminal laws—to nullify them in particular cases if equity requires—has firm historical footing.[122] It is not by chance that the jury has the power to issue an unreviewable general verdict of acquittal; it is a considered decision that the people should apply laws when criminal punishment is at stake to ensure that an individual does not lose her liberty unless it would be just in a particular case. Law application, as Henry Monaghan has observed, "is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment. Thus, law application frequently entails some attempt to elaborate the governing norm."[123] The jury possesses the power to elaborate the governing norms underlying criminal laws from the perspective of the community and its sense of moral blameworthiness. Trial by jury "gives protection against laws which the ordinary man may regard as harsh and oppressive" and provides "insurance that the criminal law will conform to the ordinary man's idea of what is fair and just."[124] As Wigmore observed, "as a rule of law only takes account of broadly typical conditions and is aimed on average results, law and justice every so often do not coincide."[125] The jury's power to issue a general verdict gives the jury flexibility to ensure justice in a particular case when law and justice are in conflict.

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[121] As John Adams noted, "The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great Principles of the Constitution, are intimately known." Adams, *supra* note 93, at 230.

[122] The "[f]ear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[123] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 236 (1985) (footnote omitted). Additionally, see Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999), who notes that "the jury plays a role in interpreting the law," *id.* at 911, "in saying that the law applies in this kind of case, or that it does not apply in another case," *id.* at 909, which causes the law to evolve over time.

[124] SIR PATRICK DEVLIN, TRIAL BY JURY 160 (1966).

[125] John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929); *see also* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 155 (1986) (noting that, "[b]ecause lawmakers cannot anticipate every set of circumstances, it is up to the jury to adjust the general rule of law to the justice of the specific case").

This unreviewable power to be lenient makes the jury a more powerful judicial check on the state than a judge. Although some scholars have argued that the "judicial [p]ower" vested in Article III judges also encompasses the broad power to interpret laws equitably beyond the plain text of the laws themselves,[126] this is not a position without controversy.[127] Most critically, it is not universally accepted by judges themselves. Thus, many (perhaps most) judges will resist this broad role for themselves.[128] Moreover, even if some judges believe that this equitable power should be deemed part and parcel of the "judicial power," it is certainly limited by appellate review.[129] Judges must give reasons for their decisions, and aside from the cases heard by the United States Supreme Court and some cases heard by state supreme courts, those decisions are reviewable by other judges. If the reviewing judge believes it is not the judge's role to reconstruct laws in the name of equity or disagrees with the lower court's assessment of where the equities lie, the lower court judge will be reversed. This dual review gives the state (the legislature and the executive) far greater power over the individual because the likelihood of a judicial check decreases. In addition, judicial review is not the only check on judges. If the legislature does not like a judge's interpretation of the law, it can overrule that interpretation by statute.[130] Or, in the case of

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[126] *See* William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 992 (2001) (arguing that the doctrine of equity of the statute has strong historical roots in our Nation's early constitutional history and is consistent with the concept of "judicial power" in our constitutional structure).

[127] For arguments that the English doctrine of equity of the statute is inconsistent with our constitutional structure, see John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001). Regardless of what the right answer is to *that* question, it is clear that *juries* have always had such power.

[128] Jonathan Molot's recent article makes a persuasive argument that "there are powerful institutional forces at work that distinguish judicial from political decision-making and lead judges more often than political officials to try to fit their decisions into existing legal materials and to strive for consistency and stability over time." Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1308 (2002).

[129] *See id.* (noting the role of appellate and peer review in constraining judicial decision making).

[130] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 562 (2001) (noting that "interpretations of criminal statutes were overruled frequently [by Congress]—more so, by a large margin, than any other class of statutory decisions" and that, in virtually all of those instances, interpretations favoring defendants were the ones that were overruled).

what it believes to be extreme recalcitrance, the legislature might even seek the impeachment of that judge.

The jury, in contrast, does not need to give any reason for an acquittal, and it faces no review by a court or legislature. It therefore has a greater opportunity than a judge to check the state and these general punitive laws. This check on general laws may at first blush seem in tension with "rule of law" values. Why should twelve (or fewer in some states) individuals override a multitude of voters?

There are at least two reasons for this equitable safety valve in criminal cases. First, the potential deprivation of liberty is greatest in criminal cases. An inequitable or rigid application of an overbroad law in this context may result in the most extreme deprivations of liberty the state can exact—criminal punishment—even when punishment is morally inappropriate.[131] Thus, to avoid these high error costs, it makes sense that a more substantial check would be used to ensure that general laws are, in fact, well-conceived and make sense in a particular case.

Second, the risk of this harm is not hypothetical. Even when criminal laws make it past both houses of the legislature—and the executive—these laws (like all laws of general applicability) will be overinclusive.[132] Legislatures cannot predict ex ante all the situations that will be covered by a general law; therefore, the law inevitably will be overbroad and cover some situations that legislators (and those voting for them) would not want covered. This is especially true given the dynamics of crime and punishment in the political process.

People view the law quite differently depending on whether they are acting as jurors facing an individual defendant or as voters viewing

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[131] *See* Poulos, *supra* note 52, at 669 ("The government oppression restrained by the right to a jury trial is the oppression of unwarranted punishment.").

[132] For an insightful explanation of why criminal laws are especially vulnerable to being overinclusive, see Stuntz, *supra* note 130, at 547-57. Kate Stith and José Cabranes argue that sentencing guidelines will be similarly overinclusive. They note that "genuine judgment, in the sense of moral reckoning, cannot be inscribed in a table of offense levels and criminal history categories." STITH & CABRANES, *supra* note 6, at 82. Rather, "it is in the nature of moral and juridical principles that they must be informed by a particular set of facts before they can be applied." *Id.* Whereas they argue for the trial judge to have more discretion, I focus on the corollary point that, when the legislature strips judges of discretion, rules establishing prescribed amounts of punishment must go to the jury. For the argument that discretionary sentencing decisions should rest with juries, see Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999).

the law in the abstract.[133] As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case.[134] Jury trials force the people—in the form of community representatives—to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged. The result is a more measured, individualistic evaluation of whether liberty deprivation is appropriate. It is the essence of the judicial role—law application in an individual case—performed by the people.[135]

Bill Stuntz's recent article demonstrates that this checking function is especially valuable today because current institutional incentives increase the likelihood that laws will be overbroad. As he explains, legislatures will tend to err on the side of overinclusive as opposed to underinclusive laws because they will trust prosecutorial discretion to weed out cases that should not be prosecuted even if those cases fall under the technical definition of the broad law.[136] Legislatures would prefer overinclusion to underinclusion because, while prosecutors can blame legislators when someone falls through the cracks of an underinclusive law and is not punished, legislators can blame prosecutors if they seek to charge individuals under an overinclusive law. And, too, by passing broad laws with fewer elements to prove, legislatures also make it easier for prosecutors to obtain convictions. This gives prosecutors enormous power, both at trial and in the

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[133] *See* Lanni, *supra* note 132, at 1780-81, 1781 nn.24-25 (summarizing research findings that reflect the public's desire for harsher penalties in the abstract and more lenient penalties in the face of a specific case). Other studies have shown that the public is not harsher than the courts in its preferences for punishment and, indeed, is sometimes more lenient. For example, Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME AND JUSTICE: A REVIEW OF RESEARCH 99 (Michael Tonry ed., 1992), cites studies that find the U.S. public less harsh than judges, *id.* at 150, and in some cases, "markedly less punitive" than criminal justice professionals, *id.* at 152.

[134] Lanni, *supra* note 132, at 1781.

[135] Martha Nussbaum defends this result as consistent with equity and justice:

> The point of the rule of law is to bring us as close as possible to what equity would discern in a variety of cases, given the dangers of carelessness, bias, and arbitrariness endemic to any totally discretionary procedure. But no such rules can be precise or sensitive enough, and when they have manifestly erred, it is justice itself, not a departure from justice, to use equity's flexible standard.

MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE 162 (1999).

[136] Stuntz, *supra* note 130, at 549 (explaining why "too little criminalization tends to be riskier than too much" for legislatures).

more common situation of plea bargaining, where prosecutors use this leverage to extract guilty pleas.[137]

The Constitution therefore does not establish the political process and political actors as the only check on the government's determinations of what is criminal. Instead, it places a judicial veto in the hands of the people because the danger of state abuse is especially high and the consequences are especially troubling. Just as the division of Congress into a House and Senate serves the interests of two different (though possibly overlapping) constituencies and checks state abuse of power,[138] so, too, does the division of the judiciary among jury and judge. It is a familiar point that the judiciary provides a critical check on the executive and legislative branches by preventing them from being judges in their own cause.[139] Less commonly observed is the fact that the judiciary is comprised of *both* judges and juries and that this division also checks state abuse of power.

Injecting the jury into the affairs of the judiciary and giving it a nullification power that the judge does not possess gives the people a greater say on how criminal laws are applied to members of their community.[140] Not only does this curb the authority of the judges themselves,[141] but it also provides a check on the legislature and

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[137] As Bill Stuntz notes, this systemic bias toward overly broad laws means that "there is no reason to suppose that any given crime definition accurately reflects majoritarian preferences. The public may wish to punish 'core' fraud, and legislators and prosecutors may share that preference, yet the statute books may (and do) criminalize a great deal more." *Id.*

[138] *See* Victoria Nourse, *The Vertical Separation of Powers*, 49 DUKE L.J. 749, 761-88 (1999) (identifying constituencies as the basis for the power of each branch of government and advocating an approach to separation of powers questions that focuses on the relative power of different constituencies); Laura S. Fitzgerald, *Cadenced Power: The Kinetic Constitution*, 46 DUKE L.J. 679, 743-52 (1997) (highlighting the importance of "nested constituencies" to the constitutional balance of power). Interestingly, while these separation of powers scholars recognize the two distinct branches of the legislature and their different constituencies, they speak of a single judiciary.

[139] *See* THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that liberty only exists because the judiciary is an independent entity).

[140] As Todd Peterson has noted, "the best way to avoid the concentration and abuse of power by government officials is not to give it to the government in the first place, but to reserve it to the people." Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 58 (1995).

[141] *See* Federal Farmer, Jan. 18, *supra* note 114, at 320 (reiterating the importance of the jury's check on judicial conduct); Peterson, *supra* note 140, at 51-52 (discussing the Anti-Federalists' worries over giving the judge unchecked power and describing how the jury addressed the Anti-Federalists' concerns). Although these sources discuss the checking function of civil juries, the same check is provided by criminal juries—indeed, it is a much more significant check because of the greater power of criminal juries.

executive, which both serve broader constituencies that may not have the same interests as the jury drawn from the community.[142] Removing the check of the jury therefore creates a "majoritarian" danger: "a risk that individual rights would be subject to political will" because a lessening of jury power leads to a corresponding increase of legislative and executive power.[143]

Thus, like other manifestations of the separation of powers, this check is liberty-protecting.[144] Elizabeth Magill has explained one theoretical defense for separating functions among the legislature, executive, and judiciary called "the coordination thesis."[145] Under this theory, "[s]eparating functions is necessary so that three different institutions

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[142] In the federal system, it is easy to see how the jury serves local community interests to a greater extent than a federal judge who was nominated by the President and confirmed by the Senate or than a United States Attorney who was appointed by the same process. In states where judges and prosecutors are elected, it could be argued that they serve the local constituency as well—or even better than—the jury because they represent the entire community whereas twelve jurors may not. It is a debatable point whether elected judges and prosecutors serve community interests as well as juries given the influence of special interest groups and the teachings of public choice theory. Moreover, as discussed above, voters and jurors view criminal cases differently. Because elected officials must respond to voters, they may seek to punish individuals to a greater extent than the people would want, if the people were reviewing the facts of the individual case instead of responding to crime in the aggregate as voters. Thus, jurors may well represent community sentiment more accurately than elected officials in the context of particular cases.

[143] Nourse, *supra* note 138, at 794 (discussing *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986) as a case involving "a shift from a less to a more politically tied decisionmaker—from the judiciary to an [administrative law judge] within the executive department").

[144] *See* Rebecca Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 569-70 (1998) [hereinafter Brown, *Accountability*] (arguing that the election of representatives allowed the people to check governmental abuse of power and thereby protect individual liberty); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514-16 (1991) [hereinafter Brown, *Separated Powers*] (arguing that the separation of powers is designed to protect individual rights). Indeed, it is on this basis that Brown disagrees with the Court's approach to the separation of powers question in *Mistretta v. United States*, 488 U.S. 361, 380 (1988), in which the Court upheld the Sentencing Reform Act of 1984 and its creation of a Sentencing Commission within the judicial branch. According to Brown, "[t]he Court should have decided whether the innovative structural techniques Congress employed in commissioning the [S]entencing [G]uidelines posed a threat to individual rights," and that inquiry should have led the Court to strike down the Guidelines for "consolidating in the Executive Branch the power both to prosecute and to sentence." Brown, *Separated Powers*, *supra*, at 1560; *see also* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 183 n.49 (1972) ("The jury is a democratic institution not in terms of majority rule but rather in terms of rule by the people over themselves.").

[145] M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1185 (2000).

must agree before the government can injure an individual."[146] The criminal jury provides yet an additional check—one from outside the government itself. Before an individual can lose her liberty in a criminal case, the people themselves must agree. Indeed, that is why the jury's verdict of acquittal—but not its verdict of conviction—is unreviewable.

To be sure, the jury is not a perfect check, and we do well to question whether additional safeguards are necessary.[147] However, it is important to acknowledge the threshold protection that the Constitution provides in the form of the jury, especially given the fact that even this baseline protection has been under siege.

B. *Equity in the Jury Box*

As the previous Section demonstrated, there is no question that, at the time of the Framing, the jury was a considerable force in the structure of government and a powerful judicial check. Nor is there a question that the jury retains considerable power. But it would be misleading to stop the historical analysis at the time of the Constitution's Framing without describing the subsequent history of the jury, for the jury's role has changed dramatically in the past two centuries—and aspects of its authority have eroded.

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[146] *Id.* As Magill points out, this same argument can be expressed as protection against arbitrary governmental action. *See id.* at 1185, 1185-86 nn.173-74 (citing scholars advocating this argument). Magill has criticized the coordination thesis because, in her view, the executive and the courts do not independently analyze Congress's judgment: "[b]arring a colorable constitutional claim about the statute or its enforcement in a particular case, the Executive (which, by definition, has either consented to the law or had a veto overridden) would never claim it was not enforcing a statute because the legislature made the wrong choice; nor would a court claim its interpretation had nothing to do with the statute approved by Congress." *Id.* at 1190. Whatever the merits of this argument with respect to the executive and the courts—see *id.* at 1188-89, 1189 n.178, for a discussion about the broad executive power to check the legislature—the criminal jury's power to nullify (and its use of that power in particular cases) shows that the coordination thesis has practical import in those cases where the threat to liberty is greatest.

[147] Bill Stuntz, for example, proposes greater judicial involvement in defining substantive criminal law to correct the defects of the criminal lawmaking process. Stuntz, *supra* note 130, at 587-98. Although he advocates what he calls "constitutionalized sentencing discretion" as part of this package, he is skeptical that the legal case for this is a strong one. *Id.* at 595. This Article attempts to show that the legal foundation for such a claim is, in fact, quite persuasive.

First, there is evidence that, both before the Framing and for a time thereafter, juries were deciding questions of law.[148] For some years after the Revolution and America's founding, many judges refused to tell jurors that they were obliged to accept the judge's view of the law.[149] Furthermore, lawyers argued questions of law before the jury in some cases.[150] Several states explicitly barred judges from intruding upon the jury's power to decide legal questions.[151] In the nineteenth century, however, a debate arose as to whether juries had a "right" to answer questions of law or merely the "power" to do so by virtue of their authority to issue a general verdict and to apply the law to their factfindings.[152] In 1895, in *Sparf v. United States*,[153] the Supreme Court concluded that criminal juries did not have such a right.[154]

This was a more limited view of the jury than that which existed at the Nation's founding.[155] Indeed, Nancy King and Susan Klein have

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[148] *See* NELSON, *supra* note 96, at 21 (noting that juries "had vast power to find both the law and the facts"); David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 98-101 (1995) (describing the evidence from early American history that "supports the proposition that juries had the power and the right to decide the law in a criminal case"); R.J. Farley, *Instructions to Juries*, 42 YALE L.J. 194, 202 (1932) ("In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury . . . ."); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590-96 (1939) (citing examples of nineteenth-century cases in which juries were authorized to decide questions of law).

[149] *See* Harrington, *supra* note 73, at 379, 402 (discussing judges that deferred to juries on points of law).

[150] *Id.* at 390, 402-03.

[151] *Id.* at 391; *see* Howe, *supra* note 148, at 602, 609-12 (mentioning several state laws that protected the jury's authority to decide legal questions from judicial intrusion); Note, *supra* note 73, at 174-75 (discussing the 1808 Massachusetts legislature's adoption of a statute recognizing the right of the jury to decide questions of law).

[152] *See* James B. Thayer, *"Law and Fact" in Jury Trials*, 4 HARV. L. REV. 147, 171 (1890) (distinguishing between the "power" and the "right" of a jury to decide questions of law); *see also* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 212 (1998) (concluding that colonial evidence remains inconclusive as to whether a jury had the *right* to decide questions of law, but not disputing that the jury had the *power* to decide such questions); Note, *supra* note 73, at 176 (arguing that, in Massachusetts, there was "a general acceptance of the jury's right to decide matters of law in criminal cases"). As Michael Stokes Paulsen has observed, however, the power to interpret the law "arises by implication, as a necessary incident to the exercise of specifically delegated powers." Paulsen, *The Most Dangerous Branch*, *supra* note 55, at 241.

[153] 156 U.S. 51 (1895).

[154] *Id.* at 70. For an excellent discussion of how the jury's power to decide questions of law eroded, see ABRAMSON, *supra* note 103, at 67-88.

[155] Although some judges had begun to question the jury's right to decide questions of law by the time the Fourteenth Amendment was ratified in 1868, it is noteworthy

relied on *Sparf* as establishing the "complete demise"[156] of the jury's authority to engage in nullification or "pious perjury" to lower penalties.[157] One can legitimately question whether the Court reached the right result in *Sparf*; but even accepting the Court's decision, it is more limited than King and Klein intimate.

While King and Klein are correct that the Court in *Sparf* did not afford the jury a *right* to nullify or to engage in "pious perjury," the Court did not question the jury's *power* to do so. The Court did not second-guess the jury's authority to issue a general verdict, nor the protection of its verdict of acquittal—which unquestionably gives the jury the ability to ignore or temper the law in an individual case. The Court's distinction between a right to decide the law and the power to do so affected only the instructions a jury would receive. Although these instructions undoubtedly prevent some jurors from questioning the law and the judge's interpretation of it, there are also undoubtedly other jurors who will interpret the law differently from the judge, in spite of the instructions.[158] The compromise reached—essentially a

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that the Supreme Court had not questioned the jury's right to decide questions of law until *Sparf*—almost three decades after the Fourteenth Amendment was ratified.

[156] King & Klein, *supra* note 7, at 1485.

[157] *Id.* (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *238-39).

[158] Although instructions may affect juror behavior in some cases, the empirical evidence shows that jury comprehension of instructions is low and that jurors bring and cling to preconceived ideas of the content of the law. *See* Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1358 (1979) (describing the results of a study showing that standard legal instructions "are not well understood by jurors"); Dan M. Kahan, *Lay Perceptions of Justice vs. Criminal Law Doctrine: A False Dichotomy?*, 28 HOFSTRA L. REV. 793, 796 (2000) (describing empirical research on jurors' conceptions of legal insanity and criminal offenses which indicates that jurors' perceptions "are unaffected by the definitions contained in the instructions that courts give them"); Vicki L. Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts*, 61 J. PERSONALITY & SOC. PSYCHOL. 857, 858 (1991) (claiming that research has shown jury comprehension of instructions to be "quite poor"). This empirical evidence therefore confirms the legal realist critique that "modern jury procedures mask a charade: we have judges go through the motions of instructing jurors on the law and tell them they must abide by the instructions, but we suspect that jurors do not fathom the instructions and fall back on their own gut reactions or common sense in deciding how the case should come out." ABRAMSON, *supra* note 103, at 91; *see also* United States v. Dougherty, 473 F.2d 1113, 1135 (D.C. Cir. 1972) ("The jury knows well enough that its prerogative is not limited to the choices articulated in the formal instructions of the court. The jury gets its understanding as to the arrangements in the legal system from more than one voice.... There is the informal communication from the total culture—literature (novel, drama, film, and television); current comment (newspapers, magazines and television); conversation; and, of course, history and tradition." (footnote omitted)). For a description of a study evaluating the effect of nullification instructions on jurors, see SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL:

"don't ask, don't tell" policy regarding nullification—reflects the fact that the Court was not prepared to remove the safeguard of the jury's equitable power, even if it was reluctant to encourage its use as a matter of course.[159] Put another way, the jury "must judge not merely the defendant's guilt or innocence but the merit of the judge's instructions for the particular case."[160]

Similarly, although the right/power distinction with respect to questions of law has led the Court to condone limits on the kind of evidence a defendant may put before the jury—such as those disallowing express arguments about why laws should be nullified or why a particular defendant might be especially sympathetic[161]—the defendant retains quite a bit of flexibility in telling her story of what happened and why. Thus, the defendant can still appeal to the jury's sense of justice, even if she must do so indirectly.

In sum, although this erosion is significant, it did not strip the jury of its core power to check the state and reach an equitable result, even if it means nullifying the law in a particular case.[162] The criminal jury has retained its power to issue an unreviewable general verdict of acquittal, thus protecting the jury's law-application function and reaffirming that the criminal jury performs more than a factfinding role under the Constitution.

PSYCHOLOGICAL PERSPECTIVES 160-61 (1988). For a discussion of how jurors reasonably interpret the law differently from judges, see Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

[159] This sentiment was reflected in the D.C. Circuit's *Dougherty* opinion when Judge Leventhal praised the "equilibrium [that] has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution." 473 F.2d at 1134. The opinion goes on to state, "What makes for health as an occasional medicine would be disastrous as a daily diet." *Id.* at 1136.

[160] MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 61 (1973). "Because the jury system requires the conscientious juror to distinguish between departing from an instruction at will and departing from an instruction because he has 'damn good reason' for doing so as determined by the role ends he is committed to serve, the jury role retains the obligatory status of the judge's instructions while permitting departures from them." *Id.* at 62.

[161] *See* Daniel C. Richman, Old Chief v. United States*: Stipulating Away Prosecutorial Accountability*?, 83 VA. L. REV. 939, 975-79 (1997) (noting that evidentiary rules limit defendants from "presenting evidence and arguments that explicitly court nullification" and that this prevents the jury from knowing all the information necessary to check the prosecutor).

[162] *See* ABRAMSON, *supra* note 103, at 64 ("Even critics of jury nullification concede that criminal juries have the raw power to pardon lawbreaking because there is no device for reversing a jury that insists on acquitting a defendant against the law.").

Indeed, perhaps the greatest testament to the legitimacy and vitality of the criminal jury's equitable power is the fact that the criminal jury has retained it even as the civil jury's authority has been weakened. The Supreme Court has not allowed the kinds of limits on the criminal jury that it has condoned in the civil context. Devices to correct errors of law that are permissible in the civil context—such as judgments notwithstanding the verdict and appeals—are not available to the government in criminal cases.[163] If the Court did not intend the criminal jury to exercise such powers, the criminal jury would be subjected to these same review mechanisms. The criminal jury's power, then, is no mere accident. The Supreme Court has deliberately and consistently declined to remove the critical—if imperfect—safety valve for jurors to check general criminal laws. The unreviewable verdict of acquittal allows the jury to continue to check the government based on community sentiment.[164] And, it is a power that enables the jury, in effect, to "create[] [its] own sentencing discretion"[165] based on its sense of justice.

But the "right" to decide questions of law was not the only realm of the jury that eroded. A second area in which the jury's power diminished involved whether the right to jury trial could be waived. Prior to 1930, jury trials in federal court, like other jurisdictional

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[163] Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 264 (describing the many error-correction devices in the civil context that are not permissible in criminal cases and noting that the rationale is "to protect the jury's authority to acquit against the evidence"). But while Leipold views this as an historical accident that has somehow managed to survive for more than two centuries, this Article explains the structural, historical, and normative basis for reading a law-application power into the criminal jury's constitutional role.

[164] Moreover, since *Sparf*, the Court has heralded this political function of the jury. *See* HANS & VIDMAR, *supra* note 125, at 157 (summarizing cases in which the Court sees the jury's function as political and noting that these cases "can be interpreted to mean that the Court supports the infusion of community sentiment in jury verdicts, and would sanction, under certain circumstances, jury verdicts at odds with unfair laws or oppressive prosecutorial practices").

[165] Beck v. Alabama, 447 U.S. 625, 640 (1980). Although the jury can affect sentences through its application of general criminal laws, this power is distinct from a direct constitutional power to sentence. *See* Spaziano v. Florida, 468 U.S. 447, 459 (1984) (noting that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination" of the "appropriate punishment to be imposed on an individual"). That is, while the jury does not have the direct power to decide the specific sentence a defendant should receive if the law provides a range of zero to ten years, the jury does have the power to determine whether a defendant is guilty of a manslaughter charge which carries a range of zero to ten years or a murder charge which carries a range of ten years to life. If the jury concludes the defendant is not guilty of the murder charge, it has effectively limited the sentence that can be imposed even though the jury does not have the power to sentence directly.

provisions, could not be waived.[166] This reflected the mandatory language in Article III that the trial of all crimes "shall" be by jury and the larger view that the jury plays a key role in the constitutional design. In *Patton v. United States*,[167] however, the Supreme Court concluded that the parties could agree to waive a jury trial in favor of a bench trial.[168] This development may seem to stand in tension with the view of the jury as a structural check on government.[169]

Critically, however, the government cannot dispense with the jury unless the defendant agrees.[170] Thus, the individual whose liberty is at stake and who faces the stigma of a criminal conviction must approve of the shift from jury to judge. If the defendant wants the check of the people to apply in her case, it will. The jury, then, remains a critical equitable check on general laws because the jury will apply those laws if the defendant does not agree to a bench trial. The defendant's gatekeeping power makes sense when one considers that the defendant herself suffers the inequities of an overinclusive law.

There is, however, still a third development that has made inroads on the jury's ability to protect a defendant's liberty interest against government intrusion. The growth of discretionary judicial sentencing allowed judges to make critical factfindings that determined the length of a defendant's sentence. At common law, "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense."[171] To the extent the law mandated a

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[166] *See* AMAR, *supra* note 109, at 108 ("[A]s late as 1898, the Supreme Court . . . was squarely on record as declaring that a criminal defendant could not waive jury trial."); Amar, *supra* note 55, at 1198-99, 1199 n.299 (noting that, prior to 1930, court decisions held that jury trials could not be waived).

[167] 281 U.S. 276 (1930).

[168] *Id.* at 312. For an argument that the Supreme Court reached the wrong result in *Patton*, see Amar, *supra* note 55, at 1196-99.

[169] To be sure, the claim that the jury is a structural check loses some force when it can be waived at will. But other constitutional doctrines of power and structure, such as sovereign immunity, also permit waiver of some kind. *See, e.g.*, College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999) ("[A] State may waive its sovereign immunity by consenting to suit."). Moreover, this exception places the focus on the defendant's liberty interest, and the protection of individual liberty against the state is the ultimate purpose of the jury.

[170] The law varies on whether the government must also consent to a non-jury trial. In federal court, approximately half the states, and the District of Columbia, the government can veto a defendant's request for a bench trial. *See* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call To Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. DAVIS L. REV. 309, 321-23 (1993) (discussing the variations across different jurisdictions on whether government consent is needed for a bench trial).

[171] Apprendi v. New Jersey, 530 U.S. 466, 479 (2000).

particular punishment, the jury's verdict dictated the defendant's sentence. This gave jurors a de facto sentencing function because their acquittal on a greater charge would dictate a lesser sentence or give judges the authority to impose a lesser sentence.[172] Although such mandatory sentences for felonies were prevalent at the time of the Constitution's Framing,[173] there was already a move toward discretionary sentencing, which allowed judges to sentence defendants within a broad range prescribed by statute.[174] In the nineteenth and most of the twentieth centuries, discretionary sentencing became the norm, and judges and correctional personnel were given broad leeway to determine prison sentences "according to informed judgments concerning [prisoners'] potential for, or actual, rehabilitation and their likely recidivism."[175]

This flexibility allowed judges to make factual findings that affected a defendant's punishment—arguably a task for the jury because those findings would bear on a defendant's blameworthiness and punishment. The Supreme Court in *Williams v. New York*,[176] however, endorsed this broad authority for the judge.[177] Although this gave judges

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[172] *See infra* text accompanying notes 198-205. Judges, too, could *reduce* sentences under certain circumstances. *See* Bibas, *supra* note 7, at 1124-26 & nn.204-07 (discussing judges' discretion to downgrade sentences).

[173] *See* United States v. Grayson, 438 U.S. 41, 45 (1978) ("In the early days of the Republic, when imprisonment had only recently emerged as an alternative to the death penalty, confinement in public stocks, or whipping in the town square, the period of incarceration was generally prescribed with specificity by the legislature. Each crime had its defined punishment." (citing REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 83-85 (1976))).

[174] *See Apprendi*, 530 U.S. at 481 ("[J]udges in this country have long exercised discretion . . . in imposing sentence *within statutory limits* in the individual case."); Bibas, *supra* note 7, at 1125-26 (describing the sentencing discretion that existed at common law); King & Klein, *supra* note 7, at 1506-08 (noting that judges had discretion to sentence within broad ranges); Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 985-89 (2003) (describing the judicial sentencing that existed in Virginia, Kentucky, and Pennsylvania). Moreover, even at the Framing, judges had discretion to extend the benefit of clergy to defendants in capital cases. *See id.* at 948-49 (discussing the benefit of clergy as it was used in colonial Virginia). The discretion to exercise mercy is, however, quite consistent with the view of the judiciary advanced here.

[175] *Grayson*, 438 U.S. at 46 (citing REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE, *supra* note 173, at 82).

[176] 337 U.S. 241 (1949).

[177] *Id.* at 246-49. For an argument that this regime violated due process and equal protection, see Saltzburg, *supra* note 48, at 248. Because this Article is concerned with the *jury's* constitutional role, my focus is on how the prior regime interfered with the jury guarantee, not on whether it violated more general notions of due process and

a *factfinding* power that arguably rests with juries, it did not strip the jury of its *law-application* power in criminal cases.

The criminal jury protects individual liberty differently from judges in both respects: its factfinding power and its law-application power. The jury may protect "legal innocence" differently from the judge through its factfinding responsibility. The jury, as a multi-member body, is "more likely than one person to reflect public sentiment"[178] and may view the facts in a different light than would the single trial judge.[179] The fair cross-section requirement "enhanc[es] that likelihood" because it makes it more likely that juries will represent the community's perception of the facts than "trial judges [who] collectively do not represent—by race, sex, or economic or social class—the communities from which they come."[180] Moreover, because the judge is a repeat player, she might be more inclined to favor the government's view of the facts as the government is also a repeat player in the criminal justice process. The judge may also become desensitized to the enormity of what is at stake in a criminal proceeding because it so familiar. The jury, by contrast, comes to the process with a fresh set of eyes and brings no institutional bias to its vision of the facts. Thus, even if the jury and judge agree on the proper application and

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equal protection. In particular, the key question for purposes of this Article is whether the prior regime—even if accepted as constitutionally permissible—provides authority for a Guidelines regime because the jury's role had already been diminished under the old regime or whether the latter regime represents an even greater constitutional threat to the jury's function.

[178] Stephen Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 63 (1980).

[179] *See* HANS & VIDMAR, *supra* note 125, at 50 (discussing the difference in jurors' perceptions based on their backgrounds and experiences and noting that "[t]he jury's heterogeneous makeup may also lessen the power of prejudice"); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519, 525 (1991) (noting that "[d]ifferent jurors will construct different stories" about the evidence at trial based on each juror's life experience and knowledge about the world); *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1278 (2000) (arguing that "[j]urors necessarily rely on context and individual interpretation as they sift through often disjointed and complex presentations of evidence to find facts and to make decisions").

[180] Gillers, *supra* note 178, at 63; *see also* Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 100 & n.139 (1993) (observing that judges are "primarily white, male, middle-class"); Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, the Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142, 169 (1991) ("In federal courts, at least, jurors are more likely than judges to be women and members of racial minorities." (footnote omitted)).

interpretation of the law, they may see the facts quite differently given these institutional differences.[181]

In *Williams*, as noted, the Supreme Court approved the power of judges to make critical factual findings in the sentencing phase of criminal cases. If a jury acquits a defendant outright, of course, there is no danger that the judge can override its decision. Thus, when a defendant is acquitted of all charges, a jury's unique perspective on the facts is preserved. But under a discretionary sentencing regime, a judge can increase criminal punishment on the basis of facts that the jury has not found as long as the jury has convicted the defendant of some crime. That is, a jury acquittal on a greater charge does not prevent the judge from overriding the jury's determination and increasing a defendant's sentence on the basis of acquitted or uncharged conduct as long as the jury convicted on a lesser charge that carries a sufficiently high statutory maximum. This scenario presents one of the very risks the jury is designed to address: having the government alone determine guilt or innocence about a fact that will affect punishment.

If the government can punish an individual found innocent by a jury on a greater charge as long as the jury convicts of a lesser charge, the jury's power to check the government becomes greatly diminished. The jury might have acquitted on the greater charge precisely because it had reasonable doubts about the defendant's guilt based on the facts as the jury saw them. Bringing its collective experience and perspective to bear on the case, the jury may have concluded that the government had not met its burden and the defendant should not be punished for the greater conduct. The judge is a poor replacement for the jury, for her potential bias is as strong in sentencing as it would be at trial.[182]

Yet the Supreme Court has allowed a single judge to override a jury's acquittal decision based on that judge's lone view of the facts. It is undeniable that this development curtailed the jury's factfinding power, and one can legitimately question whether the Court's decision

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[181] *See* Marder, *supra* note 123, at 918 (describing the jury as "a check on professionals, who may have grown too removed from the experiences and common sense reasoning of ordinary citizens").

[182] *See* Murphy, *supra* note 106, at 790 (arguing that jury participation is as important at sentencing as it is at trial because of the jury's lack of government bias).

was correct as an initial matter.[183] But even accepting judges' power over sentencing *facts*—which this Article does for the sake of argument and also because of its strong historical roots and longevity—discretionary judicial sentencing did not diminish the jury's equitable power over *law*. When judges sentenced defendants under the discretionary sentencing regime, they did so based on their assessment of the individual and the particular facts and circumstances of the case. There were no generally applicable laws being applied by judges. Thus, although judges' power increased vis-à-vis juries to decide facts, the judiciary as a whole did not sacrifice any power to the legislature or executive. Judges and juries together retained broad power to ensure equitable results in particular cases. Judges made their own factual assessments about sentencing, and juries retained the power to determine which (if any) general laws imposing punishment applied. Thus, juries could continue to check (or nullify) those laws in particular cases if they believed equity demanded such a result.

This is not to say, however, that this jury power comes at no costs for defendants or the system. It is of course possible that the jury might exercise this discretionary power in undesirable ways, that "the wishes and feelings of the community"[184] might be the kind of popular prejudice that is troubling. For example, jurors in the South frequently acquitted white defendants in lynching cases even when faced with overwhelming evidence of guilt.[185] Social science research has found that white jurors are more likely to acquit white defendants than African American defendants and that white jurors are more likely to acquit when the victim is African American than when the victim is white.[186] Similarly, there is some data indicating that African

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[183] *See, e.g.*, Saltzburg, *supra* note 48, at 247-48 (characterizing the discretionary sentencing regime described in *Williams* as "arbitrary and virtually undefensible" and raising significant constitutional due process and equal protection questions).

[184] Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

[185] Alschuler & Deiss, *supra* note 67, at 890-91.

[186] *See, e.g.*, Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611, 1626 (1985) (summarizing conclusions of nine studies, all of which found that white jurors were "more likely to find a minority-race defendant guilty than they were to find an identically situated white defendant guilty"); King, *supra* note 180, at 82-85 (describing study findings). Studies have also shown a bias on the basis of the victim's race in jurors' decisions to impose the death penalty. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 401 (1990) (describing a study of Georgia death penalty cases that revealed a higher risk of death penalty imposition for white victims than black victims); SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL

American jurors are more likely to acquit African American defendants.[187] Thus, defendants may be treated disparately depending on their own race or the race of their victims. In addition, jurors might use their unreviewable power to acquit to express their broader disagreement with the policy behind a criminal law, regardless of the circumstances of the individual defendant. For example, juries have resisted laws against statutory rape and drunk driving, especially when they were initially passed, because jurors did not agree with the social norms underlying those laws.[188] As social norms have changed, juries have followed suit.[189] But to the extent we want the criminal laws to change social norms and not merely follow them, this jury function has the potential to stunt that development.

These dangers are significant, but it is important to recognize that the same risks are present whenever *any* actor in the criminal justice system is given discretion to mitigate punishment. For example, these same concerns arise when the police make determinations about which crimes to investigate and whom they will target for stops and searches.[190] The executive's power to pardon and prosecutorial discretion not to enforce the law can also suffer from these biases.[191] Studies

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SENTENCING 109 (1989) (reporting findings of capital sentencing disparities that correlated to the race of the victim).

[187] *See* Jeffrey Rosen, *After 'One Angry Woman'*, 1998 U. CHI. LEGAL F. 179, 179 & n.3 (1998) (discussing the perceived rise in "race-based jury nullification" (citing Michael D. Weiss & Karl Zinsmeister, *When Race Trumps Truth in the Courtroom*, *in* CENTER FOR EQUAL OPPORTUNITY, RACE AND THE CRIMINAL JUSTICE SYSTEM: HOW RACE AFFECTS JURY TRIALS 63 (Gerald A. Reynolds ed., 1996))); *see also* Douglas O. Linder, *Juror Empathy and Race*, 63 Tenn. L. Rev. 887, 904-05 (1996) (noting that "[r]ecent trial statistics indicate that the growing racial diversity of urban juries has substantially increased acquittal rates for black criminal defendants" and that studies support the argument that black jurors are likely to empathize with black defendants).

[188] HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 276-80, 293-96 (1971).

[189] For example, in the first half of the 1960s, the conviction rate in rape cases was only twenty-seven percent. By 1987, it shot up to seventy-three percent. JAMES P. LEVINE, JURIES AND POLITICS 110-11 (1992). A similar trend appears with the conviction rate in civil rights cases. *Id.* at 112-13.

[190] *See, e.g.*, Tracey Maclin, Terry v. Ohio*'s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN'S L. REV. 1271, 1271-75 (1998) (discussing racial profiling by police officers); William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1799 (1998) (arguing that the police focus on urban crack markets, rather than on other drugs, reflects class bias). For descriptions of the power of police to "nullify" criminal laws by failing to enforce them and of the potential for unequal treatment based on the views of the individual officer, see KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 84-90 (1969); Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962).

[191] *See, e.g.*, Stuntz, *supra* note 130, at 594 (noting that "prosecutors prosecute if and when they choose" without formal legal oversight); James Vorenberg, *Decent*

on race and capital sentencing have found even greater disparities in the exercise of prosecutorial discretion than in jury discretion.[192] In

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Restraint of Prosecutorial Power, 94 HARV. L. REV. 1521, 1522 (1981) (discussing the "great and essentially unreviewable powers" of prosecutors). The Baldus study discussed in *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987), for example, highlighted not only juror bias, but prosecutorial bias as well. Lanni, *supra* note 132, at 1800-01. As Albert Alschuler has noted, "when the discretion of prosecutors and other officials not to enforce the law is not only tolerated but applauded, it is difficult to argue (as prosecutors, of all people, often do) that affording a dispensing power to jurors would bring the rule of law to an end." Albert W. Alschuler, *A Teetering Palladium?*, 79 JUDICATURE 200, 201 (1996) (book review).

[192] *See* Cynthia K.Y. Lee, *Race and the Victim: An Examination of Capital Sentencing and Guilt Attribution Studies*, 73 CHI.-KENT L. REV. 533, 537 (1998) (citing the Supreme Court's discussion of the Baldus study in *McCleskey*, 481 U.S. at 287); *see also* Lanni, *supra* note 132, at 1800-01 (same). Thus, just as it is possible that jurors may improperly exercise their discretion, it is also possible that prosecutors may improperly exercise the discretion they possess under the Sentencing Guidelines. Commentators have observed that some of the discretion that previously resided with judges under the discretionary sentencing regime now resides with prosecutors under the Sentencing Guidelines. *See, e.g.*, Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 557 (1992) (finding that, although the guideline system has not transferred to prosecutors all of the sentencing discretion that judges previously exercised under the discretionary sentencing regime, there is empirical evidence suggesting significant circumvention of the Sentencing Guidelines by prosecutors); David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 902 (1996) ("Charging decisions, charge selection, and plea agreements can allow the prosecutor to determine the resulting sentence to a far greater degree than the federal judiciary."); *see also* Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning in the Federal Prosecutor's Expanding Power over Substantial Assistance Departures*, 50 RUTGERS L. REV. 199, 236 (1997) (detailing the substantial discretion prosecutors have under the Guidelines to request a downward departure for defendants on the basis of "substantial assistance" and explaining how that discretion reintroduces the problem of disparity into the sentencing process).

This substantial discretion might explain, at least in part, the fact that the Guidelines have failed to eliminate sentencing disparity on certain levels. Some data indicate that, before the Guidelines, the average sentence for African American males between the ages of eighteen and thirty-five was two months longer than the average sentence for white males between the ages of eighteen and thirty-five. Gerald W. Heaney, *The Reality of Guidelines Sentencing: No End to Disparity*, 28 AM. CRIM. L. REV. 161, 207 (1991). Under the Guidelines, the average sentence for African American males between eighteen and thirty-five is now approximately two years longer than the average sentence for white males in the same age group. *Id.* at 206. And this disparity is not merely because of harsher drug sentences (where the differential went from seven months before the Guidelines to thirty months after the Guidelines). *Id.* at 207. The differential for violent crimes increased from six months before the Guidelines to thirteen months after the Guidelines were adopted. *Id.*

Stephen Schulhofer has questioned the accuracy of some of this data because the disparity might reflect differences in the nature of the cases being compared. The pre-Guidelines cases being analyzed were more complex than the post-Guidelines cases, and some of the pre-Guidelines cases may have involved date bargaining, in which

other words, no criminal justice or sentencing scheme will eliminate all disparity as long as some actors in the process have discretion. Yet some discretion is necessary to ensure that the application of the laws remains just.[193]

The jury's enshrinement in the Constitution and the powers it has retained in criminal cases for 200 years reflects the judgment that any risk of disparity from jury involvement in the criminal justice process is outweighed by the benefits the jury brings. The jury adds a unique perspective to the criminal justice system: the views of the community. Even when all of the government actors—the police, the prosecutor, the judge, and the legislature—agree that the defendant's behavior should be punished, the jury stands as a final barrier. The jury, like the judge, is a judicial actor. Its function is to apply the law in a particular case. But because the jury has an unreviewable power to acquit, it can correct overinclusive general criminal laws in a way that judges cannot. As Bill Nelson has observed, the jury's power

> to fit the circumstances of individual cases has great potential for flexibility, for records of jury determinations of points of law are seldom preserved, and hence those determinations do not become precedents with a binding effect on future juries. In each case, a jury is free, if justice requires, to reach the same result reached by other juries in analogous cases in the past; if, on the other hand, justice requires departure from past verdicts, the jury is free so to depart. Moreover, no record is kept of such departures, and therefore legal change and development are imperceptible; men have the valuable illusion of legal stability. . . . The broad power of juries to find law thus gave the legal system real flexibility while simultaneously giving the illusion of stability—two values that are important in doing justice in individual cases and in convincing litigants that justice has been done them.[194]

This accommodation is necessary because "[a]ll new laws, though penned with the greatest technical skill, and passed on the fullest and

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prosecutors agreed to limit an indictment to conduct that took place before the effective date of the Guidelines. Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem is Uniformity, Not Disparity*, 29 AM. CRIM. L. REV. 833, 840-41 (1992). But Schulhofer acknowledges that the discrepancies between the sentences received by African Americans and by whites for drug offenses and violent crimes post-Guidelines "undoubtedly warrant further study." *Id.* at 841.

[193] "The existence of discretion, somewhere in the [criminal justice] system, to make a context-sensitive evaluation of the offender's conduct and character is intrinsic to criminal law because context-specific, retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment." Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 818 (2002).

[194] NELSON, *supra* note 96, at 28-29.

most mature deliberation, are considered as more or less obscure and equivocal."[195]

> The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.[196]

Although juries are often criticized for lacking the necessary expertise to apply increasingly complicated laws and for rendering verdicts on the basis of emotion and sympathy, that is, in a very real sense, the point of the jury.

The jury trial is where the law meets the individual, and the particular facts and circumstances of the individual's case are evaluated not by an impersonal lawmaker, but by her peers. Here is where nuance can make the difference. Here is where the law can yield to community values. Here is where government abuse can be checked by the people.[197] If rigid and predictable application of the law were the goal, the criminal jury trial would never have been mandated by the Constitution in the first place, and we would have long ago dispensed with the unreviewable general verdict of acquittal.

The jury has, in fact, made ample use of this power to correct what have been, in its view, overly broad or harsh laws. As the Supreme Court noted in *Jones v. United States*,[198] "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences."[199] Because jurors could find the defendant guilty of any lesser offense included in the offense charged at common law, jurors could "create[] their own sentencing discretion by distorting the factfinding process" and acquitting

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[195] THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961).

[196] United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part); *see also* STITH & CABRANES, *supra* note 6, at 169 ("[N]o system of formal rules can fully capture our intuitions about what justice requires.").

[197] *See* HYLTON & KHANNA, *supra* note 60, at 42 (noting that the jury guarantee, among other procedural protections for the defendant, checks self-interested behavior by the prosecutor and other government agents).

[198] 526 U.S. 227 (1999).

[199] *Id.* at 245.

the defendant of the more serious charge.[200] In his study of juries in England from 1200 to 1800, Thomas Green found that jurors consistently acquitted defendants of capital charges and convicted on lesser charges because they believed the laws to be too harsh as applied to the defendant.[201] In another example, John Langbein reports that, in eighteenth-century England, "[t]he jury not only decided guilt, but it chose the sanction through its manipulation of the partial verdict."[202] Thus, jurors would downgrade from grand to petty larceny if the goods were of relatively small value or if the jury sympathized with the defendant.[203] In this country, jurors would "persistently" refuse to convict a defendant of first-degree murder to avoid a mandatory death sentence.[204] Indeed, the frequency with which juries acquitted eventually led to more humane sentencing laws.[205]

Juries still possess the power to nullify unjust laws, although it is admittedly more difficult for juries to check laws that would, in their estimation, produce overly harsh results when they are unaware of what the actual sentence will be. (And most jurisdictions forbid judges and parties from instructing the jury about penalties.)[206] But

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[200] Beck v. Alabama, 447 U.S. 625, 640 (1980).

[201] *See* GREEN, *supra* note 69, at 360 (noting "the long history of official acquiescence in jury mitigation of the law"). Green recounts the common practice of English jurors in simple homicide and non-professional theft cases of manipulating the fact-finding process to prevent the defendant from being executed. *Id.* at 28-64, 261, 269. Green labels this as "sanction nullification," *id.* at 97, or an "intermediate form of nullification," as distinct from the jury nullification in its "strongest sense," which "occurs when the jury recognizes that a defendant's act is proscribed by the law but acquits because it does not believe the act should be proscribed," *id.* at xviii.

[202] John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55 (1983).

[203] *Id.* at 54; *see also* KALVEN & ZEISEL, *supra* note 188, at 310-11 (discussing how early nineteenth-century English juries would refuse to convict defendants of capital crimes if they felt the punishment was disproportionate).

[204] Baldwin v. Alabama, 472 U.S. 372, 388 (1985) (quoting Woodson v. North Carolina, 428 U.S. 280, 302-03 (1976)).

[205] *See* Sauer, *supra* note 106, at 1257 (citing examples from seventeenth- and eighteenth-century England that exhibit how jury acquittals led to the amelioration of harsh laws); *cf.* GREEN, *supra* note 69, at 147 (noting that "authorities modified the substantive law" in light of widespread resistance). John Poulos has pointed to the common law distinction between murder and manslaughter to highlight that the Framers understood the difference between "greater and lesser offenses created from what was once a single crime." Poulos, *supra* note 52, at 700. He has argued that the Framers therefore understood that a crime can perform two basic functions: "creat[ing] liability for punishment when none existed before [the law was enacted]" and "creat[ing] liability for enhanced punishment." *Id.* at 700-01.

[206] Although states are permitted to use jury sentencing—see *Chaffin v. Stynchcombe*, 412 U.S. 17, 21-22 (1973) for the proposition that jury sentencing does not

the jury does attempt to make such predictions, and if it predicts that the punishment will be disproportionate to what the defendant did, it is less likely to convict.[207] There is evidence of juror resistance to laws imposing mandatory sentences or "three-strikes" sentences when jurors are aware of the consequences of a conviction.[208] Jurors even try to anticipate what the sentence will be under the Guidelines in determining whether to convict. For instance, one juror in the District of Columbia related her experience on a hung jury where four jurors refused to convict because they "knew exactly what the sentencing guidelines called for" and they felt that penalty was too harsh given the offense.[209]

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violate due process—when a jury has no sentencing function (which is the case in federal court and most state courts), the jury typically does not receive any information about the sentencing consequences of its verdict. *See* Sauer, *supra* note 106, at 1242 ("The general rule in federal and most state judicial systems is that neither the judge nor advocates should inform the jury of the sentencing consequences of a guilty verdict."); *see also* Shannon v. United States, 512 U.S. 573, 580 (1994) (noting the "principle that jurors are not to be informed of the consequences of their verdicts"). Indeed, juries are often expressly instructed *not* to think about sentencing consequences in rendering their verdicts. *See, e.g.*, Johnson v. United States, 636 A.2d 978, 980 n.3 (D.C. 1994) (citing CRIMINAL JURY INSTRUCTIONS FOR D.C., Instruction 2.74 (4th ed. 1993), which states, "The question of possible punishment of the defendant in the event of conviction is no concern of [the jury] and should not enter into or influence your deliberations in any way"). For an argument that the jury should receive an instruction on sentencing consequences with respect to mandatory penalties, see Sauer, *supra* note 106, at 1260-70. *See also* United States v. Datcher, 830 F. Supp. 411, 416 (M.D. Tenn. 1993) (arguing that segregating factfinding and sentencing creates "an artificial, and poorly constructed, fence around the jury's role."). *But see* United States v. Chesney, 86 F.3d 564, 574 (6th Cir. 1996) (noting that, in general, "juries should be instructed not to consider defendants' possible sentences during deliberations").

[207] *See, e.g.*, Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2450-51 (1997) ("As penalties increase, people may not be as willing to enforce them because of the disproportionate impact on those caught.").

[208] *See* Iontcheva, *supra* note 132, at 332 (presenting evidence that the adoption of mandatory sentencing laws led to increased jury nullification); King, *supra* note 61, at 433 (arguing that jury nullification takes place in the face of "three-strikes" laws and other mandatory sentences); Marder, *supra* note 123, at 891-92, 895-97 (noting that there is evidence that "three-strikes" laws lead to jury nullification).

[209] Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, *Panel Discussion–Jury Nullification*, 145 F.R.D. 149, 191 (1992); *see also* Lanni, *supra* note 132, at 1784 (describing other instances of nullification based on anticipated penalties). While most of the political support for harsh sentences comes from suburban voters, most crimes occur in "certain neighborhoods of large cities." Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 37 (1997). "In the poor and minority community [sic], personal experience with offenders and their families forces the public to see the tradeoffs that result from longer terms of imprisonment." *Id.* at 64. Jurors in these communities might vote to acquit on some charges, regardless of the weight of the evidence, if they believe too

More controlled studies and surveys have confirmed the tendency of jurors to alter their verdicts based on their prediction of punishment. Harry Kalven and Hans Zeisel found that juries will nullify when they perceive "a gross discrepancy between the offense and the anticipated punishment."[210] Several psychology experiments also show that verdicts are dramatically affected by what the jurors believe will happen to the defendant upon conviction.[211]

Moreover, even if a jury does not know the precise punishment for an offense, it will understand the relative punishment. That is, if a defendant faces more than one charge, the jury can reasonably estimate that it can mitigate the consequences for the defendant by acquitting on one charge and convicting on another. Indeed, the Supreme Court has acknowledged and supported the jury's power to be lenient in its acceptance of inconsistent verdicts in criminal cases.[212] As Alexander Bickel noted, allowing inconsistent verdicts "reaffirms the jury's power to exercise leniency by limiting punishment to sentence upon only one of many counts."[213] "To deny the jury a share in this endeavor is to deny the essence of the jury's function, which is finding a solution for those occasional hard cases in which 'law and justice do not coincide.'"[214] In other words, the jury deliberately acquits on some charges and convicts on others, even when such results are logically inconsistent, in order to reach a just outcome. In

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many people from their communities are being sent to prison and that the punishments are too severe for the crime. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 716 (1995) (arguing that there should be a presumption in favor of nullification when an African American is charged with a victimless crime because "[b]lack people have a community that needs building, and children who need rescuing, and as long as a person will not hurt anyone, the community needs him there to help").

[210] KALVEN & ZEISEL, *supra* note 188, at 306. Darryl Brown has pointed out that jurors are not necessarily behaving outside the rule of law when they nullify, but might be interpreting statutes in creative ways—akin to the dynamic statutory interpretation methods used by many judges—to reflect their normative judgments of culpability. Brown, *supra* note 158, at 1167, 1169-71, 1190-91.

[211] KASSIN & WRIGHTSMAN, *supra* note 158, at 159, 166 n.69.

[212] *See* United States v. Powell, 469 U.S. 57, 65 (1984) ("[T]he possibility that the inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest."). *But see* Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 HARV. L. REV. 771, 797 (1998) (arguing that the jury's power to be lenient is not constitutionally based, and therefore, the Supreme Court should not support inconsistent verdicts on this basis).

[213] Alexander M. Bickel, *Judge and Jury—Inconsistent Verdicts in the Federal Courts*, 63 HARV. L. REV. 649, 651-52 (1950).

[214] *Id.* at 651 (quoting Wigmore, *supra* note 125, at 170).

upholding inconsistent verdicts, the Supreme Court expressly relied on the fact that it is the jury's "historic function" to act "as a check against arbitrary or oppressive exercises of power."[215] The jury knows that its compromise position will result in a reduced sentence; it mitigates punishment precisely because it believes the defendant should not be blamed for the entirety of the conduct with which she is charged.

Roscoe Pound praised this check by the jury—this "[j]ury lawlessness"—as "the great corrective of law in its actual administration. The will of the state at large imposed on a reluctant community, the will of a majority imposed on a vigorous and determined minority, find the same obstacle in the local jury that formerly confronted kings and ministers."[216] And this communication from the jury sends important signals to the legislature that laws may need to be changed.

Thus, while the reasons for mitigation will not always be laudable, giving the jury this power allows it to err on the side of protecting the legally and morally innocent, even if we might disagree with the moral judgment made by the jury. Like the reasonable doubt standard, this power symbolizes our societal judgment that it is better to let a guilty person go free—or at least be punished to a lesser degree—than to punish the legally or morally innocent.[217]

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[215] United States v. Powell, 469 U.S. 57, 65 (1984); *see also* Dunn v. United States, 284 U.S. 390, 393 (1932) ("Consistency in the verdict is not necessary."). Albert Alschuler has observed, however, that inconsistent verdicts might instead be viewed as permitting unlawful convictions. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 212-14 (1989). By relying on the Supreme Court's logic in inconsistent verdict cases, I do not mean to suggest that juries always issue inconsistent verdicts to be merciful. I agree with Alschuler that it is inappropriate to assume juries are always benevolent. My point here, however, is simply to note that the Supreme Court has allowed inconsistent verdicts based on the Court's acceptance of the jury's power to nullify.

[216] Pound, *supra* note 11, at 18.

[217] The empirical evidence on how the jury exercises its power is mixed. In their classic study of the American jury, Kalven and Zeisel found that, although juries and judges agreed roughly seventy-five percent of the time, in the cases involving disagreement, the jury was more likely to acquit. KALVEN & ZEISEL, *supra* note 188, at 56-57. Specifically, they found that the jury was likely to be more lenient than the judge in more than eighty-five percent of the cases in which juries and judges disagreed. *Id.* at 59. As Kalven and Zeisel put it:

> In the end the point is that the jury, as an expression of the community's conscience, interprets [the norm that we live in a society preferring to let ten guilty men go free rather than risk convicting one innocent man] more generously and more intensely than does the judge.

Id. at 189. For a critical view of Kalven and Zeisel's methodology, see Michael H. Walsh, *The American Jury: A Reassessment*, 79 YALE L.J. 142 (1969) (book review).

The Supreme Court has recognized this value of the jury in cases involving the ultimate power of the state: death penalty proceedings. And it has praised precisely those less predictable features of the jury by acknowledging that "[i]ndividual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable,'"[218] and nevertheless claiming that "the inherent lack of predictability of jury decisions does not justify their condemnation."[219] Rather, the Court stated that "it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'"[220] Here is one instance, at least, where death is not different. The criminal jury plays this valuable role in all criminal proceedings.

As the Supreme Court has remarked, "On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices."[221] "[T]he premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task."[222] Similarly, Justice Gray noted:

> [I]t is a matter of common observation, that judges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused.[223]

Whether because of its valuable function or its historical pedigree, the jury to this day commands the respect and admiration of the American people. Recent studies have found that seventy-eight

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In a comparison of jury and judge conviction rates from 1945 to 1980, James Levine similarly found that juries were more lenient during the period from 1945 to 1962. But he also found that juries were more likely to convict than were judges from 1962 until the early 1970s. LEVINE, *supra* note 189, at 122-24. It is unclear, however, whether these comparisons were apt because it is possible that the caseloads of judges and juries varied. For instance, it is possible that defendants facing more serious charges opted for jury trials and that prosecutors devoted more time to those trials.

[218] McCleskey v. Kemp, 481 U.S. 279, 311 (1987) (quoting Peters v. Kiff, 407 U.S. 493, 503 (1972)).

[219] *Id.*

[220] *Id.* (quoting KALVEN & ZEISEL, *supra* note 188, at 498).

[221] United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 18-19 (1955).

[222] *Id.* at 18.

[223] Sparf v. United States, 156 U.S. 51, 174 (1895) (Gray, J., dissenting).

percent of Americans believe "[t]he jury system is the most fair way to determine the guilt or innocence of a person accused of a crime."[224] Sixty-nine percent believe that "[j]uries are the most important part of our judicial system."[225]

Thus, despite the curtailment of jury power at the margins—for example, allowing judges to instruct juries that they must follow the law—the Court has never attempted to cut back "the unreviewable *power* of a jury to return a verdict of not guilty for impermissible reasons."[226] As the Court itself has noted, "this is not a case where a once-established principle has gradually been eroded by subsequent opinions."[227] Rather, the jury's raw power to acquit without review has persisted since the Nation's founding. Thus, as long as the jury applies general laws imposing punishment, there is an equitable safety valve.

The argument in this Article depends critically on this conception of the jury and its importance. For those who reject this—and instead view the criminal jury as an anachronistic holdover that fits uneasily in the modern administration of criminal justice—the remainder of the argument may be unsatisfying. But for those who continue to believe in the jury's importance—because the Constitution enshrines its power, because history documents the jury's use of its power to protect liberty, because the jury continues to act as a valuable check against the state, because the American people continue to place the jury in high regard—the threat the jury faces today in the form of mandatory sentencing laws applied by judges is the sort of "secret machination" Blackstone warned against, that which threatens the very purpose of the jury.

II. THE THREAT OF MANDATORY SENTENCING LAWS

Mandatory sentencing laws made their way onto the legal landscape without much analysis of what they would mean for the judiciary writ large—that is, the combined power of judges and juries in the constitutional structure. They were passed in response to the concern that judges had too much power. No one—not legislatures, not voters,

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[224] AM. BAR ASS'N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM (1999), *at* http://www.abanet.org/media/perception/perception40.html.

[225] *Id.* Another study found that participants rated juries higher than judges in terms of fairness, accuracy, lack of bias, and the representation of minorities. Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 tbl.2 (1988).

[226] Harris v. Rivera, 454 U.S. 339, 346 (1981) (emphasis added).

[227] United States v. Powell, 469 U.S. 57, 63 (1984).

not courts—seemed to consider that they might have an impact on juries. So, for example, when the Supreme Court in *Mistretta v. United States*[228] upheld the Federal Sentencing Guidelines against an attack that the Guidelines were an improper delegation of legislative power that violated the separation of powers,[229] the Court did not consider the jury's role in that system. The Court in *Mistretta* permitted Congress to delegate to an unelected commission a fundamental question of lawmaking—under what circumstances the state should deprive an individual of liberty and even life.[230] It did not, however, address the following questions: whether the responsibility for applying those laws could be transferred from the jury to the judge and how that transfer increases legislative and executive power at the expense of the judiciary.

Legislatures, courts, sentencing commissions, and scholars have largely ignored the effect of mandatory sentencing laws on juries because it is not immediately apparent how those laws amount to a greater intrusion on the jury's constitutional power than the discretionary regime that came before. In fact, there is a world of difference between the two regimes, and that difference directly impacts the jury's equitable role.

Mandatory sentencing laws intrude far further on the jury's—and thus the judiciary's—constitutional function because they diminish not merely the jury's factfinding power, but also its law-application power. As noted, under the previous sentencing regime, judges had complete freedom to individualize their factual findings in particular cases because they were not applying general laws of any kind. Indeed, their sentencing decisions were largely unreviewable. This gave judges power much like that possessed by juries, for it allowed judges to adjust their rulings to the individual circumstances before them regardless of legislative or executive demands. To be sure, judges lacked the community perspective of the jury. But judges at least possessed an institutional power similar to that of the jury: the ability to "do justice" in an individual case.

Mandatory sentencing laws, in contrast, pose the same threat as other general criminal laws: they may lead to an unjust result in a particular case. The Guidelines and other mandatory sentencing laws

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[228] 488 U.S. 361 (1989).

[229] *Id.* at 374.

[230] *See id.* at 378 n.11 ("We assume, without deciding, that the [United States Sentencing] Commission was assigned the power to effectuate the death penalty provisions of the Criminal Code.").

dictate that specified facts will be deemed blameworthy as a general matter and establish punishment that will apply in all cases. Furthermore, if the prosecutor believes the trial judge has ignored the letter of these laws, she can appeal the ruling and the appellate court must rule for the government if the trial judge misapplied the law.[231] Hence, there is little room for the trial judge to bend the law as a matter of justice or equity. This obviously strengthens the legislature's and executive's position as compared to the situation the political branches would be in if the jury applied these laws. If the jury applied these laws and determined they should not apply in a particular case—for whatever reason—that would be the end of the matter.

Thus, the new threat posed by mandatory sentencing laws, as distinguished from the prior sentencing regime, is to the jury's valuable function of applying laws of general blameworthiness to ensure their just employment in individual cases. If legislatures can demand that these laws be applied by judges instead of juries and prosecutors can appeal trial judges' determinations as inconsistent with these general laws, legislative and prosecutorial power increases because judges cannot check these laws to the same extent as juries can. As a result, judicial power as a whole is diminished.

This Part details the threat mandatory sentencing laws pose for the system of separated powers and the jury's role within that system. Because an evaluation of all federal and state mandatory sentencing regimes would be impractical, this Article focuses on the Federal Sentencing Guidelines.[232] The Federal Sentencing Guidelines apply throughout the federal criminal system,[233] and because of their rigidity, they provide a vivid demonstration of how such laws can undercut the constitutional scheme of separated powers. Section A examines the ways in which the Guidelines shift the law-application responsibility in

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[231] Just as this Article assumes that trial judges will perform their factfinding function in good faith, see *infra* note 271, it also assumes that appellate judges will act in good faith. If the trial judge ignores the law or engages in manipulative factfinding, the Article assumes that most appellate courts will reverse the trial judge, regardless of the equitable arguments.

[232] To the extent that state sentencing guidelines are similarly restrictive of judicial discretion, the same concerns for the jury will apply. Some states, however, have flexible guidelines that do not appear to raise the same constitutional difficulties. *See infra* notes 372-73 and accompanying text (noting that some state sentencing systems are more flexible in allowing judicial discretion than the Federal Guidelines).

[233] In 2001, the Guidelines applied in almost 60,000 cases. OFFICE OF POLICY ANALYSIS, U.S. SENTENCING COMM'N, FEDERAL SENTENCING STATISTICS BY STATE, DISTRICT & CIRCUIT: OCTOBER 1, 2000, THROUGH SEPTEMBER 30, 2001, at tbl.2, *available at* http://www.ussc.gov/JUDPACK/JP2001.htm (last visited Oct. 22, 2003).

a criminal case from the jury to the judge, which has the effect of increasing legislative and executive power. Section B describes the operation of the Sentencing Guidelines in a plea bargaining regime, which is the overwhelming method by which most criminal cases are resolved, and explains the relationship between the jury and plea bargaining.

A. *The Guidelines as Criminal Laws*

To understand fully the relationship of the Guidelines to the jury trial guarantee and their similarity with general criminal laws, it is helpful to retrace briefly the evolution of the Guidelines themselves.[234] As noted above, before the advent of sentencing guidelines and mandatory minimum sentences, most federal and state statutes gave judges extensive discretion to sentence defendants. The commonly stated purpose for this discretion was an underlying belief in rehabilitation. The judge—and later in the process, the parole officer—needed broad discretion to calibrate sentences based on the defendant's particular prospects for reformation. The sentence was, at least in theory, designed to "treat" the defendant.[235] Under this theory, the judge needed a broad statutory range in which to operate, and the sentencing proceeding itself needed to be flexible enough to permit the introduction of a wide array of information that might pertain to rehabilitation.[236]

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[234] For an exhaustive and informative look at the legislative history of the Federal Sentencing Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993).

[235] *See* Pat Carlen, *Crime, Inequality, and Sentencing*, *in* A READER ON PUNISHMENT 309, 315 (R. A. Duff & David Garland eds., 1994) ("[T]he general rehabilitative model has always been less committed to making the punishment fit the crime and more concerned with fitting the punishment to the offender . . . ."); Herman, *supra* note 33, at 302 (suggesting that, "as rehabilitation became a goal of sentencing, the need for discretion in sentencing increased" because judges needed to look both to the past and the future in assessing a defendant's prospects for rehabilitation); Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523, 531, 542-43 (1993) (describing the importance of the rehabilitative rationale to the Court's decision to allow discretionary sentencing in *Williams*). In practice, of course, many judges based their sentencing decisions on a host of goals that may have had nothing to do with rehabilitation. These included deterrence, incapacitation, and just deserts.

[236] *See* Carlen, *supra* note 235, at 315 (noting that the general rehabilitative model focused on "an individualized sentencing aimed at removing (or ameliorating) the conditions presumed to have been part-cause of the criminal behaviour"); Herman, *supra* note 33, at 303 (observing that, with the goal of rehabilitation, "most jurisdictions

The rehabilitation ideal faced attacks from both the left and right sides of the political spectrum in the 1970s and 1980s.[237] Liberals were dissatisfied with the arbitrariness and disparity that resulted from indeterminate sentencing[238] and doubted the state's ability to find and treat the causes of criminal behavior.[239] Conservatives believed that the vagaries of the rehabilitative approach were at odds with the deterrence and incapacitation goals of the criminal law.[240]

Thus, the federal government (and many state governments) sought to reform sentencing. The Sentencing Reform Act of 1984[241] created the United States Sentencing Commission, an independent federal agency in the judicial branch that is empowered to promulgate Sentencing Guidelines. The Sentencing Reform Act provided that the Guidelines would take effect if Congress did not disapprove them within six months.[242]

The Sentencing Commission adopted a modified "real" offense approach to sentencing as opposed to a "charge" offense system. A charge offense system "would tie punishments directly to the offense for which the defendant was convicted."[243] A real offense system is "driven not by the particularities of the charge, but by what the defendant 'really' did."[244] Under a pure real offense sentencing regime, "the sentencing authority is permitted to consider all manner of facts not necessary to the defendant's conviction on the offense actually tried ('extra-element facts')."[245] The Sentencing Commission rejected a pure charge-based system because it believed that a

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assumed that a separate sentencing proceeding was needed to develop whatever offender-oriented facts the sentencing judge might consider relevant").

[237] Harold Edgar, *Herbert Wechsler and the Criminal Law: A Brief Tribute*, 100 COLUM. L. REV. 1347, 1356 (2000); *see also* STITH & CABRANES, *supra* note 6, at 30-31, 39-48 (discussing the politics of the 1970s and 1980s which led to the Sentencing Reform Act of 1984). For an illuminating account of how cultural forces shaped this political shift, see DAVID GARLAND, THE CULTURE OF CONTROL (2001).

[238] *See* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 23 (1973) ("[A] regime of substantially limitless discretion is by definition arbitrary, capricious, and antithetical to the rule of law.").

[239] *Id.* at 87-89.

[240] Edgar, *supra* note 237, at 1356-57.

[241] Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

[242] *Id.* § 235(B)(ii)(1)(III).

[243] Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 9 (1988).

[244] James E. Felman, *The Fundamental Incompatibility of Real Offense Sentencing Guidelines and the Federal Criminal Code*, 7 FED. SENTENCING REP. 125 (1994).

[245] Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines' Modified Real-Offense System*, 91 NW. U. L. REV. 1342, 1344 (1997).

charge-based system would vest enormous discretion in the prosecutor to determine what charges to bring and could lead to the same disparity in sentencing that prompted the Sentencing Guidelines in the first place.[246] But too many "real offense" elements could make the process "unwieldy or procedurally unfair"[247] because it could shift to the judge and the sentencing proceeding—which lacks the procedural protections of a trial—too many critical determinations.[248] The Commission attempted to forge a middle-ground position. Under its modified real offense system, the offense of conviction forms the "base offense level," but that level is modified "in light of several 'real' aggravating or mitigating factors[] (listed under each separate crime), several 'real' general adjustments ('role in the offense,' for example) and several 'real' characteristics of the offender, related to past record."[249]

The Sentencing Guidelines, therefore, do not merely address the problem of disparate sentencing ranges for similar statutory offenses. Rather, they put in place substantive changes—they simply do so in the form of sentencing guidelines, as opposed to an alteration of the statutory offense itself.[250]

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[246] *See* Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1204 (1993) (noting that the Sentencing Commission adopted its form of modified real offense sentencing because of its "concern that prosecutorial charging decisions would undermine the new sentencing system"); O'Sullivan, *supra* note 245, at 1346, 1400-32 (explaining the reasons behind a modified real offense system and, in particular, how such a system prevents prosecutors from undermining the goals of sentencing reform through charging and plea bargaining decisions).

[247] Breyer, *supra* note 243, at 11.

[248] In addition, the implementation of a pure real offense system would preclude defendants from obtaining the benefits of negotiated charge or count bargains. Nagel & Schulhofer, *supra* note 192, at 512-13.

[249] Breyer, *supra* note 243, at 12 (footnotes omitted); *see also* Lear, *supra* note 246, at 1194 (describing the "modified" real offense system); O'Sullivan, *supra* note 245, at 1361 (recognizing the Commission's "compromise between charge- and real-offense sentencing").

[250] *See* Gerard E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENTENCING REP. 112, 112 (1994) [hereinafter Lynch, *Sentencing Guidelines*] ("By rendering the offense of conviction ordinarily insignificant for sentencing purposes, and replacing the code offenses for these purposes with comprehensive codified guidelines, the new federal sentencing regime to a considerable extent rationalizes and displaces congressionally-enacted criminal statutes."); *see also* STITH & CABRANES, *supra* note 6, at 3 ("In essence, the Sentencing Commission has identified a multitude of new 'Guidelines crimes,' each a variant of one or more statutory crimes and each with its own mandated range of punishment."); Gerard E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFF. CRIM. L. REV. 297, 316 (1998) [hereinafter Lynch, *Model Penal Code*] ("The substantive distinction between legislative enactments carving an offense into different degrees with different punishment structures, and sentencing guidelines subdividing a single legislatively-defined

Consider first the *types* of factual determinations made by judges under the Sentencing Guidelines, all of which result in an increased sentence for the defendant. A judge must increase a defendant's sentence if the judge finds that the defendant perjured herself on the stand.[251] The Guidelines give judges the authority to calculate the amount of loss suffered by victims of a fraudulent scheme.[252] A judge similarly decides how much a defendant stole (or intended to steal) in the course of a burglary[253] or robbery.[254] A judge determines the amount of drugs trafficked by a defendant.[255] She decides whether a defendant convicted of a drug offense possessed a dangerous weapon.[256] Similarly, a judge must increase a defendant's sentence if she concludes that the defendant brandished a weapon in the course of a robbery.[257] A judge even determines whether the defendant's conduct resulted in the death of a victim, and she must increase a defendant's sentence if such a determination is made.[258] For example, in *United States v. Fenner*,[259] a jury convicted the defendants of weapons and narcotics offenses.[260] During sentencing, the trial court concluded that the defendants were also responsible for a murder in relation to these offenses.[261] The Fourth Circuit upheld the large sentence enhancement

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crime (or a group of related crimes) according to regulations identifying aggravating and mitigating circumstances, is of course a slim one.").

[251] U.S. SENTENCING GUIDELINES MANUAL § 3C1.1, cmt. n.4(b) (2002); *see also* United States v. Dunnigan, 507 U.S. 87, 89 (1993) (holding that the Constitution permits sentence enhancement under the Sentencing Guidelines "if the court finds [that] the defendant committed perjury at trial").

[252] U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (1998) (consolidated with § 2B1.1 effective Nov. 1, 2001); *see also* United States v. Photogrammetric Data Servs., Inc., 259 F.3d 229, 256-59 (4th Cir. 2001) (upholding trial court's calculation of loss under § 2F1.1 for defendants convicted of fraud).

[253] U.S. SENTENCING GUIDELINES MANUAL § 2B2.1(b)(2) (2002); *see also id.* § 2X1.1(a) (requiring the trial court to determine the base offense level "from the guideline for the substantive offense" attempted or intended); United States v. Lamb, 207 F.3d 1006, 1008 (7th Cir. 2000) (calculating defendant's base offense level based on amount he intended to steal).

[254] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(7) (2002).

[255] *Id.* § 2D1.1(c).

[256] *Id.* § 2D1.1(b)(1); *see also* United States v. Watts, 519 U.S. 148, 150, 157 (1997) (per curiam) (approving a sentencing enhancement for weapon possession under § 2D1.1(b)(1) even though the jury acquitted the defendant of possessing a weapon in relation to his drug offense under 18 U.S.C. § 924(c)).

[257] U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2) (2002).

[258] *Id.* § 2K2.1(c)(1)(B).

[259] 147 F.3d 360 (4th Cir. 1998).

[260] *Id.* at 362.

[261] *Id.*

resulting from the defendants' responsibility for a death, despite the fact that a state jury had acquitted the defendants of murder.[262]

Now consider the *effect* of these factual findings. As a result of the judge's finding in *Fenner* that a death resulted from the defendants' conduct, one defendant's sentence was increased by seven years, and the other's increased by thirteen years.[263] The judge's factual findings had predetermined consequences for the defendants' punishment *as a matter of law.* The judge has little discretion to depart from the Guideline ranges and faces appellate review of her departure decisions.[264]

Thus, the generally applicable laws of blameworthiness contained in the Sentencing Guidelines resemble criminal laws in all relevant respects. The Guidelines, as Gerard Lynch notes:

> bear all the formal attributes of a penal code. Splitting some offenses into . . . multiple degrees . . . , and combining others under the same guideline provision, the guidelines create, in effect, a simplified codification of the behavior criminalized by federal law. By rendering the offense of conviction ordinarily insignificant for sentencing purposes, and replacing the code offenses for these purposes with comprehensive codified guidelines, the new federal sentencing regime to a considerable extent rationalizes and displaces congressionally-enacted criminal statutes.[265]

Like the criminal code itself, the Sentencing Guidelines have the force and effect of law. For one, the Sentencing Guidelines identify particular conduct as blameworthy no matter what the individual circumstances. Furthermore, the Sentencing Guidelines specify precisely how blameworthy conduct is by dictating the punishment

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[262] *Id.* at 366-67.

[263] *Id.* at 363.

[264] *See* Koon v. United States, 518 U.S. 81, 92 (1996) ("Congress allows district courts to depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" (quoting 18 U.S.C. § 3553(b))). For a discussion of how courts have treated this "heartland" standard, see Marc L. Miller & Ronald F. Wright, *Your Cheatin' Heart(land): The Long Search for Administrative Sentencing Justice,* 2 BUFF. CRIM. L. REV. 723, 770-802 (1999). Some factors can never be the basis for departure, including race, sex, national origin, creed, religion, socioeconomic status, lack of guidance as a youth, and drug or alcohol dependence. U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.4, .10, .12 (2002). For a discussion of recent congressional changes to the departure standard, see *infra* text accompanying notes 357-63.

[265] Lynch, *Sentencing Guidelines, supra* note 250, at 113.

associated with the crime. And although there is departure power, it is limited.[266]

The Guidelines do what substantive code revisions would have done, with one fundamental difference. Whereas code reform would have left these factual and law-application decisions with the jury, the Sentencing Commission placed this responsibility with the judge.[267]

The judge's power—and duty—under the Guidelines to consider facts apart from those of conviction extends not only to criminal behavior that was never charged, but also to behavior that was charged but that the jury did not find beyond a reasonable doubt (i.e., that the jury acquitted). Thus, as the *Fenner* case discussed above illustrates, an individual can receive an increase in punishment on the basis of acquitted criminal conduct as long as the individual is convicted of some other charge.

Of course, prior to the Guidelines, courts often considered at sentencing the broad range of conduct committed by a defendant and did not limit themselves to the offense of conviction in setting punishment.[268] Intuitively, then, it may seem that the Guidelines do not amount to a significant change. But there is a difference. Previously, consideration of "relevant conduct" was not mandatory, so the judge could use her discretion in deciding whether or not to consider it. Nor did the consideration of relevant conduct yield a predetermined amount of punishment.[269] In other words, the judge previously had complete discretion to adapt her ruling to the individual

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[266] *See infra* Part III (discussing both the implicit and explicit constraints placed on departure).

[267] The Sentencing Guidelines' substantive changes to the criminal law have led Judge Lynch to ask, "if crimes are to be divided into more rather than fewer degrees, shouldn't defendants have the traditional right to have a jury of their peers decide the level of their guilt?" Lynch, *Sentencing Guidelines, supra* note 250, at 114. Judge Nancy Gertner, of the United States District Court for the District of Massachusetts, has similarly observed that "[t]here is something fundamentally troubling about the choice to abandon substantive code reform, which would have empowered the jury, and the choice to pursue a system of sentencing code reform that has only empowered a Sentencing Commission." Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 431 (1999).

[268] *See* William W. Wilkins, Jr. & John R. Steer, *Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines*, 41 S.C. L. REV. 495, 504 (1990) (stating that, prior to the enactment of the Sentencing Guidelines, "courts customarily have considered [a] broad range of offense conduct when imposing [a] sentence").

[269] *See* David Yellen, *Illusion, Illogic, and Injustice: Real Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403, 418 (1993) (discussing how "[t]he impact of real-offense elements was . . . not rigid and predetermined" in the federal system before the Guidelines).

circumstances before her because she was not applying a generally applicable law that dictated how a fact would affect punishment. Thus, although the judge was previously engaged in *factual findings* similar to those made by juries, the judge was not performing a *law-application* function akin to that performed by the jury. Indeed, the judge was not applying any law at all; therefore, the judge retained discretion to adjust her findings as she saw fit in a particular case.

In contrast, under the Guidelines, a sentence *must* be increased on the basis of relevant conduct that is proven by a preponderance of the evidence.[270] So, if one believes that judges perform their judicial function in good faith, federal judges no longer have an option of ignoring evidence of relevant conduct in determining a defendant's sentence.[271] If the prosecutor proves such conduct by a mere preponderance of the evidence, the judge must increase the sentence. This enhancement typically makes an enormous difference. For example, in *United States v. Manor*,[272] the defendant was charged with one count of conspiracy to distribute 250 grams of cocaine and with other distribution counts involving approximately nineteen grams of cocaine.[273] The jury acquitted him on the conspiracy count but convicted him on the intent to distribute nineteen grams.[274] At sentencing, the judge treated the conspiracy to distribute 250 grams as relevant conduct, which tripled the defendant's sentence exposure.[275] As a result, the defendant faced the identical punishment range he would have faced if he had been convicted of the conspiracy charge.[276] The jury's acquittal was rendered essentially meaningless.

Only if a defendant is already at the maximum for the convicted offense will the jury's acquittal shield the defendant from an increase in punishment under the Guidelines. But because the statutory maximum authorized is typically far higher than the average sentence

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[270] *See* Koon v. United States, 518 U.S. 81, 92 (1996) ("A district judge now *must* impose on a defendant a sentence falling within the range of the applicable Guideline, if the case is an ordinary one." (emphasis added)).

[271] Some might argue that judges can avoid the sentencing consequences of the Guidelines by manipulating their findings of fact. That is, they can deny that the prosecutor has demonstrated that particular conduct has occurred. While this is, of course, possible, this Article presumes that most judges will make honest findings of fact and uphold their duty to apply the law to those facts.

[272] 936 F.2d 1238 (11th Cir. 1991).

[273] *Id.* at 1242.

[274] *Id.*

[275] *Id.*; Lear, *supra* note 246, at 1196-97, 1197 n.74.

[276] Lear, *supra* note 246, at 1196-97.

prescribed by the Guidelines, the relevant conduct provision generally has an enormous effect on the actual sentence a defendant receives.[277] One study, for example, found that half of all sentences had been increased—sometimes doubled or tripled—by uncharged conduct.[278]

Several respected jurists and commentators have spoken out against this aspect of the Guidelines. Judge Richard Arnold has called this attribute "unseemly and unworthy of the United States of America."[279] Judge Jon Newman has argued that "[a] just system of criminal sentencing cannot fail to distinguish between an allegation of conduct resulting in a conviction and an allegation of conduct resulting in an acquittal."[280] Judge Gilbert Merritt believes that "[t]he 'relevant conduct' provisions of the new sentencing code are so fundamentally inequitable and contrary to principles of evenhanded justice that they violate due process of law."[281] Jeffrey Standen has noted that, under true real offense sentencing, federal statutes become "trivial."[282] He argues, moreover, that real offense guidelines are not needed (or even effective) in checking prosecutorial discretion. Instead, he argues, Congress should spend more time defining crimes with specificity and eliminating overlapping offenses because it is the "current plasticity of the federal code [that] provides the foundation for prosecutors to select among statutes, often carrying different sentencing outcomes, in charging and convicting offenders."[283]

The Supreme Court, however, has thus far been willing to condone real offense guideline sentencing. Without even hearing argument on the question, the Court approved the Guidelines' mandate that judges consider relevant conduct, even when a jury has acquitted a defendant of that conduct.[284] The Court relied on the false premise

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[277] *Id.* at 1206-07.

[278] Herman, *supra* note 33, at 311-12.

[279] United States v. England, 966 F.2d 403, 410 n.5 (8th Cir. 1992).

[280] United States v. Concepcion, 983 F.2d 369, 396 (2d Cir. 1992) (Newman, J., dissenting to denial of reh'g).

[281] United States v. Silverman, 976 F.2d 1502, 1527 (6th Cir. 1992) (Merritt, C.J., dissenting).

[282] Jeffrey Standen, *An Economic Perspective on Federal Criminal Law Reform*, 2 BUFF. CRIM. L. REV. 249, 280 (1998).

[283] *Id.* at 285-86. Even Julie O'Sullivan, who has written a persuasive defense of the relevant conduct provisions, has conceded that increasing sentences based on relevant conduct "undermine[s] the jury's role, in public perception as well as in reality." O'Sullivan, *supra* note 245, at 1381 n.155.

[284] *See* United States v. Watts, 519 U.S. 148, 154 (1997) (per curiam) ("In short, we are convinced that a sentencing court may consider conduct of which a defendant has been acquitted."). The Court used similar reasoning to uphold—against a Double

that, if discretionary sentencing was permissible, mandatory sentencing must be as well.[285] And from this fatal assumption, mandatory sentencing took root.

B. *The Sentencing Guidelines and Plea Bargaining*

Thus far we have considered the operation of the Guidelines when a defendant takes her case to trial. But, the overwhelming majority of criminal cases never go to trial. Although plea bargaining for

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Jeopardy challenge—a prosecution for conduct which had previously been used to increase a sentence under the Guidelines' relevant conduct provision. *See* Witte v. United States, 515 U.S. 389, 399 (1995) ("[U]se of evidence of related criminal conduct to enhance a defendant's sentence for a separate crime within the authorized statutory limits does not constitute punishment for that conduct within the meaning of the Double Jeopardy Clause."). In an opinion concurring in the judgment, Justice Scalia (joined by Justice Thomas) pointed out that there is "no real difference" in the majority's distinction between punishing a defendant twice for the same offense and "'punish[ing a defendant] *twice as much* for *one* offense solely because [the defendant] also committed another offense, for which other offense we will also punish [the defendant] (only once) later on.'" *Id.* at 407 (Scalia, J., concurring).

[285] The Supreme Court simply relied on *Williams v. New York*, 337 U.S. 241, 247 (1949). *Watts*, 519 U.S. at 152. A sentencing enhancement in the Guidelines based on relevant conduct, the Court held, does not "punish a defendant for crimes of which he was not convicted, but rather increase[s] his sentence because of the manner in which he committed the crime of conviction." *Id.* at 154. The problem with this logic, however, is that, in the absence of the acquitted or uncharged conduct being used as "relevant conduct," the defendant would not receive the same amount of punishment *as a matter of law*. Put another way, if defendant *A* committed the same offense as defendant *B* but did not perform the acquitted or uncharged conduct, defendant *A* would receive a lesser punishment than defendant *B* as a matter of law by operation of the Guidelines. Thus, defendant *B* is, in a very real sense, being punished on the basis of a general law for which he was not convicted. *See* Lear, *supra* note 246, at 1222 (explaining why, "[o]nce the decision is made to condemn specific conduct as, in and of itself, criminally reprehensible, a conviction must be treated as a prerequisite to punishment based on that conduct"); Reitz, *supra* note 235, at 531-33 (detailing a case in which codefendants tried on the same counts received identical sentences, even though a jury had acquitted one defendant of one of the three crimes with which both were charged); Benjamin E. Rosenberg, *Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing*, 23 SETON HALL L. REV. 459, 488 (1993) ("[T]he sentence is a response to a set of circumstances or a pattern of behavior—relevant conduct—that may never have been presented to the jury, that the defendant may not have had an adequate opportunity to rebut or that may not even be criminal." (footnotes omitted)); Matthew MacKinnon Shors, Note, United States v. Watts*: Unanswered Questions, Acquittal Enhancements, and the Future of Due Process and the American Criminal Jury*, 50 STAN. L. REV. 1349, 1388 (1998) ("Once the legislature decides to classify conduct as criminal, . . . a conviction is a prerequisite to any punishment based on that conduct."). This has led some courts of appeals to conclude that, at the very least, relevant conduct must be shown by clear and convincing evidence when it would dramatically increase a sentence. *Watts*, 519 U.S. at 156.

felony cases was relatively rare in the eighteenth century,[286] it is now the norm.[287] Approximately ninety-one percent of defendants convicted in federal and state courts plead guilty.[288] The percentage of felony convictions obtained by plea tops ninety-seven percent in some areas.[289]

Perhaps the greatest danger posed by plea bargaining is the one the jury trial is designed to avoid: too much power in the hands of the government without a check by the people.[290] Even in regimes in which judges can override bargains, they are an inadequate check on the prosecution. As George Fisher recently detailed, judges are unlikely to disagree with the deal that has been struck because their incentives now largely coincide with those of prosecutors.[291] They are likely to accept the plea bargain to ease the burden of their docket.[292]

The more substantial protection for the defendant comes from the fact that she can threaten to take her case to the jury.[293] In the

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[286] John Langbein has argued that plea bargaining was unheard of in the eighteenth century. *See* John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL'Y 119, 120 (1992) (explaining that "[v]irtually every prisoner charged with a felony insisted on taking his trial" (quoting JOHN M. BEATTIE, CRIME AND THE COURTS IN ENGLAND: 1660-1800, at 336-37 (1986))). But George Fisher has recently offered evidence of plea bargaining during this time period. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 158-61 (2003) (exploring instances of plea bargaining in Manchester, England, during the late eighteenth century).

[287] In 1970, the Supreme Court claimed that plea bargaining was "inherent" in our criminal law and held it to be constitutional. Brady v. United States, 397 U.S. 742, 751 (1970).

[288] Bibas, *supra* note 7, at 1150 & n.330 (citing LEONIDAS RALPH MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, 2000 ANNUAL REPORT OF THE DIRECTOR, app. tbl.D-4 (2001), *available at* http://www.uscourts.gov/judbus2000/appendices/d04sep00.pdf; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1998, at 403 tbl.5.17, 417 tbl.5.42 (1999); 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.3(o), at 124 n.207 (2d ed. 1999)).

[289] William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 24 (1997).

[290] *See* Langbein, *supra* note 286, at 124 ("Plea bargaining achieves just what the Framers expected the jury to prevent, the aggrandizement of state power.").

[291] The incentives for plea bargaining became especially strong in the twentieth century, as procedural protections for criminal defendants expanded, jury trials became more costly and time-consuming, and new opportunities for trial error arose. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1039 (2000) (discussing the efficiency of pleas).

[292] *Id.*

[293] *See* KALVEN & ZEISEL, *supra* note 188, at 31 (noting that decisions regarding pretrial dispositions are "in part informed by expectations of what the jury will do"). If the government and defendant agree to proceed by a bench trial, then it is the expected outcome of the bench trial that will shape the contours of the bargain.

course of the bargain, the prosecutor will determine what deal to offer the defendant based on the prosecutor's evaluation of the societal costs of a reduced sentence; the costs of going to trial, which include the actual costs in time and resources; and the risk that a jury will acquit. In determining whether to take the prosecutor's offer, the defendant must also estimate the likelihood of a conviction if the case goes to the jury and the likely sentence if the jury convicts.[294] The jury trial guarantee is still relevant in the plea bargaining context, then, because it defines the parameters of the bargaining terms.[295] If the chance of acquittal is high enough—because the prosecutor's evidence is weak or the defendant's case is otherwise sympathetic—the case is more likely to go to trial because the prosecutor cannot offer a deal with terms favorable enough for the defendant to accept.

Thus, the anticipated outcome at trial governs the plea bargain. It is therefore critically important that the jury's power at trial is not undermined[296] because, to the extent the jury's authority is eroded, plea bargaining is largely unconstrained and the government can name its price without any oversight.

The Sentencing Guidelines make plea bargaining a cause for concern both because they curtail the judge's discretion and because they diminish the jury's ability to limit the sentence a defendant could receive even if she were to take her case to trial. George Fisher has explained that prosecutorial bargaining power is greatest when the prosecutor can offer a guaranteed concession if the defendant pleads and can threaten a guaranteed increase in the defendant's sentence if

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[294] Stephanos Bibas points out that the plea bargain must also be weighed against the outcome of a guilty plea without an agreement. Bibas, *supra* note 7, at 1159-60, 1159 n.359. But, of course, the guilty plea without an agreement will itself be weighed against the jury trial option; thus, the availability of a jury trial will still affect the calculus.

[295] Our traditional adversarial procedure, including the jury trial, "keep[s] at least a loose rein on executive power." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2144 (1998). The jury trial serves to "protect[] against the punishment of those . . . whom the government disapproves, but about whose blameworthiness there remain troubling doubts" and also acts "as the fail-safe appellate process that promotes the reasonableness of prosecutorial-administrative determinations by setting the limits within which it operates." *Id.* at 2145-46.

[296] For example, as Judge Lynch has noted, a non-unanimous jury verdict rule might have a damaging effect on the defendant in the bargaining process. *Id.* at 2147. The benefit of turning some hung juries into convictions (and a smaller number into acquittals) will be outweighed, he argues, by the enormous indirect effects that abandoning the unanimity rule will have on plea bargaining. *Id.* Because a defendant would be more likely to lose at trial, there will be fewer trials and less oversight of the bargaining process. *Id.* at 2146-47.

the defendant goes to trial.[297] In discretionary sentencing schemes, a judge may or may not increase a sentence if a defendant takes her case to trial. As a result, the prosecution has little concrete support for a threat that a defendant's sentence will increase if a defendant goes to trial.[298]

The Sentencing Guidelines change this dynamic. Under the Guidelines' provisions, if a defendant goes to trial and is convicted, the penalty is generally increased from what it would have been had the defendant pleaded guilty, with or without a deal from the prosecutor. That is because the Sentencing Guidelines offer defendants a two- to three-level reduction for "acceptance of responsibility," which does not typically apply to defendants who deny elements of factual guilt at trial.[299] This reduction can mean several years to a defendant facing a high penalty. In addition, most judges tend to give sentences at the lower end of a sentencing range when a defendant pleads guilty,[300] so the defendant typically receives a reduction in her sentence if she pleads even without an extra discount from the prosecutor. Thus, the defendant is indirectly punished for going to trial before a jury.

In many cases, the prosecutor will offer the defendant a further reduced sentence for pleading guilty. Although the real offense aspect of the Guidelines limits the prosecutor's bargaining power somewhat, federal prosecutors still retain some leeway.[301] For instance, if a defendant pleads guilty, a prosecutor may avoid charging the defendant under a statute that contains a mandatory minimum or a statute that prevents the defendant from obtaining a reduction under the "safety valve" provision of the Sentencing Guidelines.[302] In

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[297] FISHER, *supra* note 286, at 224.

[298] *See id.* at 225 ("Before the Guidelines, then, defendants generally could not predict with confidence the costs of wagering trial and losing. In the face of this uncertainty, we may expect that many defendants measured those costs too low and unreasonably passed up the benefits of a plea.").

[299] U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (1998) cmt. nn.2-3; Bibas, *supra* note 7, at 1153 n.340, 1154-55 n.345.

[300] Bibas, *supra* note 7, at 1153.

[301] In addition to manipulating charges, prosecutors can engage in fact manipulation as well, at least to the extent that the probation officer relies on the prosecution's factual claims and does not investigate the claims independently. *See* STITH & CABRANES, *supra* note 6, at 87 (describing how "[i]n practice, many probation officers simply report the facts of the case as directly recounted to them by the prosecutor").

[302] U.S. SENTENCING GUIDELINES MANUAL § 5C1.2 (2002) provides that the mandatory minimum sentences required by certain statutes do not apply if a defendant meets the eligibility criteria established in 18 U.S.C. § 3553(f) (2000). A prosecutor

addition, the prosecutor might agree to file a motion recommending a downward departure from the authorized guideline range.[303]

The prosecutor also has a less explicit—but potent—bargaining chip under the Sentencing Guidelines in that a jury acquittal on one charge does not shield the defendant from punishment for that conduct.[304] As noted, a jury verdict can protect the defendant only if she is acquitted of *all* charges. If the prosecution has a strong case on any single charge but has weak evidence on other charges, the defendant may still not want to risk going to trial. That is because, even if the jury acquits the defendant of these weaker charges, the judge must increase the defendant's sentence on the basis of the acquitted conduct if the judge finds by a preponderance of the evidence that the conduct occurred. This increase can extend all the way up to the statutory maximum for the convicted offense. Because most offenses do not come close to the statutory maximum under the Sentencing Guidelines, that is a substantial risk. Recall the facts of *Manor*.[305] Even though the jury acquitted Manor of the count involving conspiracy to distribute 250 grams of cocaine, he was sentenced as if he had been found guilty.[306] He therefore gained nothing by going to trial, even though the jury acquitted him of the more serious charge. Instead, he lost the benefits of whatever the prosecutor may have offered as part of a plea bargain.

It is not difficult to see the bargaining power this gives the prosecutor. Even if the defendant is innocent of a greater offense, by going to trial, she runs the risk of being sentenced as if she were guilty because the jury cannot shield her from having her sentence increased on the basis of the acquitted conduct. The jury's determination does not restrict the judge from taking the acquitted conduct into account. On the contrary, the Guidelines *require* a judge to consider such conduct if the judge finds it has been demonstrated by a preponderance of the evidence. The judge is likely to be less skeptical of the prosecutor's case than the jury. Under a preponderance of the evidence standard and without the procedural protections and evidentiary rules

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could therefore agree not to charge a defendant under a statute that is ineligible for the safety valve reduction, such as 21 U.S.C. § 860 (2000).

[303] *See* U.S. SENTENCING GUIDELINES MANUAL §§ 5K1.1, 5K2.0 (1998) (discussing substantial assistance and other grounds for departure).

[304] *See supra* text accompanying notes 270-85 (discussing the government's power to punish a defendant who is acquitted by a jury on a greater charge as long as the jury convicts on a lesser charge).

[305] 936 F.2d 1238, 1240 (11th Cir. 1991).

[306] *Id.* at 1242.

of trial, the danger is even greater that the judge will side with the prosecutor. Therefore, a prosecutor can credibly threaten a defendant with an increased sentence if she risks going to trial under the Sentencing Guidelines.[307]

Thus, together the Sentencing Guidelines and plea bargaining provide a dangerous mix that the judiciary has little power to check. The jury in essence is nothing more than a low-level gatekeeper. Its conviction clears the way for substantial government abuse, and its acquittal does nothing to prevent the defendant from being punished for her acquitted conduct unless the acquittal is on all counts or the defendant's Guideline sentence is already at the statutory maximum for the convicted offense. When plea bargaining takes place in the shadow of this regime, fewer defendants will take the risk of a trial. Instead, they will accept just about whatever bargain they can get from the prosecutor, as long as the ultimate deal leaves them better off than they would be going to trial. The prosecutor, therefore, has enormous bargaining power.[308]

* * *

The Sentencing Guidelines work an enormous change in the balance of separated powers. Under the discretionary regime that existed before mandatory minimum sentences and sentencing guidelines, judges had ample authority to ensure that a defendant received punishment commensurate with her individual circumstances. Indeed, that was the entire point of the discretionary sentencing model: judges had wide latitude to consider whatever facts they deemed relevant to formulating a sentence that would further the rehabilitation of the offender. To be sure, this was hardly a perfect system. With such broad power, there was the potential for abuse and disparity. But there was no question the judiciary had the power to prevent an

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[307] *See* FISHER, *supra* note 286, at 216 (arguing that it is relatively easy for the prosecutor to prevail on relevant conduct because of the lower standard of proof and because the relevant conduct in question "often is among the most readily proved parts of the government's case").

[308] Note that the judge provides almost no check on the prosecutor. The relevant conduct provisions allow the judge to impose a harsher sentence, but the judge cannot suggest that the plea bargain take place on terms more lenient to the defendant. *See id.* at 214-15 (evaluating the "limited powers of leniency" afforded judges under the Sentencing Guidelines). Moreover, in the typical plea agreement under the Sentencing Guidelines, there will be a stipulation as to relevant conduct (e.g., drug quantity). Thus, the judge is unlikely to make her own determination regarding this issue. She will likely just accept the plea.

overinclusive law from applying when it would be unjust. Juries still decided whether general criminal laws applied and those laws gave judges a wide range within which to sentence, based on whatever facts the judge deemed appropriate and without the threat of a government appeal. Thus, the judiciary—judge and jury—had ample power to ensure a just result in an individual case.

Similarly, under our Nation's early regime of mandatory punishments—in which particular offenses yielded specific punishments—there was also a check. Before general criminal laws dictating particular punishments could be applied in a particular case, a jury had to agree to convict. And with an unreviewable power to acquit, the jury possessed authority to make sure the general law was properly applied in individual cases.[309] The jury's power to correct these general laws was, of course, a blunt instrument; the jury could only acquit or convict. Thus, the jury could not make the kinds of finely calibrated sentencing determinations judges made under the discretionary sentencing regime. Moreover, the judge's evidentiary decisions could prevent some facts about the defendant's circumstances or the crime from coming before the jury, which further limited both the jury's power to evaluate those individual circumstances and its ability to convey the community's sense of justice.[310] But for all its faults, the jury could at least impose some check on the operation of general laws if the evidence in the particular case justified a departure or if the general law itself was flawed (in the jury's estimation).

Thus, in both of these situations, which together dominated the American legal landscape for more than 200 years, the judiciary possessed authority to ensure that a general criminal law was being properly applied to a defendant; the executive and the legislature did not have similar unchecked power to make that determination. The problem with modern sentencing laws, like the Guidelines and mandatory minimums, is that they strip this power from *both* judicial actors. The legislature passes general laws with particular punitive effects, but it

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[309] *See* STITH & CABRANES, *supra* note 6, at 10 (listing the jury's power to nullify as a discretionary check on mandatory capital punishment schemes that existed throughout most of the nineteenth century).

[310] *See* Richman, *supra* note 161, at 976 (noting that "[e]very evidentiary rule that—for fear of jury misvaluation, 'inflammation,' or nullification—prevents the jury from learning something about a criminal defendant, his victim, or his crime tends to rob verdicts of the power to communicate the community's actual prosecutorial priorities"). The defendant, however, will be able to tell the jury what happened and why, so there will always be some level of individualization in each case, regardless of what additional evidence about the defendant's personal circumstances is kept from the jury.

requires judges to apply those laws within strictly confined limits or face an appeal by the prosecution. As a result, neither the judge nor the jury has the power to ensure that the law is being properly applied in a particular case.[311] That power rests with the government. As David Garland observes:

> These methods of fixing sentences well in advance of the instant case [such as sentencing guidelines and mandatory minimum sentences] extend the distance between the effective sentencer (in reality, the legislature, or the sentencing commission) and the person upon whom the sentence is imposed. The individualization of sentencing gives way to a kind of 'punishment-at-a-distance' where penalty levels are set, often irreversibly, by political actors operating in political contexts far removed from the circumstances of the case. The greater this distance, the less likely it is that the peculiar facts of the case and the individual characteristics of the offender will shape the outcome.[312]

In other words, under such a regime, the legislative and executive branches may dictate criminal punishment without an effective judicial check.[313]

This is the danger of stripping the adjudicatory process of discretionary power: it paves the way for unchecked legislative and executive power that invites abuse and threatens individual liberty.

III. REINVIGORATING THE CONSTITUTIONAL JURY CHECK

When the Supreme Court decided *Apprendi*, it opened the door to the possibility that the Court would finally consider the threat mandatory sentencing laws pose for the jury. But that door was quickly shut

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[311] *See* GARLAND, *supra* note 237, at 172 (noting that, with sentencing guidelines and mandatory minimum sentencing, "legislatures and government ministers have acquired more direct and unimpeded means of shaping practical outcomes," and "[p]ublic demands for greater punishments are now more easily and instantly translated into increased sentences and longer jail terms"). Judges could, of course, attempt to nullify the law by manipulating their factual findings and hoping that they would not be reversed under a clearly erroneous standard. But, as noted above, *supra* notes 231, 271, this Article rests on the assumption that trial and appellate judges will exercise their duties in good faith and not engage in such manipulation.

[312] GARLAND, *supra* note 237, at 179.

[313] *See also* King & Klein, *supra* note 7, at 1535 ("[S]ome outer limit on the substantive criminal law is necessary in order to prevent legislatures from bypassing criminal procedural guarantees wholesale. Procedure and substance are inexorably linked, and *Apprendi* suggests the importance of keeping that link secure."); *cf.* Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1700-02 (1987) (arguing that a jury should be required to find, beyond a reasonable doubt, any fact that triggers a distinct range of judicial sentencing discretion).

in *Harris* when the Court found mandatory sentencing laws permissible as long as they do not dictate punishment over the statutory maximum for the charged offense.[314] Unless the Court shifts gears in *Blakely* and distinguishes mandatory minimums from binding sentencing guidelines, a legislature is free to raise statutory maxima as high as it wants—subject only to the Eighth Amendment and the political process itself—and then allow mandatory minimums and Sentencing Guidelines to do all the real work of sentencing.[315]

The Court is reluctant to find punishment disproportionate under the Eighth Amendment.[316] And it should go without saying that the

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[314] 536 U.S. 545, 567-68 (2002).

[315] Under the Court's narrow test, which is tied to a *statutory* maximum, the Guidelines would presumably survive *in toto* because they exist in the subterranean world below the statutory ceiling. Thus, under this reading of *Apprendi*, the Supreme Court's decisions in *Witte v. United States*, 515 U.S. 389 (1995), *United States v. Watts*, 519 U.S. 148 (1997) (per curiam), and *Edwards v. United States*, 523 U.S. 511 (1998), remain good law. These decisions permitted sentencing enhancements for uncharged drug conduct, acquitted conduct, and the type and quantity of drugs, respectively, within a statutory maximum. *Blakely* may call into question the Federal Sentencing Guidelines, however, if the Court were to recognize that a maximum can be created by binding sentencing guidelines. But because *Blakely* involves sentencing guidelines enacted by a legislature, it is possible that the Court would distinguish the Federal Sentencing Guidelines from their state counterparts.

[316] Indeed, the Court this past Term upheld two consecutive sentences of twenty-five years to life under a three-strikes law for a defendant whose third strike was stealing approximately $150 worth of videotapes and whose prior offenses were nonviolent. Lockyer v. Andrade, 123 S. Ct. 1166, 1169-70, 1175-76 (2003); *see also* Ewing v. California, 123 S. Ct. 1179, 1189-90 (2003) (upholding a sentence of twenty-five years to life for a defendant whose third strike was stealing three golf clubs); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (holding that a mandatory life sentence without parole for a first-time drug possessor is not cruel and unusual); Hutto v. Davis, 454 U.S. 370, 371-72 (1982) (per curiam) (holding that a forty-year sentence for the distribution of nine ounces of marijuana is not disproportionate). Given the Court's acceptance of these draconian sentences, it is clear that Congress and state legislatures essentially have free reign to raise statutory maxima. *See* King & Klein, *supra* note 7, at 1522 ("[T]he Eighth Amendment will rarely, if ever, check legislative efforts to bypass procedure through redefinition of substantive criminal offenses already serious enough to be punished as felonies."). It is for this reason that Ronald Allen's suggested limit on legislatures is really no limit at all. He has argued that, unless a fact is necessary to make the authorized punishment proportionate to the offense under the Eighth Amendment, that fact need not be proven beyond a reasonable doubt. Ronald J. Allen, *Structuring Jury Decisionmaking in Criminal Cases: A Unified Constitutional Approach to Evidentiary Devices*, 94 HARV. L. REV. 321, 342-44 (1980); Ronald J. Allen, *The Restoration of* In Re Winship*: A Comment on Burdens of Persuasion in Criminal Cases After* Patterson v. New York, 76 MICH. L. REV. 30, 46-48 (1977). But, in practice, the Supreme Court's proportionality review gives a legislature essentially unfettered discretion to raise statutory penalties. Indeed, under this standard, the statutory scheme in *Apprendi* would have survived because the penalty ultimately imposed (twelve years) would certainly have survived Eighth Amendment proportionality review.

political process fails to provide a check given politicians' perceptions that voters demand a tough stance on crime.[317] Criminals are a prime example of a politically powerless group—almost four million Americans have been stripped of their voting rights (some permanently) because of a felony conviction[318]—and the vast majority of voters support stiffer sentences.[319] The severity of drug sentences, three-strikes laws, and mandatory minimum sentences are testament to that which is politically popular. Nancy King and Susan Klein recently examined how state legislatures have responded to Court decisions—such as *Patterson v. New York*,[320] *McMillan v. Pennsylvania*,[321] and *Almendarez-Torres v. United States*[322]—that upheld state laws circumventing criminal procedural requirements and found that other states have eagerly "jumped on the bandwagon, easing the prosecutor's procedural burden through modification of the substantive law."[323] From this study, they concluded that "some rewriting of the substantive criminal law after *Apprendi* will undoubtedly be attempted."[324] The political process writ large, then, seems unlikely to stop inflated statutory maxima and the

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John Jeffries and Paul Stephan have attempted to correct for the inadequacies of proportionality review in imposing a meaningful limit on legislatures by arguing that the Constitution requires an actus reus and a mens rea in the definition of any crime in order to make its punishment proportional. *See* John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burdens of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1370 (1979) ("As commonly understood, criminal law doctrine postulates two essential components of crime definition . . . ."). The Supreme Court, however, has been unwilling to identify components, such as actus reus and mens rea, that are constitutionally required before criminal culpability can attach. *See* Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 477 (1989) (commenting on the Court's "unwillingness to delineate constitutional principles of substantive law"); *infra* text accompanying notes 403-14 (addressing the arguments for a substantive limit on punishment determinations).

[317] For a discussion of how institutional dynamics between legislatures, prosecutors, and appellate judges lead to the expansion of criminal law, see Stuntz, *supra* note 130, at 528-29.

[318] THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2003), *available at* http://www.sentencingproject.org/pdfs/1046.pdf.

[319] *See* Beale, *supra* note 209, at 25 (citing statistics showing that at least eighty percent of the public supports increased sentences).

[320] 432 U.S. 197 (1977).

[321] 477 U.S. 79 (1986).

[322] 523 U.S. 224 (1998).

[323] King & Klein, *supra* note 7, at 1491.

[324] *Id.* at 1492. King and Klein also argue that some statutes will be altered more easily than others, depending on whether the enhancement is contained within the same statute as the underlying core conduct or whether it was enacted as a separate, add-on statute, designed to apply to a variety of offenses. *See id.* at 1492-94 (distinguishing between "nested" and "add-on" statutes).

growing importance of sentencing guidelines and mandatory minimums.

Thus, despite the Court's broad rhetoric about mediating the "competition developed between judge and jury over the real significance of their respective roles,"[325] the rule it actually adopted does very little to protect the jury's structural role. *Apprendi*'s limit on the legislature's ability to define crime really provides no protection at all for the jury, given the ease with which a legislature can draft around it. Barring a change of course in *Blakely*, a legislature can increase the overall statutory maxima and use sentencing guidelines to dictate sentences for specific conduct.[326] There is, then, little to distinguish the Court's rule from the one of deference proposed by the dissent; both offer the legislature "a means of dispensing with inconvenient constitutional 'rights.'"[327] Despite Justice Scalia's proclamation that we have rejected Justice Breyer's "sketch[] [of] an admirably fair and efficient

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[325] Jones v. United States, 526 U.S. 227, 245 (1998).

[326] Ironically, the Court's rule can actually be harmful to defendants because of the way it will operate with the Sentencing Guidelines. *See* Bibas, *supra* note 7, at 1159-69 (explaining why defendants might be worse off after *Apprendi* due to the interaction between its elements rule and the Sentencing Guidelines regime); Ross, *supra* note 48, at 200 (describing the negative impact *Apprendi* could have on defendants). As noted in Part II, because of the effect of relevant conduct provisions, defendants likely will not risk taking their case to a jury even if it is probable they will be acquitted on some counts because that acquitted conduct could still be used against them at sentencing. Now, however, when the defendant pleads guilty, she must plead guilty to all of the facts that are deemed elements of the offense (including, for example, drug quantity), so she will no longer have a sentencing hearing on those factors. *See* Bibas, *supra* note 7, at 1160-65 (using a hypothetical case of drug trafficking to illustrate how *Apprendi* might work in practice); *see also* Ross, *supra* note 48, at 200 (arguing that this increase in stipulated factors will also lead to greater charge bargaining, which, in turn, will give prosecutors even more power). Based on this dynamic, Stephanos Bibas argues that the Court should have adopted instead a rule to "fit the legal landscape of the old," which would have included plea bargaining and the Guidelines. Bibas, *supra* note 7, at 1159. His proposed rule, however, makes no pretense of protecting the jury trial guarantee.

While I disagree with his solution, Bibas highlights that the relevant conduct provision of the Sentencing Guidelines may make it futile for the defendant to take her case to the jury. *See* Bibas, *supra* note 7, at 1165 (explaining that, for most defendants, "the relevant-conduct rule undercuts any benefits from the reasonable-doubt standard"). Otherwise, placing a fact with the jury will strengthen the defendant's position. In the absence of a relevant conduct provision, if a defendant is acquitted of some subset of charges, her sentence cannot be increased as a matter of law on the basis of that conduct. Thus, if she has a strong case, she can plea bargain with the prosecutor, knowing that the prosecutor will cut a better deal to avoid the risk of trial. *See id.* at 1169-70 (conceding that a defendant can extract a better plea bargain if the court's rule makes the threat of trial plausible).

[327] Monge v. California, 524 U.S. 721, 740 (1998) (Scalia, J., dissenting).

scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State,"[328] the Court seems to have embraced it wholeheartedly.

A. *Reconceptualizing the Jury's Domain*

The Supreme Court's statutory maximum test for identifying what juries must decide rests on the formalistic argument that the jury's conviction authorizes punishment up to that point. The jury, in other words, has acted as an appropriate gatekeeper because it has ruled on the facts that establish that maximum punishment.

It undermines the point of the jury, however, to give them the power to apply only the laws that impose the statutory maximum for the offense because those laws represent only one of the laws in a proceeding that might be unjust to apply in a particular case or that might be unjust as a general matter. To be sure, that authority allows the jury to shield a defendant from all punishment if the jury acquits the defendant of all charges. But if the jury convicts the defendant of any of the charges, the government can seek to invoke additional general laws that dictate criminal punishment in the same proceeding.[329] And those laws pose *the same equitable threat as the law imposing the statutory maximum.*[330] Because the threat of overinclusive laws is the same in the case of *all* general laws of blameworthiness that mandate criminal punishment—whether sentencing laws or liability laws—the response should also be the same: a check by the people, operating in the judiciary, to provide an equitable check against executive and

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[328] Apprendi v. New Jersey, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

[329] Indeed, because federal judges typically sentence defendants at the low end of the permissible sentencing range, it is often the *minimum* allowable sentence (whether from Guidelines or statutes) that holds the greatest practical importance for the defendant, not the *maximum.*

[330] Bill Stuntz questions whether this threat amounts to a strong "*legal* case," Stuntz, *supra* note 130, at 595, but nevertheless notes that, as a matter of logic:

> [i]t is hard to understand why constitutional law should make it impossible for legislatures to command that a given course of conduct be punished (the power to acquit for any reason does away with that legislative power, at least in theory), and yet leave legislatures free to require that, if behavior is to be punished, it should be punished at least so much.

Id. at 596. Indeed, this rationale can be used to explain why the Court reasoned in *Apprendi* that the jury guarantee does not merely extend to the determination of guilt or innocence, but also to the length of a defendant's sentence. *Apprendi,* 530 U.S. at 484. The Court further noted that the criminal law "'is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability' assessed." *Id.* at 485 (quoting *Mullaney v. Wilbur,* 421 U.S. 684, 697-98 (1975)).

legislative overreaching. It is insufficient to give the jury authority over only a subset of those laws, as the Supreme Court's test does.

Put another way, in developing a benchmark for when legislatively identified facts must be decided by the jury instead of the judge, the key is whether the judiciary has sufficient discretion to ensure that a general law is not applied to impose criminal punishment in an individual case when it would be unjust to do so. If the judge's discretion is greatly curtailed in this regard, the laws that mandate punishment on the basis of those facts should be applied by juries, which have a built-in discretionary power to check those laws and to ensure that they properly lead to criminal punishment in an individual case.

When a law associates a particular fact with a particular punishment (or range of punishment), that law requires a judicial check to secure its appropriate application in an individual case. The jury is uniquely suited to that task because of its functional power to acquit without review.[331] If a legislature wishes to take advantage of the expressive and actual power of a generally applicable criminal law, it must leave the responsibility of applying the law to the jury so that the community's voice can check the general rule.[332] But the legislature is free to deem anything it wishes criminal—subject to other constitutional limitations such as the Due Process Clause, Eighth Amendment, and Ex Post Facto Clause. The legislature is limited simply in its ability to rest such key determinations with judges instead of juries unless, at the very least, judges have general broad powers similar to the jury.

Thus, this limit leaves crucial substantive determinations with the legislature, while preserving the jury's role as a check on the general laws. And unlike the statutory maximum rule adopted by the Court, which also leaves crucial substantive determinations to the legislature,

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[331] This is not meant to be an endorsement of mandatory sentences. The relative merits of discretionary versus mandatory sentencing are beyond the scope of this Article. Instead, the focus here is on how to guarantee that, when the legislature opts for mandatory sentences, the judiciary can provide an appropriate check.

[332] Mark Knoll and Richard Singer have found that "no federal court, prior to *McMillan*, had doubted that any statutorily enunciated fact which was tied to punishment had to be pled in the indictment and proved at trial." Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE U. L. REV. 1057, 1085 (1999). Stephanos Bibas argues that judges at common law had the "discretion to downgrade felony sentences of transportation to branding and to trigger the pardon and commutation process." Bibas, *supra* note 7, at 1125. But allowing judges to depart downward at their discretion based on the individual facts of a defendant's case is far different from requiring them to *increase* a sentence when certain facts are found pursuant to a generally applicable law.

this rule does not allow the legislature to undermine the jury's role. It is a real limit that protects the procedural guarantee of a jury trial without requiring the courts to legislate.

It is a limit, moreover, that preserves the jury's power when cases go to trial and when they are settled by plea. As noted above, under the current Sentencing Guidelines regime, prosecutors determine the deal they can offer the defendant with reference to the likely outcome if the case goes to trial. Currently, as long as the jury convicts the defendant of *any* charge, the defendant is subject to punishment on the basis of *all* charges—and uncharged conduct as well—up to the maximum for the charged offense. That maximum is often far higher than the applicable Guidelines range, so it typically will not act as a substantial check.[333] Thus, even if the evidence on a particular charge is weak, the prosecutor may still assume it could obtain a higher sentence on the basis of that charge if the case went to trial because the prosecutor believes it can convince a jury of the defendant's guilt on a lesser charge and can convince a judge of the defendant's guilt on the greater charge. Unlike the jury, the trial judge is not free to ignore the law—because the prosecutor can appeal—so the judge must apply the law and increase a sentence as long as she makes the relevant factual finding.[334] This becomes all the more likely because the prosecutor need only prove her factual case by a preponderance of the evidence. The prosecutor can therefore demand more at the bargaining table because the jury's power at trial has been weakened.

In contrast, if all laws that require increased punishment must go to the jury, the prosecutor would perform a different calculus in determining what "bargain" to offer the defendant. In that situation, the jury is the only judicial actor applying a general law imposing punishment. Thus, if the jury would likely convict the defendant of a lesser charge and acquit the defendant of a greater charge, the prosecutor can no longer argue that the trial judge must increase the defendant's sentence on the basis of the acquitted conduct as a matter of law because there is no general law that the judge must apply. Instead, the prosecutor can only appeal to the judge's discretion (assuming there

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[333] As Jacqueline Ross points out, the more significant threshold is likely to be a mandatory minimum sentence. Jacqueline E. Ross, *What Makes Sentencing Facts Controversial? Four Problems Obscured by One Solution*, 47 VILL. L. REV. 965, 969 (2002).

[334] Thus, only if the trial judge is willing to manipulate her factual findings can she avoid what she might otherwise believe to be a harsh result. Although some judges might engage in such tactics, many will find it offensive to their judicial task. In many cases, then, judges will be applying laws that they believe produce unjust outcomes.

is a sentencing range for the charged conduct). Because the Sentencing Guidelines frequently result in sentences higher than those judges would prefer to impose, this limits the prosecutor's demands. Thus, even under a plea bargaining scenario, the defendant's liberty interest against the government receives greater protection when the jury applies laws imposing mandatory punishment.

This is true even though a regime with greater jury involvement may create a greater likelihood of charge bargaining than the modified real offense regime in the Guidelines.[335] As noted, the modified real offense regime is designed to check charge bargaining because it requires the judge to take into account the full range of the defendant's conduct at sentencing, whether that conduct was charged or not. Under the regime proposed here, judges could not be required to take uncharged conduct into account, thus bargaining over the charge itself could take on greater meaning. But although prosecutors may attempt to charge bargain more frequently under a regime where all laws mandating criminal punishment must be applied by juries, the defendant's interest is protected by the fact that the defendant can reject the bargain and take her case to trial. Because the prosecutor must make her decisions based on the anticipated result at trial, the judiciary—juries and judges—indirectly exerts control over the prosecutor's conduct in the bargain. As Daniel Richman has observed, "From this ex ante perspective, the mere possibility of a jury trial can bring an often overlooked degree of accountability into our system of essentially administrative justice."[336]

Analyzing modern sentencing laws through this lens, two conclusions can be drawn. First, facts that yield mandatory minimum punishments in statutes must be decided by juries. The very term

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[335] But note that charge bargaining also occurs under the Sentencing Guidelines. *See* FISHER, *supra* note 286, at 17 (explaining that "sentencing guidelines often empower prosecutors to dictate a defendant's sentence by manipulating the charges").

[336] Richman, *supra* note 161, at 975. Richman also points out that:

> The prosecutor who wants to maximize her conviction rate, by plea or by trial, must make all her decisions in the shadow of projected jury responses. By doing so, she gives the community a voice across the whole range of her case selection decisions. It is not necessarily the strongest of voices, since considerations of evidentiary strength or numerous other factors may predominate in the calculus. Nor is it the clearest of voices, given the inscrutability of general verdicts. And it is not a voice finely calibrated to differentiate among all cases. Yet through it, the community has a far greater say in how prosecutors deploy their resources than it has through any more direct mechanism of political accountability.

Id. at 973-74 (footnotes omitted).

"mandatory" reflects the legislature's intent to limit judicial discretion to make exceptions to these sentencing floors.[337] And, in fact, the judge's power to depart from these laws is minimal. Under federal law, for example, the judge needs either the executive's permission (in the form of a prosecutor's request for a substantial assistance departure)[338] or the legislature's approval (through the defendant's qualification for the narrow "safety-valve" exception, which applies only to low-level drug offenders who have no or minimal criminal history)[339]. Obviously, the judiciary's check on the legislature and executive is an ineffectual one if judges cannot ignore a general law of blameworthiness without legislative or executive permission. This is precisely the sort of situation in which the jury's check is so critical, for it ensures that some judicial actor has the opportunity to intercede before a general law of blameworthiness can be used to punish an individual.

The second conclusion that flows from this analysis is that the laws linking facts to punishment in the Sentencing Guidelines should also be found by juries. As Part II explained, in many critical respects, the Guidelines are indistinguishable from general criminal laws. The Guidelines, as much as the underlying statutes to which they apply, are binding laws.[340] From a defendant's perspective, her liberty interest is defined by the Guidelines to a much greater extent than by statute.[341]

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[337] Although mandatory minimums are "mandatory" for judges, some "mandatory" penalties are "discretionary" in the sense that *prosecutors* have the discretion whether or not to bring charges under such laws. Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202-14 (1993). As Schulhofer points out, however, this exacerbates the problems posed by mandatory penalties because the discretion that exists with prosecutors is "largely unguided" and "exercised at the lowest levels of visibility. Indeed, the very illegitimacy of such discretion in an ostensibly mandatory system drives discretionary judgments further underground, obscures accountability, and invites disparity and abuse." *Id.* at 221.

[338] 18 U.S.C. § 3553(e) (2000).

[339] *Id.* § 3553(f).

[340] *See* Apprendi v. New Jersey, 530 U.S. 466, 523 n.11 (2000) (Thomas, J., concurring) (stating that the Guidelines "have the force and effect of laws" (citing Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting))). As Judge Eugene Nickerson explained, "The Commission's function is not to guide or give advice to a Federal Court; it is to promulgate provisions, that is, laws that, unless they are unconstitutional, the federal courts are bound by law to follow on pain of being reversed." United States v. Norris, 128 F. Supp. 2d 739, 742 (E.D.N.Y. 2001), *vacated by* 281 F.3d 357 (2d Cir.), *cert. denied*, 536 U.S. 949 (2002). He observed that "[t]he Guidelines, despite the name bestowed upon them, do not 'guide' a district court. Rather they direct a district court." *Id.* at 743.

[341] *See* Rosenberg, *supra* note 285, at 493-95 (arguing that the Guidelines "confer a

The effect and purpose of the Guidelines is the same as the effect and purpose of general criminal laws: to declare blameworthy conduct and establish the penalty for that conduct.[342] Moreover, the factual determinations the Guidelines require judges to make are precisely those traditionally made by juries. Justice Scalia has highlighted the parallel with the following hypothetical: A state passes a single crime of "knowingly causing injury to another," with various enhancements based on mens rea, severity of injury, and other circumstances.[343] Justice Scalia argued that it would destroy the meaning of trial by jury to allow a judge to determine such facts as "whether the defendant acted intentionally," "whether he used a deadly weapon," or "whether the victim ultimately died."[344] Although his hypothetical had a thirty-day penalty for the base offense, with statutory enhancements for each additional fact, it is difficult to see why the scheme would be any less troublesome if a judge decided these same facts because the statute had one maximum penalty of life imprisonment and the Commission passed different sentencing ranges based on the particulars of the offense. Yet that is exactly what the Guidelines do. The Guidelines require a judge to increase the range of punishment to which a defendant is exposed if the judge finds that the defendant

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liberty interest that is entitled to due process protection"); Richard Singer, *The Model Penal Code and ~~Three~~ Two (Possibly Only One) Ways Courts Avoid Mens Rea*, 4 BUFF. CRIM. L. REV. 139, 167 (2000) (arguing that the question of whether a fact is an offense element or a sentencing factor should be decided based on the "impact on the defendant, not the method by which the legislature has sought to make the impact").

[342] Mark Knoll and Richard Singer attempt to distinguish the Guidelines from other statutes on the basis that the Guidelines are never discussed or even adopted by Congress, but instead become effective as long as Congress does not object. Thus, according to their argument, "Congress has not, neither as a factual nor theoretical matter, considered the factors involved in the Guidelines with as much precision as it has weighed the impact of factors that are expressly enunciated in a statute." Knoll & Singer, *supra* note 332, at 1061 n.21. If anything, however, this argument lends even greater support to the proposition that the jury find these facts. Under this characterization of the Sentencing Commission, only a non-democratic agency has concluded that these facts are relevant to punishment, and it has placed the factfinding responsibility in a non-democratic judiciary. Thus, at no point have the "people"—either in the form of the legislature or the jury—had a say. This is completely contrary to the constitutional design. At the very least, a jury should check the Sentencing Commission's determinations by finding these sentencing facts. On the other hand, if Congress effectively monitors the Sentencing Commission such that the Guidelines it produces can fairly be characterized as the laws of Congress, then the Guidelines should be treated the same as all other criminal laws and therefore be applied by juries.

[343] Monge v. California, 524 U.S. 721, 738 (1998) (Scalia, J., dissenting).

[344] *Id.*

used a dangerous weapon[345] or her offense resulted in the death of a victim.[346] The trial judge's decisions, moreover, can be appealed by the prosecutor. Thus, if the judge attempts to mitigate the operation of the Guidelines, the prosecutor can check the judge.

What complicates the constitutional analysis in the case of the Guidelines, however, is that they allow judges to depart under certain circumstances. Indeed, Congress directed the Commission to ensure that its Guidelines would permit "sufficient flexibility to permit individualized sentences."[347] Thus, it is necessary to consider whether the departure power actually allowed under the Guidelines gives judges a sufficient check on general laws such that the jury power is unnecessary (as was arguably the case with the discretionary sentencing regime). An inspection of how the Guidelines operate in practice shows that they do not grant judges sufficient flexibility to mimic the jury's function.

A trial judge can depart from the Guidelines in two main instances. First, the Guidelines permit departure when the prosecution files a motion requesting a sentence below the Guideline range because the defendant gave the government "substantial assistance."[348] Since this departure rests with the discretion of the prosecutor, not the trial judge, it obviously does not allow trial judges to check abuse by the prosecutor or correct what the trial judge believes to be an overly broad application of a general law. Yet almost half of all departures under the Guidelines result from this process.[349]

A trial judge can also depart from the Guidelines if she "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[350] The Sentencing Commission,

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[345] U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2002).

[346] *Id.* § 2K2.1(c)(1)(B); *see also* United States v. Miller, No. 00-5142, 2001 WL 845256, at *1 (10th Cir. July 26, 2001) (upholding the use of two unconvicted homicides as relevant conduct in setting the offense level).

[347] 28 U.S.C. § 991(b)(1)(B) (2000).

[348] U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2002).

[349] *See* OFFICE OF POLICY ANALYSIS, *supra* note 233, at tbl.8 (showing that 35.4% of all cases in 2001 resulted in downward departures and that almost half of these departures—9390 out of 19,416—were substantial assistance departures). Although the government's motion is a prerequisite, a district court can depart under § 5K1.1 if the government refused to file a motion "based on an unconstitutional motive" such as racial discrimination. Wade v. United States, 504 U.S. 181, 185-86 (1992).

[350] 18 U.S.C. § 3553(b)(1) (2000). "In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing

however, has warned that this should be a "rare" situation because of the breadth of its consideration.[351] Appellate courts have agreed, believing that "the Sentencing Commission *has* already considered, and the Sentencing Guidelines *have* already factored in, many if not all circumstances that are arguably relevant to criminal sentencing."[352] Thus, "departures are not authorized where, at bottom, the sentencing court simply disagrees with the Commission's assessment of the relative seriousness of the crime committed."[353] For example, the Seventh Circuit "held that the district court had no authority to reduce a 51 month prison sentence for a defendant who was acknowledged to be mentally ill, who had suffered a history of abuse by her father, and who everyone agreed was a danger to no one."[354] While the Seventh Circuit acknowledged the result was "harsh," it believed departure was not permissible.[355] The Fourth Circuit has similarly asserted that the trial court "may not depart from an otherwise applicable guideline range simply because its own sense of justice would call for it."[356]

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guidelines, policy statements, and official commentary of the Sentencing Commission." *Id.*

[351] Douglas A. Berman, *Balanced and Purposeful Departures: Fixing a Jurisprudence that Undermines the Federal Sentencing Guidelines*, 76 NOTRE DAME L. REV. 21, 47-48 (2000).

[352] STITH & CABRANES, *supra* note 6, at 102. Indeed, this reasoning might explain the fact that the government lost only twenty-nine percent of its appeals of downward departures between 1996 and 2001. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 109 tbl.58 (2001), *available at* http://www.ussc.gov/ANNRPT/2001/table58.pdf; U.S. SENTENCING COMM'N, 2000 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 109 tbl.58 (2000), *available at* http://www.ussc.gov/ANNRPT/2000/table58.pdf; U.S. SENTENCING COMM'N, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 109 tbl.58 (1999), *available at* http://www.ussc.gov/ANNRPT/1999/table58.pdf; U.S. SENTENCING COMM'N, 1998 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 107 tbl.56 (1998), *available at* http://www.ussc.gov/ANNRPT/1998/table56.pdf; U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 107 tbl.56 (1997), *available at* http://www.ussc.gov/ANNRPT/1997/table56.pdf; U.S. SENTENCING COMM'N, 1996 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 79 tbl.51 (1996), *available at* http://www.ussc.gov/ANNRPT/1996/tab-51.pdf; *see also* FISHER, *supra* note 286, at 217 (using this statistic to demonstrate that federal prosecutors rarely challenge judges' decisions to depart, but when they do, they generally prevail).

[353] STITH & CABRANES, *supra* note 6, at 100.

[354] Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1469 n.98 (1997) (citing *United States v. Poff*, 926 F.2d 588 (7th Cir. 1991) (en banc)).

[355] *Poff*, 926 F.2d at 593.

[356] United States v. Barber, 93 F.3d 1200, 1203 (4th Cir. 1996); *see also* Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENTENCING REP. 14, 14 (1996) ("[T]he question whether the applicable guidelines produce justice in the case at hand is not open for consideration either by sentencing courts or appellate courts.").

Congress recently amended the Sentencing Guidelines to restrict the already-limited discretion of trial judges even further.[357] Congress provided for de novo review of district court decisions applying the Guidelines to the facts.[358] Thus, Congress increased appellate scrutiny of district court decisions to depart downward, effectively overruling the Supreme Court's decision in *Koon v. United States*,[359] which held that these determinations should be reviewed under the relatively more deferential abuse of discretion standard.[360] Congress further ordered the Sentencing Commission to review existing downward departure grounds and promulgate "appropriate amendments to the sentencing guidelines, policy statements, and official commentary to ensure that the incidence of downward departures are substantially reduced."[361] For defendants convicted of certain offenses—namely certain crimes against children and sexual offenses—Congress forbade downward departures on any ground not "affirmatively and specifically identified" in Part K of the Guidelines' Chapter Five.[362] In addition, the Attorney General is now obligated to report to the Judiciary Committees of the House and Senate any instance where the district court grants a downward departure.[363]

In stark contrast to this scrutiny of downward departures, appellate courts have held that a district court's discretionary decision *not* to depart downward is unreviewable on appeal.[364] Thus, the Guidelines and appellate courts have created a regime that gives the prosecutor enormous power to hold the district judge in check.

It is not surprising that the appellate courts have taken this approach to the Guidelines and that Congress recently increased their authority. In many ways, an appellate judge approaches the question in the same distant manner that a voter considers a criminal law. The

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[357] Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, 117 Stat. 650 (2003) ("PROTECT Act").

[358] *Id.* § 401(d)(2).

[359] 518 U.S. 81 (1996).

[360] *Id.* at 99-100.

[361] PROTECT Act § 401(m)(2)(A).

[362] *Id.* § 401(b)(1)(B).

[363] *Id.* § 401(*l*)(2)(A).

[364] Berman, *supra* note 351, at 52 & n.116 (citing cases that affirm this principle). Courts have been more receptive to appeals where a judge decides not to depart on the basis of a legal misunderstanding about her authority to do so, rather than where a judge acknowledges her authority but exercises the discretion not to depart. *Id.*; *see also* United States v. Morales, 898 F.2d 99, 102 n.2 (9th Cir. 1990) (distinguishing between discretionary refusals to depart and refusals based on a conclusion that departure is unauthorized).

appellate judge is removed from the individual circumstances.[365] Her function is to focus on the legal question before her.[366] But, as discussed above, the purpose of the jury is to bring an equitable element to criminal proceedings—the community's sense of justice—even if the letter of the law would otherwise apply. Judges cannot replicate this function if they face the threat of appellate review at the urging of the government.[367]

Thus, as Kate Stith and José Cabranes have concluded in their thoughtful analysis of the Guidelines:

> The two phenomena (mandatory statutory minimums and mandatory Guidelines ranges) are different manifestations of the same "counter-reformation" against discretionary sentences. Mandatory sentences and mandatory sentencing guidelines are both attempts to replace discretionary sentencing with determinate sentencing . . . .[368]

Michael Tonry has similarly observed that, although the Guidelines "were intended to be presumptive, not mandatory," they have turned out in practice to be "more and more like mandatory sentencing laws."[369] Under the Sentencing Guidelines, judges possess nothing akin to the jury's nullification power. Judges cannot simply opt to

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[365] As Daniel Freed put it:

> Appeals court judges are reviewers, opinion writers, and rulemakers. They no longer look defendants in the eye, study presentence reports, or struggle with assessing whether an offender is beginning or ending a criminal career, appears to be dangerous or harmless, is a minnow in a sea of big fish, or has gone astray under unusually stressful circumstances and will not offend again.

Daniel J. Freed, *Federal Sentencing in the Wake of the Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681, 1728 (1992).

[366] As Cynthia Lee notes, an appellate court is concerned more with future similarly situated defendants than with the individual defendant in the case before it, whereas the district judge is focused on the most appropriate sentence for the individual offender before the court and not so much on the implication of her decision for future cases. Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 33-34 (1997).

[367] This is especially true given the number of factors the Sentencing Guidelines declare off-limits for sentencing purposes. The Sentencing Commission has considered some factors not relevant as grounds for departure in any case. *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2002) (discussing drug or alcohol dependency); *id.* § 5H1.10 (covering race, sex, national origin, creed, religion, and socioeconomic status). And the Commission has determined that it is ordinarily inappropriate for judges to consider a defendant's education and vocational skills, age, mental and emotional condition, employment record, family ties and responsibilities, and community ties. *Id.* §§ 5H1.1, .2, .3, .5, .6.

[368] STITH & CABRANES, *supra* note 6, at 123.

[369] Tonry, *supra* note 6, at 129.

ignore the law—in a particular case or as a general matter—to further their view of what a just outcome would be. Indeed, judges cannot disagree with the Guidelines in any respect as long as the Sentencing Commission made an ex ante judgment on the treatment of a factor. Trial judges have thus come "to view their role under the Guidelines as 'judicial accountants.'"[370] As a result, "the awesome power of the state to inflict suffering is wielded as an exercise in bureaucratic regularity, for which no one, ultimately, bears responsibility."[371]

The Constitution provides a mechanism for checking this kind of administrative regime: the people. Judges are not the only judicial actors. Juries—the other judicial branch—have tools to check the administration of criminal laws. The criminal jury's very function is to check the government when it implements a scheme of general laws that dictate criminal punishment. Because the Guidelines fall into that category, they should be treated like all other criminal laws, and they should be applied by the jury.

It is important to recognize, however, that this analysis would not apply to all sentencing guideline schemes. For example, states such as Utah, Maryland, Delaware, Virginia, Arkansas, and Missouri have voluntary guidelines that are not subject to appeal.[372] Because judges in these states have unlimited authority to ignore the guidelines if justice so requires in an individual case, these regimes do not suffer from the same fatal defect as the Federal Sentencing Guidelines.[373] Thus, it is possible to create a guideline regime that is consistent with the jury guarantee and the constitutional commitment to individualized justice in criminal cases. The Federal Sentencing Guidelines are just not such an example.

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[370] Berman, *supra* note 351, at 72 (quoting Jack B. Weinstein, *A Trial Judge's Second Impression of the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 357, 364 (1992)).

[371] STITH & CABRANES, *supra* note 6, at 103.

[372] Richard S. Frase, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 428 (2000).

[373] The Pennsylvania Supreme Court appears to have interpreted its state's guidelines as advisory, too. *See* Reitz, *supra* note 354, at 1478-79 (describing Pennsylvania court decisions regarding review of state guidelines). A tougher question is whether a state like Minnesota, where "mitigated departures have almost never been reversed on appeal," provides enough of a judicial check. *Id.* at 1486. Although this Article provides a framework for analyzing such state sentencing guideline systems—i.e., those that fall between the extremely limited discretion allowed under the Federal Sentencing Guidelines and the broad discretion permitted in voluntary regimes—the actual analysis of these state systems is beyond the scope of this Article.

B. *Confronting the Objections*

The test identified in this Article for identifying laws that must be applied by juries is subject to at least two major objections. One possible objection to this analysis is that it could lead to a return to the pre-Guidelines world of unpredictable and disparate punishments.[374] Thus, some might argue that the Constitution should not be interpreted to yield such an undesirable result.

There is, however, reason to doubt that the pre-Guidelines level of disparity will reemerge under this interpretation. After all, nothing in this analysis precludes a legislature from specifying how a fact will affect punishment. Rather, it simply requires the jury to find the relevant fact when that fact has been linked with a specified amount of punishment and the discretion of judges is sharply curtailed in departing from such a law. The legislature may conclude that the benefits of mandating the punishment associated with particular facts justify the costs of giving the factfinding responsibility to the jury. In particular, by specifying the consequences of a particular fact, the legislature may increase the deterrent effect of the law. Sentences imposed by judges before the Guidelines tended to be more lenient than the sentences prescribed in the Guidelines, especially for drug offenders and white-collar criminals.[375] Thus, by specifying the punishment, the legislature can prevent judges from imposing a weaker punishment than it would prefer in some cases. All else being equal, the greater the punishment, the greater the deterrence. And, too, by specifying the punishment associated with a particular fact, the legislature can achieve greater uniformity and predictability in sentencing. Political pressures may also motivate legislatures to specify punishment.

The benefits of specifying the punitive effects of a particular fact, therefore, will be weighed against the costs of vesting those factual

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[374] *See* JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 132 (1949) (arguing that "jury-made law" is capricious and tends to produce arbitrary results); FRANKEL, *supra* note 238, at 5-49 (criticizing unbounded judicial discretion); Saltzburg, *supra* note 48, at 250-51 (worrying that *Apprendi* could lead to a return to the "original broad sentencing ranges of the old days"); *see also* Dale W. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. CHI. L. REV. 386, 413 (1954) (noting that "juries are permitted to deal differently with persons who are similarly situated"); Katyal, *supra* note 207, at 2420 (arguing that a uniform system like the Sentencing Guidelines can create more deterrence by accounting for "substitution" and "complementarity" effects). *But see* STITH & CABRANES, *supra* note 6, at 106 (disagreeing that the level of disparity before the Guidelines was "shameful").

[375] STITH & CABRANES, *supra* note 6, at 60-61 (citing the Commission's effort to raise penalties for drug offenders and white-collar criminals from past practice).

findings with the jury. Those costs are, admittedly, not slight. Increasing the number of facts a jury must find at trial could make an already cumbersome trial process even more unwieldy. Moreover, the prosecutor must prove the facts under the rules of evidence and with the burden of the reasonable doubt standard, which, in addition to the jury's power to nullify, decreases the chances that the prosecutor will be successful.[376] Thus, for each type of factual determination, the legislature must determine whether the value of specifying its effect on punishment in advance outweighs the increased procedural costs of having it decided at trial. For many facts, it will be worth keeping the prescribed punishment, even if the fact must be decided by a jury.

There is even less cause for concern about disparity if a de minimis exception is recognized for relatively small sentencing enhancements. That is, it is possible to construct a constitutional rule that would require proof to a jury of only those facts that have a significant effect on a defendant's sentence by a particular percentage increase over the base sentence or by an absolute number of months, for example.[377] A panel of judges from the Sixth Circuit, for instance, has argued that a fact must be tried by a jury if the risk of error in determining the issue is more than slight and the factor would "substantially affect[]" the sentence.[378] To avoid confusion in the lower courts with such a vague standard, the Supreme Court could adopt a

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[376] This Article does not address the related, but separate, questions of when a legislature can alter the burden of proof or create affirmative defenses. Such questions raise issues of due process, rather than of the jury's power, because the jury decides whether the fact has been proven no matter which party bears the burden or what standard of proof applies. Similarly, when a legislature can use a civil penalty regime to dodge the criminal jury requirement and other criminal trial procedures is beyond the scope of this Article. For a good overview of this topic, see John C. Coffee, Jr., *Paradigms Lost: The Blurring of the Criminal and Civil Law Models—And What Can Be Done About It*, 101 YALE L.J. 1875, 1878 (1992); Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679, 690 (1999); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 7-15 (1996).

[377] *See* Richard Singer & Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 FED. SENTENCING REP. 203, 205 (2000) (describing a bright-line test which would allow the consideration of facts only if they increase the defendant's sentence by a particular percentage); Singer, *supra* note 341, at 169-70 (discussing the possibility of utilizing a significant percentage increase in a sentence or an increase greater than six months as triggers for when facts need to be proved beyond a reasonable doubt to a jury); *see also* Sundby, *supra* note 316, at 508 (arguing that requiring facts that make a "substantial difference" in punishment to be proven beyond a reasonable doubt is a "quasi-procedural" rule "because a fact's importance is still derived from the legislature's decision to use the fact as a significant factor for measuring criminal responsibility").

[378] United States v. Rigsby, 943 F.2d 631, 642-43 (6th Cir. 1991).

bright-line rule implementing the Constitution. It could state that only facts that increase imprisonment (as opposed to facts that increase fines) need go to the jury, and only if the increase is greater than six months. Although a six-month line may seem somewhat arbitrary, this is the same limit the Court uses to determine whether an offense is serious enough to warrant a jury trial or whether it is "petty" and can be tried without a jury.[379]

Even without such a de minimis exception, there is nothing to stop the legislature from proposing voluntary, not mandatory, guidelines for how facts not specified in the code should affect a sentence. The Sentencing Guidelines could become real guidelines—for the judge to use at her discretion—instead of a mandatory code. Although judges will undoubtedly depart, these guidelines will serve as benchmarks that should also make the variation far less pronounced than it was when judges had no idea what other judges were doing with similar cases. Indeed, there is some evidence that states with voluntary sentencing guidelines have experienced disparity reduction.[380]

For all these reasons, the disparity that existed before the Guidelines need not reemerge to the same degree. Nevertheless, because the constitutional analysis presented here vests a judicial actor with more discretion, there would inevitably be greater disparity and unpredictability than that which exists currently under the Guidelines. First, as a result of this inevitable tradeoff, some facts will not be deemed worth the additional trial costs because they are not as important or because they would be difficult for the government to prove to a jury under trial rules. The effect of those facts on a sentence will therefore be left to the discretion of the trial judge, who will operate presumably within a wider sentencing range. Second, even for those facts that must be found by a jury, there may be more disparity than when those facts rested with judges because of greater variation among juries in applying the law than among judges. This disparity will arise because trial judges face an appellate check and juries do not.

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[379] Singer & Knoll, *supra* note 377, at 205; Singer, *supra* note 341, at 170. Another possibility is a one-year line, a standard that Stephen Saltzburg notes is consistent with most definitions of a felony. Saltzburg, *supra* note 48, at 252. Stephanos Bibas notes that, even before *Apprendi*, some courts treated as elements those facts that elevated misdemeanor penalties to felony levels. Bibas, *supra* note 7, at 1182 n.473.

[380] *See* Frase, *supra* note 372, at 436 (noting that five guideline states have reported data showing disparity reductions and that two of the five states are appropriately characterized as having "voluntary" guidelines).

Thus, while it is likely that the sentencing disparity will not be as great as it was pre-Guidelines, the results may not be as uniform and predictable as they are under the Guidelines' administrative regime. This is, of course, the tension that arises whenever an institutional actor is given unreviewable discretion. The discretion allows the actor flexibility to do justice and treat cases differently when necessary, but it also provides an opportunity for discrimination and disparate treatment. The Constitution's commitment to the jury reflects the judgment that, in the criminal context, the loss of certainty is outweighed by the benefits of individualized determinations.[381] In return for the cost of some disparity, we receive one more check on the government's awesome power to declare behavior criminal and deprive an individual of her liberty. Just as the reasonable doubt standard is designed to protect the innocent, so, too, is the jury's power under the Constitution designed to protect the legally and morally innocent.[382]

The potential increase in disparity that results from judicial discretion is the tradeoff for individualizing justice and respecting individual liberty. Under a truly mechanical application of the law, it may appear that disparity is eradicated. But the uniformity that results is not without costs. Indeed, as Stephen Schulhofer has noted, mandatory sentencing laws result in several troubling consequences.[383] Because "Congress can never foresee the full range of circumstances to which a mandatory might apply or the full scope of interconnections to other pertinent federal and state criminal statutes," drafting mistakes will inevitably occur.[384] Even if such mistakes could be eliminated, mandatory sentences result in too much uniformity, treating unlike offenders similarly when their conduct is not equally blameworthy.[385] "Important differences among offenders are by nature difficult to anticipate and categorize. Hence, uniform treatment through

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[381] This tension between uniformity and discretion is seen in the death penalty context where the jury's discretion must be bounded, but where the jury must also be permitted the discretion to take into account mitigating factors.

[382] This same rationale explains executive pardons and prosecutorial discretion not to bring charges.

[383] *See* Schulhofer, *supra* note 337, at 208-13 (discussing potential adverse consequences of implementing a mandatory sentencing regime).

[384] *Id.* at 210.

[385] *See* Schulhofer, *supra* note 192, at 835-36 (delineating three forms of inequality that can result from sentencing: the imposition of different sentences on similar offenders, the imposition of similar sentences on different offenders, and the imposition of different sentences as determined by insufficiently relevant differences).

mandatories invariably produces unfairness and generates systematic pressure for evasion."[386] The judiciary is designed to protect and recognize these individual differences. If judges lack the freedom to make such distinctions, at the very least, the jury must be given the opportunity. The cost is additional disparity, but the gain is a respect for individual circumstances. Allowing a judicial check, in other words, errs on the side of liberty.

There is, however, still a second objection to the test advanced here. Criminal trials are about more than subjecting a defendant to loss of her property or liberty. After all, individuals face loss of property or liberty in civil commitment proceedings as well. A criminal trial also has a powerful expressive component. A conviction brands the defendant a criminal and thereby reflects a community judgment that an individual has violated the standards of the community.[387]

Unlike tort law, in which the victim proceeds against a defendant, criminal law is about more than a private wrong. It is about an offense against the community and its values. Thus, a conviction carries with it the message that the defendant's actions are morally blameworthy in the eyes of the community.[388] "[I]t conveys a symbolism of censure, condemnation, and reprobation."[389] The criminal proceeding conveys "the Law, the authoritative voice of society, using force and authority publicly to enact its basic terms and relationships and to impress them, like a template, upon the conduct of social life."[390] Thus, the defendant and the public at large learn what is blameworthy from what is labeled criminal.[391]

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[386] Schulhofer, *supra* note 337, at 211.

[387] *See* Barbara D. Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299, 1339 (1977) ("The special character of a criminal conviction lies in its substantial stigmatizing effect, the possibility of imprisonment, and the fact that it serves not merely to impose costs on the defendant but also to express the condemnation of the community.").

[388] *See* Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 807 (1997) (describing the relationship between criminal punishment and societal judgments of blame); *see also* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 598 (1996) (observing that, "[u]nder the expressive view, the signification of punishment is moral condemnation").

[389] DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 265 (1990).

[390] *Id.*

[391] *See id.* at 260-65 (describing the audience of penality); *see also* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 200-01, 223-25 (1991) (discussing the socializing effects of labeling an activity as "criminal").

The Constitution recognizes the powerful message carried by the criminal law and imposes special procedural checks so that it is not abused by the state.[392] The chief among these is the jury. Judge Bazelon believed that "[t]he very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed."[393] For example, Northern juries sent powerful messages when they refused to hold defendants criminally responsible for aiding fugitive slaves in escaping from their owners. Southern juries also sent a strong, if disturbing, message when they acquitted whites who committed crimes against African Americans and civil rights workers. The acquittal in the celebrated murder trial of O.J. Simpson also served a valuable communicative function. It reflected the distrust many African Americans in Los Angeles felt toward the police as a result of racist and brutal police practices.[394] Whether or not we agree with the jury's message, the communicative function of a jury verdict and its link with community notions of blameworthiness cannot be denied. The Supreme Court has thus recognized that "one of the most important functions any jury can perform . . . is to maintain a link between contemporary community values and the penal system."[395]

The standard advocated in this Article for identifying offense elements that must go to the jury is not, however, directly tied to this expressive component of a conviction, for the standard would apply to sentencing guidelines that merely increase sentences but do not result in additional "convictions."[396] Nor do I attempt to identify facts that,

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[392] *See* Steiker, *supra* note 388, at 809 ("[T]he definition of punishment as blaming implies the need for a special procedural regime within which punishment should be imposed, both to limit the state's ability to harness the power of blame *and* to preserve blaming as a social practice.").

[393] United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, J., concurring in part, dissenting in part).

[394] *See* Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the "Will of the People"*, 3 PSYCHOL. PUB. POL'Y & L. 303, 314-15 (1997) (noting that the Simpson verdict was "based in part on a very messy empirical reality with which people of color in Los Angeles had been grappling for some years—a hostile, often racist and untrustworthy, and at times even brutal police force . . . .").

[395] Witherspoon v. Illinois, 391 U.S. 510, 520 n.15 (1968); *see also* Scheflin, *supra* note 144, at 192 ("If crime is unacceptable deviance from community values and standards, then a community judgment on that deviance must be made.").

[396] *See* O'Sullivan, *supra* note 245, at 1376 (explaining that the resolution of Sentencing Guidelines questions "does not impose upon the defendant the stigma of a criminal conviction" because "[t]he defendant has no criminal judgment lodged against him, bears no notation on his rap sheet regarding such conduct, and suffers no continuing civil disabilities by virtue of it").

by their nature, connote blame and therefore must be decided by a jury, whether or not they are enacted into positive law. Thus, like the Court's analysis in *Mullaney v. Wilbur*[397] and *Apprendi*,[398] the test I advocate relies on punishment established by criminal laws as a proxy for blameworthiness and stigma.

To be sure, attaching punishment to a fact in a general law is "an index of the community's moral judgment upon it."[399] Indeed, Kyron Huigens recently argued that "[a]ny aspect of wrongdoing that is singled out for purposes of determining the relative severity of the wrongdoing is by definition a matter of fault."[400] From that premise, he concludes that all positive laws mandating punishment must be decided by juries because juries are the institutional actors charged with assigning blame and making determinations of wrongdoing and fault.[401] In short, Huigens approaches what he calls the *Apprendi* puzzle by attempting to forge a theory of punishment based on the jury's role as the determiner of criminal fault and the judge's role as the determiner of what is a proportional sentence, as opposed to approaching the problem as a question of institutional separation of powers. Thus, although Huigens approaches the issue from a vastly different perspective than does this Article, he ends up advocating a similar test for identifying offense elements. In other words, Huigens believes the

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[397] 421 U.S. 684 (1975); *see also* Ronald Jay Allen, Mullaney v. Wilbur, *the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEXAS L. REV. 269, 281 (1977) (agreeing with Mark Tushnet that the Court in *Mullaney* used the defendant's liberty interest as a proxy for stigmatization and that stigmatization itself did not play an independent role); Mark Tushnet, *Constitutional Limitation of Substantive Criminal Law: An Examination of the Meaning of* Mullaney v. Wilbur, 55 B.U. L. REV. 775, 799 (1975) ("[R]elying on statutory penalties to measure stigma means that the interest in minimizing stigmatization is swallowed by the interest in avoiding a harsher sentence."). The link between stigma and punishment may, however, help explain the differential treatment of recidivism in *Almendarez-Torres*, 523 U.S. 224 (1998). The defendant already suffers from the stigma of the prior offense, so using it to increase a sentence does not impose additional stigma. Rather, only the defendant's liberty interest is at stake.

[398] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[399] Frankfurter & Corcoran, *supra* note 52, at 980. "Broadly speaking, acts [at the common law] were dealt with summarily which did not offend too deeply the moral purposes of the community, which were not too close to society's danger, and were stigmatized by punishment relatively light." *Id.* at 980-81; *see also* Andrew von Hirsch, *Censure and Proportionality*, *in* A READER ON PUNISHMENT, *supra* note 235, at 115, 118 ("[I]f punishment conveys blame, it would seem logical that the quantum of punishment should bear a reasonable relation to the degree of blameworthiness of the criminal conduct.").

[400] Huigens, *supra* note 7, at 455.

[401] *Id.* at 432-34.

test suggested here *is* the right test even if one approaches the problem by focusing on the jury's role in expressing blame.[402]

Although Huigens makes a persuasive case, there is a limit to how far this argument can go because the enactment of positive law is an imperfect index of blameworthiness. Not all sentencing laws are enacted on the basis of a retributive or just-deserts sentencing philosophy. For example, in the federal system, the Guidelines are not based on any particular philosophy of punishment. Instead, they are based largely on averages of past practice. While some sentences might have been set based on a rehabilitative rationale, others may have been based on deterrence or retributive concerns. Thus, using the sentence as a moral compass is somewhat misleading. What is necessary to achieve optimal deterrence does not necessarily correspond to a sense of moral blame.

To identify accurately those elements of a crime that make the offense a blameworthy one, we would need to define elements not by procedure or consequence (i.e., defining "crime" in terms of whether it is part of a positive law that imposes criminal punishment), but by a substantive standard that reflects moral blameworthiness.

This is a road many eminent scholars have traveled. Henry Hart, for example, argued that it makes little sense "to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place[.]"[403] Rather, he contended, a crime must reflect the judgment of community condemnation.[404] Herbert

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[402] Huigens distinguishes between what he calls positive fault considerations and interstitial fault considerations. *Id.* at 433. "Positive fault considerations are those that . . . have been stated in positive law," *id.*, and Huigens argues that they must, therefore, go to the jury, *id.* at 434. Interstitial fault considerations, in contrast, are not enacted into positive laws but instead arise "ex post, in the course of adjudication." *Id.* at 433. Huigens allows those determinations to be made by judges as well as juries; thus, his test would also draw a distinction between mandatory and discretionary sentencing guidelines. *Id.* at 434. As he puts it:

> If fault considerations are enacted into positive law at all, then this is evidence that they pertain to wrongdoing and to the jury's determination of whether punishment is justified in the case. In contrast, the fault determinations that the sentencing court makes involve considerations that are not positively enacted into rules, because they are relevant to a broader inquiry into character that bears on the determination of a proportionate punishment.

Id. at 450.

[403] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 431 (1958).

[404] *See id.* at 404-05 ("What distinguishes a criminal from a civil sanction . . . is the judgment of community condemnation which accompanies and justifies its imposition.").

Packer and others have argued that a "crime" must include a mens rea element because "moral blameworthiness should be the indispensable condition precedent" to the imposition of a criminal sanction.[405] At the very least, argues Joel Feinberg, we should not permit imprisonment on the basis of strict liability because "imprisonment in modern times has taken on the symbolism of public reprobation."[406]

The Supreme Court briefly toyed with the notion of a substantive limit in *Robinson v. California*[407] and *Lambert v. California*,[408] but those cases have proven to be anomalies. "[F]ew who have worn the judicial robes have sensed in themselves an individual capacity to trump forthright legislative decisions to attach the criminal stigma to *X* or to any other act or omission that is not privileged by virtue of a recognized constitutional right."[409] The judiciary has been reluctant to second-guess the legislature on what constitutes a "crime" because of the necessary policy judgments that underlie such a determination. To be sure, judges have attempted to maintain the moral component of the criminal law either by interpreting ambiguous statutory provisions to require mens rea[410] or by recognizing a mistake of law defense when

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[405] Herbert L. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 148; *see also* Jeffries & Stephan, *supra* note 316, at 1374 ("At least when the offense carries serious sanctions and the stigma of official condemnation, liability should be reserved for persons whose blameworthiness has been established."); *cf.* Stuntz, *supra* note 376, at 7 (arguing that criminal procedural rules are "worthless" and may be "perverse" without substantive limits on criminal law); Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391, 416 (1988) (arguing that, because mens rea was a jury question and a prerequisite for finding criminal guilt when the Constitution was written, the Sixth Amendment requires a jury finding of blameworthiness). Packer further argued that substantive limits should be placed on victimless crimes. *See* Herbert L. Packer, The Aims of the Criminal Law *Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 S. CAL. L. REV. 490, 493 (1971) (questioning whether there is a "rational basis" for "victimless crimes").

[406] Joel Feinberg, *The Expressive Function of Punishment, in* A READER ON PUNISHMENT, *supra* note 235, at 73, 84.

[407] 370 U.S. 660, 667 (1962) (holding that it is cruel and unusual punishment to imprison someone on the basis of his status as a drug addict).

[408] 355 U.S. 225, 229 (1957) (concluding that conviction under a registration law requires "actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply" because "'[a] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear'" (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 50 (Boston, Little, Brown 1881))).

[409] Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1277 (1998).

[410] *See, e.g.*, Staples v. United States, 511 U.S. 600, 605 (1994) (stating that statutes not explicitly requiring mens rea must be construed "in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly

the underlying conduct of the defendant "violates no moral norms independent of the law that prohibits it."[411] But they have not gone so far as to insist that legislative pronouncements include specific elements as a constitutional matter. The Supreme Court has therefore approved even those crimes that lack a mens rea requirement.[412]

The judiciary's reluctance is understandable. Moral blameworthiness is a moving target. It varies over time as well as across geography. While environmental polluting might not have been deemed morally reprehensible fifty years ago, it is today—at least in some communities.[413] How can one anchor a constitutional standard in a concept of blame that is so inherently malleable?[414]

Although it is imprecise, using a mandated punishment barometer to define the laws to be applied by juries allows the courts to track changing conceptions of moral blameworthiness, albeit imperfectly, while still placing a limit on the legislature's ability to avoid the Constitution's procedural guarantees.[415] This limit therefore seems to strike the best balance among the responsibilities and abilities of the legislature and the judiciary.

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embedded"); Morissette v. United States, 342 U.S. 246, 263 (1952) (holding that Congress's "mere omission from § 641 of any mention of intent will not be construed as eliminating that element from the crimes denounced").

[411] Dan M. Kahan, *Ignorance of Law is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 149 (1997); *cf.* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 834 (1999) (arguing that the Court will reject strict liability crimes, "if the other elements of the crime, with the strict liability element excluded, could not themselves be made a crime").

[412] *See, e.g.*, United States v. Park, 421 U.S. 658, 672 (1975) (recognizing that an act of Congress need not "make criminal liability turn on" consciousness of wrongdoing); United States v. Dotterweich, 320 U.S. 277, 281 (1943) (stating that a person can be guilty of violating section 301 of the Federal Food, Drug, and Cosmetic Act "'without any conscious fraud at all'" (quoting United States v. Johnson, 221 U.S. 488, 497 (1911))); United States v. Balint, 258 U.S. 250, 252 (1922) (holding that whether scienter is a necessary element of a statutory crime "is a question of legislative intent").

[413] For that reason, it is no solution to define "blame" according to a common law benchmark. *See* Bibas, *supra* note 7, at 1181 (arguing that, if legislatures want to "tap into common-law stigma," a jury must decide "the classic elements of classic common-law crimes, particularly mens rea requirements"). Why should only those offenses that were stigmatized 200 years ago be protected today? After all, carjacking, toxic dumping, and a host of other statutory offenses are considered by many to be quite morally blameworthy, even without a direct common law analogue.

[414] Tushnet, *supra* note 397, at 800 ("The criteria upon which a constitutional doctrine rests should not be tied to factors as changeable as the current social view of the inherent opprobrium of given conduct.").

[415] "The Framers chose to protect defendants, not primarily by regulating the substance of the criminal law, but by establishing certain trial procedures to be followed in a criminal case." Rose v. Clark, 478 U.S. 570, 593 (1986) (Blackmun, J., dissenting).

CONCLUSION

Under the mandatory sentencing regime that now exists at the federal level—and in some states—prosecutors possess the bulk of the discretion to ensure that individual laws should be applied to particular defendants. Unsurprisingly, this regime has sparked a great deal of commentary on why judges should have more discretion in checking prosecutorial abuse and ensuring that justice is served in each case.

What has been forgotten, however, is that there is another judicial actor in criminal cases and that it has the power to bring discretion to bear even on mandatory laws. The jury's power to issue an unreviewable general verdict of acquittal gives juries wide latitude to make decisions in individual cases on the basis of the jury's sense of justice, not the mechanical application of law to facts. This is critical in the criminal context, in which society is passing moral judgment on and imposing punishment for the behavior of the defendant.

But the jury can exercise this function only if it has the power to pass judgment on all general laws mandating criminal punishment. In that situation, where the trial judge cannot bring discretion to bear on an individual case, the jury is the last check on government abuse and overbroad criminal laws.

Although this Article advocates a constitutional test that gives juries the power to apply laws that link facts with specific levels of punishment, it does not advocate a mandatory punishment scheme over a discretionary one. Rather, the focus here addresses what should be done when a legislature makes the decision to switch from a discretionary sentencing regime to a mandatory sentencing regime. While the legislature is free to make such a decision, the constitutional design contemplates a judicial check in either case. In the discretionary scheme, trial judges are able to ensure individualized justice. In a mandatory regime, only the jury can supply a meaningful judicial check.

This check is not, of course, a perfect one. Many criticisms of juries are well taken. But, when judges lack the discretion to ensure justice in an individual case, juries are a fair price for "free nations . . . [to] pay for their liberty."[416]

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[416] 4 WILLIAM BLACKSTONE, COMMENTARIES *350.

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