JURY SENTENCING AS DEMOCRATIC PRACTICE

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INTRODUCTION

AFTER a century of reform and experimentation, sentencing remains a highly contested area of the criminal justice system. Scholars and the public at large continue to disagree about the proper purposes and functions of punishment. Opinion polls have repeatedly indicated a high level of public dissatisfaction with the sentences imposed by judges.[1] Recent sentencing innovations, such as mandatory minimums and sentencing guidelines, have attracted wide criticism[2] for their severity,[3] for dehumanizing the sentencing process,[4] for aggregating dissimilar cases,[5] and for shifting sentenc-

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[1] Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics 2000, at 138–39 tbl.2.54 (Kathleen Maguire & Ann L. Pastore eds., 2001) (showing that between 1990 and 2000, sixty-eight percent or more of citizens polled thought that courts in their area were too lenient in their sentencing and only eight to sixteen percent of those polled thought that courts in their area were "about right" in their sentencing).

[2] Some states have already abandoned mandatory sentencing regimes for certain crimes, and others are contemplating similar changes in their sentencing regimes. Susan Helen Moran, Rethinking Mandatory Minimum Sentences, UPI, Dec. 12, 2001, LEXIS, Nexis Library, UPI File.

[3] See Michael Tonry, Sentencing Matters 99 (1996); Frank O. Bowman, III & Michael Heise, Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences, 86 Iowa L. Rev. 1043, 1131 (2001).

[4] See, e.g., William W. Schwarzer, Judicial Discretion in Sentencing, 3 Fed. Sentencing Rep. 339, 341 (1991) (criticizing the Guidelines for exacting "a high price in terms of the integrity of the criminal justice process, in terms of human life and the moral capital of the system" while yielding "arbitrary results"); Jack B. Weinstein, A Trial Judge's Second Impression of the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 357, 366 (1992) (criticizing the Guidelines for promoting a "bureaucratic mentality" that denies each defendant's identity as a "unique human being"). For a long list of judicial critiques of the Guidelines, see Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 5 (1998) ("Many federal judges have been openly and strongly critical of the Guidelines.").

[5] Albert W. Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. Chi. L. Rev. 901, 949–51 (1991); Stephen J. Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, 851 (1992).

ing discretion to prosecutors.[6] Most recent critiques of the sentencing process have focused on the amount of discretion tolerated by the system. This Article will go a step further and argue that the source of sentencing discretion is also very important to the legitimacy and integrity of the sentencing process. In the absence of wide consensus on sentencing goals, it is best to leave the sentencing decision with a deliberative democratic institution—the jury.

After decades of inattention, the question of the role of the jury in the sentencing process has reentered the legal debate. In *Apprendi v. New Jersey*,[7] *Harris v. United States*,[8] and *Ring v. Arizona*,[9] the United States Supreme Court reexamined the proper allocation of power between judge and jury in sentencing decisions. In *Apprendi*, the Court held that the government must prove to a jury beyond a reasonable doubt all facts that increase the statutory maximum sentence for an offense.[10] In *Harris*, by a five-to-four margin, the Court refused to extend this principle to facts that increased mandatory minimum sentences (though five Justices agreed that the situations in *Apprendi* and *Harris* could not be easily distinguished).[11] In the same week that it handed down *Harris*, the Court held in *Ring* that the *Apprendi* rationale does apply to capital sentencing and that judges alone may not decide facts that could raise a sentence from life imprisonment to death.[12]

Having enhanced the jury's authority to find facts related to sentencing, the Court may have opened the door to even greater juror participation in the sentencing process. Several distinctions attempted by the Court in these opinions may prove difficult to justify over time. Why, for example, should facts increasing the statutory maximum sentence be treated differently from facts affecting

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[6] Bowman & Heise, supra note 3, at 1046–49; Schulhofer, supra note 5, at 842–45; Joseph V. Collina, Is It Time for Jury Sentencing?, Lake County Pub. Defender, at http://www.co.lake.il.us/pubdef/articles/jurysent.htm (last visited Mar. 13, 2003) (on file with the Virginia Law Review Association).

[7] 530 U.S. 466 (2000).

[8] 122 S. Ct. 2406 (2002).

[9] 122 S. Ct. 2428 (2002).

[10] *Apprendi*, 530 U.S. at 490. Prior convictions are an exception to this rule and need not be proven beyond a reasonable doubt to a jury. Id. at 488.

[11] *Harris*, 122 S. Ct. at 2420 (Breyer, J., concurring in part and in the judgment); id. at 2423–28 (Thomas, J., dissenting).

[12] *Ring*, 122 S. Ct. at 2432.

statutory minimums[13] or the range under the Sentencing Guidelines?[14] Why should juries be given the final word in a decision to impose the death sentence, while the choice between, say, a sentence of five years and life imprisonment remains with a judge? And why should juries be allowed to determine facts directly bearing on sentencing, but be kept in the dark about the actual consequences of their findings?[15]

This Article will argue that legislatures should clear this jurisprudential thicket and take the final logical step suggested by the *Apprendi* line of decisions: reintroduction of jury sentencing. To a greater degree than has been recognized, both historical precedent and insights from modern democratic theory suggest that criminal sentencing is a task to which the jury is well-suited. Moreover, our experience with the alternatives—state and federal sentencing guidelines, on the one hand, and discretionary sentencing by judges, on the other—demonstrates that the supposed drawbacks of jury sentencing are not as decisive as once thought.

Advocates of jury sentencing have been a distinct minority for decades. Only six states currently employ jury sentencing in non-capital cases, down from thirteen in 1960.[16] For decades, legal

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[13] This was the issue addressed in *Harris*. While the Court did not extend the holding of *Apprendi* to statutory minimums, five Justices appeared to agree that the two situations were not distinguishable. *Harris*, 122 S. Ct. at 2420 (Breyer, J., concurring in part and in the judgment); id. at 2423–28 (Thomas, J., dissenting).

[14] The federal Sentencing Guidelines are not easily distinguishable, from a practical standpoint, from the statutory sentencing "laws" to which *Apprendi* specifically applies. See Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting) (characterizing the Sentencing Guidelines as "significant, legally binding prescriptions" that "have the force and effect of laws").

[15] Recent news headlines reveal the unintended consequences to which this rule may lead. See Dana Canedy, As Florida Boy Serves Life Term, Even Prosecutors Wonder Why, N.Y. Times, Jan. 5, 2003, at A1. The Florida case involved a jury who found that a thirteen-year-old boy who was "practicing wrestling moves" on another child—who subsequently died—had intended to harm the child. This resulted in a verdict of first-degree murder. Id. Unbeknownst to the jury, this meant an automatic sentence of life without parole. Jury members were described as "horrified" to learn the effect of their verdict, and even prosecutors expressed regret and frustration with the unplanned outcome. Id.

[16] These states are: Arkansas, Kentucky, Missouri, Oklahoma, Texas, Virginia. See Ark. Code Ann. § 16-97-101 (Michie Supp. 2001); Ky. Rev. Stat. Ann. § 532.055 (Michie 1999); Mo. Ann. Stat. § 557.036 (West 1999); Okla. Stat. Ann. tit. 22, § 926.1 (West Supp. 2003); Tex. Code Crim. Proc. Ann. art. 37.07, § 2 (Vernon Supp. 2003); Va. Code Ann. § 19.2-295 (Michie 2000).

scholarship has been overwhelmingly skeptical toward the practice.[17] Many commentators have cited jurors' lack of experience and expertise as the source of unwarranted sentencing disparities and irrational verdicts.[18] The mistrust of jury sentencing is part of a larger discomfort with the jury as an institution. Civil juries have been accused of being unable to handle the complex issues arising in modern civil litigation,[19] and criminal juries have been branded as subversive of the rule of law.[20] As the most recent Supreme Court cases have suggested, however, the jury has continuing vitality as a democratic institution.

This Article will make the case for jury sentencing from three perspectives: the historical, the theoretical, and the practical. Part I

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[17] Many articles have been published in opposition to jury sentencing. See Charles O. Betts, Jury Sentencing, 2 Nat'l Probation & Parole Ass'n J. 369, 369 (1956); Randall R. Jackson, Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest, 55 J. Mo. B. 14, 14 (1999); James P. Jouras, On Modernizing Missouri's Criminal Punishment Procedure, 20 U. Kan. City L. Rev. 299, 301 (1952); Charles Kerr, A Needed Reform in Criminal Procedure, 6 Ky. L.J. 107, 108 (1918); H.M. LaFont, Assessment of Punishment—A Judge or Jury Function?, 38 Tex. L. Rev. 835, 837 (1960); Charles S. Potts, Suggested Changes in Our Criminal Procedure, 4 Sw. L.J. 437, 447–49 (1950); Robert S. Stubbs II, Jury Sentencing in Georgia—Time for a Change?, 5 Ga. St. B.J. 421, 425–30 (1969); Charles W. Webster, Jury Sentencing—Grab-Bag Justice, 14 Sw. L.J. 221, 230 (1960); Robert A. Weninger, Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas, 45 Wash. U. J. Urb. & Contemp. L. 3, 39 (1994); Ronald F. Wright, Rules for Sentencing Revolutions, 108 Yale L.J. 1355, 1374–75 (1999) (reviewing Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in Federal Courts (1998)); Comment, Consideration of Punishment by Juries, 17 U. Chi. L. Rev. 400, 400–01 (1950); Edward A. Linden, Note, Jury Sentencing in Virginia, 53 Va. L. Rev. 968, 1001 (1967); Craig Reese, Note, Jury Sentencing in Texas: Time for a Change?, 31 S. Tex. L. Rev. 323, 337 (1990). By contrast, in the last sixty years, the published legal scholarship in favor of jury sentencing amounts to one student note. See Adriaan Lanni, Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?, 108 Yale L.J. 1775, 1776 (1999). This Article will build on the social science arguments marshaled in Lanni's note and will argue for the salience of jury sentencing from the perspectives of history, political theory, and recent Supreme Court precedent.

[18] See Betts, supra note 17, at 372; Webster, supra note 17, at 226–27; Weninger, supra note 17, at 20; Wright, supra note 17, at 1376.

[19] See William V. Luneburg & Mark A. Nordenberg, Specially Qualified Juries and Expert Nonjury Tribunals: Alternatives for Coping with the Complexities of Modern Civil Litigation, 67 Va. L. Rev. 887, 889–91 (1981); Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv. L. Rev. 898, 898 (1979).

[20] See Nancy S. Marder, The Interplay of Race and False Claims of Jury Nullification, 32 U. Mich. J.L. Reform 285, 286 (1999); Kate Stith-Cabranes, The Criminal Jury in Our Time, 3 Va. J. Soc. Pol'y & L. 133, 133–35 (1995).

of this Article will survey the history of jury sentencing from colonial times to the present. This history reveals that jury sentencing—a uniquely American innovation—was a valued democratic institution in the early republic, but was gradually abandoned in the twentieth century as scientific approaches to punishment came into favor. The most recent developments from the Supreme Court suggest, however, that jury sentencing may be on the rise again. Part II will enlist the insights of modern political theory, particularly the ideas of deliberative democratic theory, to show that the movement away from jury sentencing has not been entirely healthy for either the sentencing process or American democracy as a whole. Part III will address the practical objections that have been leveled against jury sentencing, and will suggest that the vast majority of these are either exaggerated or equally present in alternative sentencing regimes. The jury, therefore, emerges as an equally competent, yet more legitimate, sentencing institution. Finally, Part IV will outline the actual contours of a possible jury sentencing regime that balances the democratic virtues of jury involvement with efficiency, uniformity, and other values important to the sentencing process.

I. FROM POPULAR TO PROFESSIONAL JUSTICE: JURY SENTENCING FROM COLONIAL TO MODERN TIMES

A. Jury Sentencing in the Early Republic

Sentencing juries trace their origins to the early American republic. They were not a feature of the English common law. Although English juries often delivered "pious perjury" verdicts, acquitting defendants of certain charges to prevent unduly harsh sentences,[21] they did not have formal sentencing authority. Legislators of many early American states abandoned the common law tradition and vested juries with sentencing power.[22] Enthusiasm for self-government and memories of arbitrary Crown-appointed

[21] 4 William Blackstone, Commentaries *238–39; see also Jones v. United States, 526 U.S. 227, 245 (1999) (noting that juries devised extralegal ways of avoiding a guilty verdict on certain counts if the punishment associated with the offense seemed disproportionate to the seriousness of the defendant's conduct).

[22] See Linden, supra note 17, at 970–71; Reese, supra note 17, at 326–27.

judges motivated the change.[23] Reformers also thought that juries were uniquely capable of assessing the proper punishment because, as members of the local community, they were more likely to be well-acquainted with the defendant's background and the particular circumstances of the offense.[24] The rise of jury sentencing was also likely related to a development in American punishment regimes in the late eighteenth and early nineteenth centuries. As punishment options expanded beyond shaming sanctions and the mandatory death penalty[25] and came to include various ranges and modes of imprisonment, there was more room for case-by-case decisionmaking to which juries were thought to be well-suited.

In 1796, Virginia was the first state to formally adopt jury sentencing for all criminal offenses.[26] It did so in the same reform legislation in which it adopted imprisonment as the punishment for a variety of felonies.[27] By the second half of the nineteenth century, ten more states allowed juries to assess punishment to varying degrees.[28] Although the fear of oppression by colonial judges was by

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[23] See Betts, supra note 17, at 370.

[24] Jouras, supra note 17, at 304 (citing jury sentencing proponents for the proposition that juries are oftentimes in a better position "to know the history of the accused and . . . therefore assess the proper punishment accordingly").

[25] See Nancy J. King & Susan R. Klein, Essential Elements, 54 Vand. L. Rev. 1467, 1507 (2001).

[26] Act of Dec. 22, 1796, § 15, 1796 Va. Acts ch. 2. Jury sentencing was used for certain misdemeanors in Virginia as early as 1776. Linden, supra note 17, at 971.

[27] Act of Dec. 22, 1796, §§ 5–14, 1796 Va. Acts ch. 2; Kathryn Preyer, Crime, the Criminal Law, and Reform in Post-Revolutionary Virginia, 1 Law & Hist. Rev. 53, 84-85 (1983).

[28] Ala. Code §§ 3620–3621 (1852); Act of Oct. 26, 1831, § 1, 1831 Ark. Acts 30, 30–31; Act of Feb. 15, 1831, § 42, 1830 Ill. Laws 103, 113; Act of June 17, 1852, § 116, [2] 1852 Ind. Acts 361, 377; Ky. Rev. Stat. Ann. § 19 (Bullitt-Feland 1887); Act of Jan. 12, 1831, ch. 25, § 1, 1830 Mo. Laws 33, 33; N.D. Cent. Code §§ 6809–6810 (1895); Act of Dec. 9, 1829, ch. 23, § 72, 1829 Tenn. Pub. Acts 27, 44; Act of Apr. 30, 1846, § 1, 1846 Tex. Gen. Laws 161, 161; Hawkins v. State, 3 Stew. & P. 63, 64 (Ala. 1832) (noting an 1807 statute providing for jury assessment of fines); Graham v. State, 1 Ark. 171, 183 (1838) (noting the power of Arkansas juries to assess and determine a defendant's punishment); Blevings v. People, 2 Ill. (1 Scam.) 171, 172 (1835) (construing the 1833 Illinois Criminal Code to grant the jury the power to sentence); Clark v. State, 77 Ind. 399, 401 (1881) (noting the power of Indiana juries to fix a defendant's punishment); Cornelison v. Commonwealth, 2 S.W. 235, 242 (Ky. 1886) (extolling the virtues of jury sentencing); State v. Mish, 92 P. 459, 462 (Mont. 1907) (Brantly, J., dissenting) (noting that the jury may fix punishment under Mont. Pen. Code, § 2150); see also Betts, supra note 17, at 370 (noting that the adoption of jury sentencing in Texas was

that time a distant memory, sentencing juries were still seen as a tribunal "ready to protect those charged with offenses from any attack of arbitrary power."[29] The enthusiasm for sentencing juries may also have been related to a more general fear of unelected judges, who were perceived as elitist and unresponsive to popular wishes.[30] Indeed, many states adopted jury sentencing in the mid-nineteenth century, at the same time that the movement for elective judiciary gathered speed.[31] Thus, it is no surprise that when it came to crime and punishment, juries—reflecting the wisdom and preferences of twelve ordinary citizens—seemed a better safeguard against unfair sentences than a single judge.[32]

In the early twentieth century, three more states—Georgia,[33] Mississippi,[34] and Oklahoma[35]—gave juries sentencing powers. Oklahoma adopted jury sentencing upon attaining statehood. It is

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a reaction to the arbitrariness of judges appointed by the Spanish and Mexican governments).

[29] *Cornelison*, 2 S.W. at 242.

[30] Haynes documents the rise in the nineteenth century of hostility "toward the whole machinery of judicial administration," including judges. Evan Haynes, The Selection and Tenure of Judges 96–97 (1944). The "democratic fervor" of the era "tended . . . to bring nearly all public officers under direct popular control, the judges among the rest" and led to both the enactment of statutory and constitutional provisions for the election of judges and the attempted removal of several state court judges who had struck down democratically enacted statutes as unconstitutional. Id. at 90–95.

[31] Id. at 80–135. At least four states—Alabama, Mississippi, Montana, and North Dakota, switched to judicial elections around the same time that they adopted jury sentencing. Id. at 101–35 (listing the years in which those states switched to judicial elections as, respectively, 1850, 1910, 1889, and 1889).

[32] As Judge Sherwood of the Supreme Court of Missouri explained:

> Our legislators and our constitution framers were doubtless aware of the mentioned danger,—of the one-man power,—and therefore carefully guarded every avenue against its stealthy approaches and its insidious advance. Again, the assessment of the punishment to be inflicted is part and parcel of the issue joined between the state and the prisoner.

State v. Hamey, 67 S.W. 620, 636 (Mo. 1902) (Sherwood, J., dissenting).

[33] Act of Aug. 18, 1919, No. 230, § 1, 1919 Ga. Laws 387, 387; see also Butt v. State, 103 S.E. 466, 467 (Ga. 1920) ("[T]he jur[ies] . . . are invested by law with the right and power of fixing the punishment by recommendation to life imprisonment, and whether they will so recommend or not is a matter entirely in their discretion, which is not limited or confined in any case.").

[34] Miss. Code Ann. § 1359 (1906). In Mississippi, the jury's sentencing power was limited to sexual assault offenses. See id.

[35] Act of May 12, 1908, § 1, 1907–1908 Okla. Sess. Laws 462, 462.

likely that this choice was part of Oklahoma's decision to model all of its statutes upon those of Arkansas, where jury sentencing was already well-entrenched.[36] In Georgia, jury sentencing was adopted partly as a means of promoting uniformity of punishment for similar offenses, a task at which (contrary to modern-day conventional wisdom) judges were perceived to be inadequate.[37]

Thus, by 1919, fourteen states gave juries sentencing powers in non-capital cases.[38] In several other jurisdictions, juries had the authority—whether it was statutory or judicially created—to recommend a merciful sentence.[39] Even in jurisdictions where no direct jury sentencing existed, determinate sentencing regimes allowed jurors to influence sentencing circuitously, just as their English predecessors had done, by acquitting defendants of some charges, despite clear evidence of guilt.[40]

The heyday of sentencing juries was also the time when the criminal jury had significant powers to decide matters of law.[41] From the beginning, the jury's power to determine legal issues was greater in the colonies than in England[42] and was stronger in crimi-

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[36] See Glover v. United States, 91 S.W. 41, 42 (Indian Terr. 1905).

[37] See Stubbs, supra note 17, at 423 n.13.

[38] Ala. Code §§ 3620–3621 (1852); Act of Oct. 26, 1831, § 1, 1831 Ark. Acts 30, 30–31; Act of Aug. 18, 1919, No. 230, § 1, 1919 Ga. Laws 387, 387; Act of Feb. 15, 1831, § 42, 1830 Ill. Laws 103, 113; Ind. Code Ann. §§ 2150–2153 (Michie 1908); Act of Mar. 23, 1916, ch. 39, § 1, 1916 Ky. Acts 430, 430–31; Miss. Code Ann. § 1359 (1906) (limiting jury sentencing to sexual assault cases); Act of Jan. 12, 1831, ch. 25, § 1, 1830 Mo. Laws 33, 33; Mont. Rev. Code Ann. § 12027 (Smith 1921); N.D. Cent. Code §§ 6809–6810 (1895); Act of May 12, 1908, § 1, 1907–1908 Okla. Sess. Laws 462, 462; Act of Dec. 9, 1829, ch. 23, § 72, 1829 Tenn. Pub. Acts 27, 44; Act of Apr. 30, 1846, § 1, 1846 Tex. Gen. Laws 161, 161; Va. Code Ann. § 3903 (Michie 1887).

[39] E.g., State v. Thomas, 111 A. 538 (Del. Oyer. Ter. 1920); State v. Lapista, 105 A. 676 (Del. Gen. Sess. 1918); Green v. State, 113 So. 1221 (Fla. 1927); State v. Carabajal, 193 P. 406 (N.M. 1920); State v. Jukanovich, 146 P. 289 (Utah 1915); Comment, Consideration of Punishment by Juries, supra note 17, at 401 nn.7–8.

[40] The practice of "pious perjury" was especially prevalent in capital cases. See Woodson v. North Carolina, 428 U.S. 280, 293 (1976); Philip English Mackey, The Inutility of Mandatory Capital Punishment: An Historical Note, 54 B.U. L. Rev. 32, 32–34 (1974).

[41] See Wright, supra note 17, at 1374 (noting that sentencing juries were "well-entrenched" by the middle of the nineteenth century); see infra notes 70–71 and accompanying text.

[42] As mentioned earlier, although English juries did not have the right to decide matters of law, they effectively nullified laws when they acquitted defendants in the face of evidence sufficient for conviction. See Thomas Andrew Green, Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800, at

nal than in civil cases.[43] American colonists claimed the jury's power to decide legal issues as a right because, like the proponents of jury sentencing, they believed it was an essential tool for promoting self-government and curbing official arbitrariness.[44] The authority of the criminal jury to determine law as well as facts was taken as self-evident in many colonies[45] and was confirmed in constitutions, statutes, and judicial decisions throughout the United States.[46]

Accordingly, courts in criminal cases frequently informed jurors of their right to disregard the judge's instructions on the law, while simultaneously reminding them of their duty to follow the law as written and explained by the judge.[47] Juries were seen as partners "in a joint enterprise with the judge, with respect to determinations

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62–63 (1985). American colonists went beyond the common law tradition in recognizing the jury's power to nullify laws as a right: "The ability to determine law was something more than the power to bring in a general verdict.... American judges actually asserted an almost plenary power in the jury to decide the law as it saw fit." Matthew P. Harrington, The Law-Finding Function of the American Jury, 1999 Wis. L. Rev. 377, 378, 387.

[43] See Harrington, supra note 42.

[44] See id. at 395–96.

[45] Albert W. Alschuler & Andrew G. Deiss, A Brief History of the Criminal Jury in the United States, 61 U. Chi. L. Rev. 867, 903–06 (1994); see also Sparf v. United States, 156 U.S. 51, 142–51 (1895) (Gray, J., dissenting) (reviewing American colonial cases that affirmed the authority of criminal juries to determine issues of law as well as fact).

[46] See, e.g., Ga. Const. of 1777, art. XLI ("The jury shall be judges of law, as well as of fact, and shall not be allowed to bring in a special verdict...."); Ind. Const. of 1851, art. I, § 64 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); Md. Const. art. 23 ("In the trial of all criminal cases the Jury shall be the Judges of Law as well as of fact...."); Pa. Const. of 1790, art. IX, § 7 ("[I]n all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."); Act of Mar. 12, 1808, ch. 139, § 15, 1808 Mass. Acts 382, 389 (declaring the right of juries to "decide at their discretion, by a general verdict, both the fact and the law, involved in the issue"); Commonwealth v. Knapp, 27 Mass. (9 Pick.) 477, 496 (1830) ("As the jury have the right... to return a general verdict of *guilty* or *not guilty*, they must necessarily, in the discharge of this duty, decide such questions of law as well as of fact, as are involved in this general question; and there is no mode in which their opinions upon questions of law can be reviewed by this Court or by any other tribunal."); see also Jeffrey Abramson, We, the Jury 75 (2000) ("[T]he criminal jury's prerogative to decide questions of law lasted well into the nineteenth century."); Mark DeWolfe Howe, Juries as Judges of Criminal Law, 52 Harv. L. Rev. 582, 591–96 (1939) (noting that judicial decisions in the colonies recognized the jury's power to determine legal issues).

[47] See Howe, supra note 46, at 592–96.

of law and fact; judge-jury cooperation was the rule in both areas."[48] Partnership between juries and judges was also common in sentencing matters. In the states with jury sentencing, judges instructed jurors on the range of punishment authorized by the legislature and were often authorized to intervene in the sentencing process by reducing the sentence imposed by the jury,[49] imposing hard labor or solitary confinement[50] in addition to the jury's assessment of fines, or determining the place of confinement imposed by the jury.[51]

The jury's power to sentence was related to its power to decide the law in another important way. In the eighteenth and nineteenth centuries, jurors frequently used their power to determine legal matters as a way of challenging or nullifying unjust legislation.[52] As widely documented by legal historians, colonial jurors often refused to enforce navigation acts and acquitted persons accused of seditious libel in protest against the unfairness of these laws.[53] Similarly, prior to the Civil War, juries in the North acquitted defendants indicted for violating the Fugitive Slave Law.[54] Jurors also

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[48] Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 173 (1964).

[49] See, e.g., State v. Bevins, 43 S.W.2d 432, 434 (Mo. 1931) (noting the power of the judge to reduce the sentence imposed by the jury).

[50] E.g., Act of Feb. 15, 1831, § 42, 1830 Ill. Laws 103, 113 (providing that the jury "shall fix the term and nature of the confinement, as is provided by this act; [but] the judge, in passing a sentence on the prisoner, shall say in said sentence, how long the prisoner shall be confined, how long to solitary confinement, and how long to hard labor, and to either or both").

[51] See, e.g., Washington v. State, 23 So. 697, 697 (Ala. 1898) (holding that, although juries fix the period of punishment, judges decide the kind or character of punishment to be imposed).

[52] The jury's discretion to decide matters of law was effectively much greater when the jury opted for acquittal rather than conviction, since the Double Jeopardy Clause ensured that the verdict was not subject to review. See Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1190 (1991).

[53] Abramson, supra note 46, at 74–75; James Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger, Printer of The New York Weekly Journal 41–105 (2d ed. 1972); Alschuler & Deiss, supra note 45, at 874 ("Zenger's trial was not an aberration; during the pre-Revolutionary period, juries and grand juries all but nullified the law of seditious libel in the colonies."); Harrington, supra note 42, at 393–94 (discussing juries' refusal to enforce navigation and sedition laws).

[54] Robert M. Cover, Justice Accused: Antislavery and the Judicial Process 175–225 (1975). Unfortunately, the power to nullify was not always used to benign ends: Scholars have noted the history of acquittals against the evidence in lynching cases in the post-Reconstruction South. See Alschuler & Deiss, supra note 45, at 890–91.

acquitted defendants in capital cases when the death penalty seemed a disproportionate punishment for the underlying crime.[55] This widespread nullification may have prompted several more states to grant juries the authority to decide the punishment in capital cases.[56] Allowing the jury leeway in sentencing, the reasoning went, was more acceptable than the numerous acquittals resulting from the jury's reluctance to impose the death penalty in particular cases.

As the nullification cases demonstrate, the jury—whether at trial or at sentencing—operated as a deeply political institution in the early republic.[57] It played a central part in the American system of checks and balances.[58] Many compared juries to legislatures because juries provided an opportunity for direct popular participation in government.[59] The Anti-Federalists were especially concerned that as the central government acquired new powers, it would grow distant from the concerns of ordinary citizens.[60]

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[55] See Mackey, supra note 40, at 32–34.

[56] See Ex parte Giles, 632 So. 2d 577, 581 (Ala. 1993); Commonwealth v. Mutina, 323 N.E.2d 294, 300 n.7 (Mass. 1975).

[57] More recent Supreme Court opinions reflect this historical understanding. See Taylor v. Louisiana, 419 U.S. 522, 529 & n.7 (1975) (noting that the jury "plays a political function in the administration of the law" and that "the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it"); see also Spaziano v. Florida, 468 U.S. 447, 481, 485 (1984) (Stevens, J., concurring in part and dissenting in part) (asserting that juries "play[ ] an essential role in legitimating the system of criminal justice" and are "a significant and reliable objective index of contemporary values") (citations omitted); cf. 1 Alexis de Tocqueville, Democracy in America 282 (Phillips Bradley ed., Henry Reeve trans., Francis Bowen rev., 1946) (1835) ("The jury is above all, a political institution, and it must be regarded in this light in order to be duly appreciated.").

[58] Letter from The Federal Farmer (Oct. 12, 1782), *reprinted in* 2 Complete Anti-Federalist 245, 249–50 (Herbert J. Storing ed., 1981) ("It is 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.... The trial by jury in the judicial department and the collection of the people by their representatives in the legislature are those fortunate inventions which have procured for them, in this country, their true proportion of influence...."); see also Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 165 (1997) ("The jury was to check the judge—much as the legislature was to check the executive, the House to check the Senate, and the states to check the national government.").

[59] Amar, supra note 58, at 167; see also Vikram David Amar, Jury Service as Political Participation Akin to Voting, 80 Cornell L. Rev. 203, 218–21 (1995) (detailing early support for the jury as a vehicle for civic participation).

[60] See Amar, supra note 58, at 161–64.

Against this background, juries became the embodiment of the ideal of a decentralized democracy. They were seen as the vehicle through which community concerns could be made to bear on important political decisions. As the Federal Farmer argued:

> The jury trial, especially politically considered, is by far the most important feature in the judicial department in a free country . . . . The body of the people, principally, bear 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.[61]

Some early commentators on American democracy also emphasized the function of the jury as a school of civic virtue—a forum in which citizens learned how to take charge of political affairs in their community. Tocqueville, for example, argued that the jury "may be regarded as a gratuitous public school, ever open, in which every juror learns his rights . . . and becomes practically acquainted with the laws."[62] Federal judges in the early republic appreciated the educative potential of jury service and used jury charges to instruct jurors not only on the case before them, but on the criminal law generally or even on political matters of the day.[63]

The educative function of jury service made the jury valuable not only as a means of dispute resolution, but also as an essential component of American democracy. This strong belief in the democratic and educational functions of jury service resulted in juries enjoying broad authority in the early republic. More than factfinders, juries decided the fate of the defendants they convicted.

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[61] Letter from The Federal Farmer (Jan. 18, 1788), *reprinted in* 2 Complete Anti-Federalist, supra note 58, at 315, 320.

[62] 1 Tocqueville, supra note 57, at 285; see also Letter from The Federal Farmer, supra note 61, at 320 (pointing to the jury as one of the "means by which the people are let into the knowledge of public affairs"); Francis Lieber, On Civil Liberty and Self-Government 239 (1859) (praising the jury as "the greatest practical school of free citizenship").

[63] Neal Katyal, Judges As Advicegivers, 50 Stan. L. Rev. 1709, 1728–31 (1998).

B. The Decline of the Jury's Authority and Changing Theories of Penology

As the nineteenth century progressed, courts began restricting the authority first of the civil jury, and then of the criminal jury. On the civil side, demands for consistency and predictability in increasingly complex litigation prompted calls for judicial decisionmaking bound by precedent and expounded in written opinions.[64] In addition, the codification and federalization of many areas of civil law meant that local input in adjudication was no longer essential.[65] The gulf between the roles of juries and judges grew as the rise of law schools created a new class of specially trained legal experts.[66] Although criminal law remained more accessible to laypersons, a general emphasis on consistency and rule of law disfavored jury participation in adjudication of criminal matters as well.[67]

By the 1820s, using devices such as new trials and special verdicts, state judges had all but taken away civil juries' power to determine matters of law,[68] even as statutes and constitutions in many states continued to grant jurors the power to judge both fact and law.[69] The jury's power to decide matters of law in criminal cases, however, survived until the end of the nineteenth century.[70] In a

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[64] Darryl K. Brown, Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines, 47 Hastings L.J. 1255, 1273 (1996). The professionalization of the bar was an important power driving these changes. See Charles Warren, A History of the American Bar 3–28 (1980).

[65] Cf. Abramson, supra note 46, at 90 ("The fight over the jury's right to decide questions of law was another front in the battle over the geography of democracy in America.").

[66] Warren, supra note 64, at 3–28.

[67] As the Supreme Court remarked in *Sparf v. United States*, juries would be "uncontrolled by any settled, fixed, legal principles" and therefore incapable of providing "the protection equally of society and of individuals in their essential rights" if given unrestrained authority to decide questions of law. 156 U.S. 51, 102–03 (1895).

[68] Brown, supra note 64, at 1269–70; Harrington, supra note 42, at 379, 414–23.

[69] Howe, supra note 46, at 596–613, 614 nn.125–26.

[70] The power remained strong in certain states in the mid-nineteenth century (notably, most of these states also practiced jury sentencing). See Ind. Const. of 1851, art. I, § 19; Md. Const. art. 23; State v. Jones, 5 Ala. 666, 668–69 (1843); McDaniel v. State, 30 Ga. 853 (1860) (noting that when the jury cannot conscientiously adopt the law as it is given to them in the charge by the court, "it is not only their right, but their duty, to find a verdict according to the opinion which they entertain of the law"); Fisher v. People, 23 Ill. 218, 230–31 (1860); Doss v. Commonwealth, 42 Va. (1 Gratt.) 557, 559 (1844) ("The jury in a criminal cause are the judges of the law and the evidence."). By

landmark 1895 criminal case, the Supreme Court held that, in federal court, questions of law were outside the jury's province:

> Upon the court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. Under any other system, the courts, although established in order to declare the law, would for every practical purpose be eliminated from our system of government as instrumentalities devised for the protection equally of society and of individuals in their essential rights. When that occurs our government will cease to be a government of laws, and become a government of men.[71]

By the early twentieth century, therefore, courts had begun to seriously reconsider the powers of the criminal jury. By 1930, the Supreme Court allowed defendants to waive their rights to trial by a twelve-member jury, thereby implying that the right to a jury trial was principally for the benefit of the defendant, not the community at large.[72] Lawrence Friedman points out that "[b]y 1938, twenty-one states and the federal government allowed bench trials."[73] By the late 1920s, plea bargaining had increased dramatically (reaching ninety percent of felony convictions in New York state), leaving an ever smaller percentage of criminal cases to judgment by jury.[74]

Jury sentencing survived this first wave of restrictions on jury powers.[75] Even jury sentencing, however, was slowly being eroded by the professionalization of the law of punishment. By 1910, re-

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the end of the nineteenth century, however, even jury sentencing states curtailed the jury's power to decide legal issues. E.g., Brown v. State, 40 Ga. 689 (1870) (denying the jury's right to ignore instructions); Murray v. Heinze, 42 P. 1057, 1061 (Mont. 1895); Ford v. State, 47 S.W. 703, 704 (Tenn. 1898); Harris v. State, 75 Tenn. 538, 543–44 (1881); Pridgen v. State, 31 Tex. 421 (1868); Brown v. Commonwealth, 10 S.E. 745 (Va. 1890).

[71] *Sparf*, 156 U.S. at 102–03.

[72] Patton v. United States, 281 U.S. 276, 297–98 (1930). Some states soon followed suit. E.g., Palmer v. State, 25 S.E.2d 295 (Ga. 1943); Boaze v. Commonwealth, 183 S.E. 263, 264 (Va. 1936).

[73] Lawrence M. Friedman, Crime and Punishment in American History 389 (1993). All states allowed bench trials by 1960. Id.

[74] Alschuler & Deiss, supra note 45, at 924–25.

[75] Indeed, three states, Georgia, Mississippi, and Oklahoma, switched to jury sentencing in the early twentieth century. See supra notes 33–35 and accompanying text.

flecting progressive beliefs in the possibility of the rehabilitation of criminal offenders,[76] many state legislatures—and then Congress—passed laws that created parole and probation systems.[77] Probation officers gathered and analyzed information about the defendant's character and prepared a pre-sentencing report that served as the basis for the ultimate sentence.[78] Parole commissioners, trained in penology and insulated from political pressures,[79] determined when prisoners had been rehabilitated and could be reintegrated into society. Although parole officers had wide latitude in setting the release date for prisoners, offenders in federal court could not be paroled before they had served one-third of the sentence imposed by the court.[80] Judges, in turn, were expected to rely on pre-sentence reports and on their own legal expertise in fashioning individualized sentences consistent with the rehabilitative model.

The emphasis on expertise and rehabilitation, rather than on retribution and community wisdom, further diminished the authority of the jury. Some defendants challenged the new system on the ground that it infringed on their right to trial by jury.[81] These challenges inevitably failed, in part because the right to punishment by jury was statutory and not constitutional.[82] The end result of this transformation was that a class of professional parole officers, commissioners, and criminal justice experts had sprung into existence and assumed a large role in determining defendants' actual punishment.

By the 1950s, therefore, the belief in the jury as a political and legal decisionmaking institution was considerably eroded, and an

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[76] See Stith & Cabranes, supra note 4, at 16–17. For a discussion of the rise of the rehabilitative model of sentencing in the early twentieth century, see, for example, Edward Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, 16 J. Am. Inst. Crim. L. & Criminology 9, 18–21 (1925).

[77] See An Act to Parole United States Prisoners, ch. 387, §§ 2–10, 36 Stat. 819 (1910) (codified as amended at 18 U.S.C. §§ 4202–4208 (2000)) (repealed 1984); Stith & Cabranes, supra note 4, at 18; Lindsey, supra note 76, at 52–58 (documenting the adoption of parole laws by various states in the period from 1900 to 1910).

[78] Stanton Wheeler et al., Sitting in Judgment: The Sentencing of White-Collar Criminals 42–43 (1988).

[79] Parole officials were appointed for fixed terms, and their decisions were largely shielded from public scrutiny. Stith & Cabranes, supra note 4, at 21.

[80] 18 U.S.C. § 4205 (repealed 1984).

[81] Lindsey, supra note 76, at 51.

[82] Id. at 51–52.

ethos of professionalization had emerged around the practice of sentencing. The intellectual stage was set for an assault on the practice of jury sentencing.

C. From Science to Math: The Final Collapse of Jury Sentencing

The decline of the jury's political role and the ascent of the scientific approach to punishment in the first half of the twentieth century shook the intellectual foundations of jury sentencing, making it appear an anachronism in the states where it existed. In the 1950s and 1960s, much legal scholarship argued for complete abolition of the practice.[83] By the 1970s and 1980s, another intellectual current threatened to diminish its prevalence—the rise of determinate sentencing, accompanied by mathematical models and grids.

The rise of determinate sentencing was, in many ways, a repudiation of the rehabilitative model that had come into vogue in the first half of the century. By the 1970s, the methodology and philosophical premises of the rehabilitative model became the subjects of severe criticism. Scholars and public officials complained that attempts at individualized treatment of offenders produced unwarranted disparities among cases.[84] In addition, the growth in violent crime in the late 1960s and 1970s discredited the adequacy and attainability of rehabilitation as a sentencing objective.[85] Finally, some of the most fervent advocates for change in the indetermi-

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[83] See Betts, supra note 17, at 371–73; Jouras, supra note 17, at 305–06; Kerr, supra note 17, at 108; LaFont, supra note 17, at 837; Potts, supra note 17, at 447–49; Webster, supra note 17, at 228–29; Comment, Consideration of Punishment by Juries, supra note 17, at 405–08.

[84] See Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 133 (1969); President's Comm'n on Law Enforcement & Admin. of Justice, The Challenge of Crime in a Free Society 357–58 (1969).

[85] Stith & Cabranes, supra note 4, at 31 ("The vehemence of this criticism grew as crime rates increased throughout the 1960s and 1970s and, with them, the number of media accounts of parolees . . . who committed new, violent crimes."); see Lanni, supra note 17, at 1778 (noting the waning of the rehabilitative model as a result of rising crime); see also Ernest Van den Haag, Punishing Criminals: Concerning a Very Old and Painful Question 10 (1975) (arguing that retribution is the proper basis for punishment); Andrew Von Hirsch, Doing Justice: The Choice of Punishments 45 (1976) (advocating a "just deserts" approach to sentencing); James Q. Wilson, Thinking About Crime 199–201 (rev. ed. 1975) (advocating incapacitation); Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Pol. Econ. 169 (1968) (claiming that deterrence is the proper basis for sentencing).

nate sentencing regime argued that judges contributed to sentencing disparities by basing their sentencing decisions on ideological or emotional dispositions.[86]

Responding to these concerns with indeterminate sentencing, the Sentencing Reform Act of 1984 aimed both to eliminate unwarranted sentencing disparities in federal courts and to amend the philosophy of sentencing to include "just deserts" and "crime control" considerations.[87] As part of the reform legislation, Congress abolished parole in the federal system and created the U.S. Sentencing Commission ("the Commission"). The Act charged the Commission with the task of drafting mandatory guidelines to address the problem of unwarranted sentencing disparities.[88]

Consensus on a comprehensive sentencing philosophy, however, was hard to muster. In the absence of a clear congressional mandate,[89] the Commission felt that it could not make the choice among sentencing goals that were fiercely contested:

> Such a choice would be profoundly difficult. The relevant literature is vast, the arguments deep, and each point of view has much to be said in its favor. A clear-cut Commission decision in favor of one of these approaches would diminish the chance that the guidelines would find the widespread acceptance they need for effective implementation.[90]

Instead of dealing with the thorny question of sentencing purposes, the Commission focused on the mechanics of sentence de-

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[86] Marvin E. Frankel, Criminal Sentences: *Law Without Order* 23 (1973) ("The particular defendant on some existential day confronts a specific judge. The occupant of the bench on that day may be punitive, patriotic, self-righteous, guilt-ridden, and more than customarily dyspeptic.").

[87] Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.).

[88] Federal Sentencing Guidelines Manual § 1.1 (1990).

[89] Unable to agree on a sentencing purpose, Congress simply listed all possible sentencing objectives to be considered by the Sentencing Commission in drawing up the Guidelines. See 18 U.S.C. § 3553(a) (2000); 28 U.S.C. § 991(b) (2000) (listing retribution, deterrence, incapacitation, and rehabilitation as goals for the sentencing court to consider and for the Sentencing Commission to include in its Guidelines); see also Stith & Cabranes, supra note 4, at 52 (noting the tension between these goals and "the vast uncertainty and disagreement over what particular types of penalties are most efficacious in achieving any of these purposes").

[90] Federal Sentencing Guidelines Manual, ch. 1, pt. A, introductory cmt. (1990).

termination. The Sentencing Guidelines ("the Guidelines") established a mathematical system of calculating the proper punishment, taking into account factors such as the offense level and prior criminal conduct of the offender. In effect, the Guidelines replaced individualized moral judgment with "complex quantitative calculations that convey[ed] the impression of scientific precision and objectivity."[91]

At the state level, sentencing guidelines and mandatory sentencing laws also became more popular in the 1980s.[92] Eight states adopted presumptive or voluntary guidelines in the 1980s, and eight more joined them over the next decade.[93] Like their federal counterparts, most state sentencing reformers also abolished parole.[94] Moreover, while many states relied on rather flexible (and, in some cases, voluntary) sentencing guidelines to cabin judicial discretion,[95] some legislatures passed determinate sentencing statutes that, like the federal laws, defined a presumptive sentence for each statutory offense and allowed only a narrow range of deviations from the statutory sentence.[96]

The onset of determinate sentencing kept the professionalization originally introduced by the rehabilitative model, while jettisoning much of what remained of individual judicial discretion. The sentencing trajectory had thus progressed as follows: From citizens' judgment in the early republic, to discretion by judges guided by criminal justice professionals in the early twentieth century, to mathematical formulas in the late twentieth century. At the latest stage of this development, rigid presumptive guidelines—especially when coupled with mandatory sentencing laws—left little room for discretion even by judges. Instead, sentences came to be deter-

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[91] Stith & Cabranes, supra note 4, at 82.

[92] Indeed, state sentencing guidelines predated those at the federal level. Minnesota charged a sentencing commission with promulgating guidelines in 1978. Act of Apr. 5, 1978, ch. 723, § 9, 1978 Minn. Laws 761, 765–67.

[93] American Sentencing Guidelines Systems as of June 1999, at http://www.ussc.gov/states/asgs.pdf (last visited Jan. 25, 2003) (on file with the Virginia Law Review Association) [hereinafter Sentencing Guidelines Systems]. As of 1999, seven more states were studying proposals for sentencing guidelines. Id.

[94] Id.

[95] See Kay A. Knapp & Denis J. Hauptly, State and Federal Sentencing Guidelines: Apples and Oranges, 25 U.C. Davis L. Rev. 679, 681–84 (1992).

[96] Gary T. Lowenthal, Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform, 81 Cal. L. Rev. 61, 63 (1993).

mined mechanically on the basis of grids prepared in advance by the sentencing commissions.

In such an environment, jury sentencing appeared more archaic than ever before. By the early 1980s, six states had completely abandoned sentencing by juries: Alabama, Georgia, Illinois, Indiana, Montana, and North Dakota.[97] Mississippi used jury sentencing only in rape and statutory rape cases.[98] Even the eight states that retained the practice for a wider range of offenses reformed their systems to take account of new sentencing goals.[99] Two more states, Tennessee and Oklahoma, abolished the practice in the 1990s,[100] leaving the number of jury sentencing states at five by 1998.[101]

D. The Flaws of Determinate Sentencing

The avowedly objective, mathematical approach to punishment did not, however, shield determinate sentencing from criticism. With respect to the federal system, commentators complained about the lack of transparency in the process by which the Commission gathered and interpreted data.[102] Under the veneer of mathematical certainty, many saw political agendas influencing the shape of the sentencing guidelines.[103] Many critiques focused on the Commission's departure from past judicial sentencing practices in

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[97] See Jackson, supra note 17, at 15; Lanni, supra note 17, at 1791 nn.70–71.

[98] Miss. Code Ann. §§ 97-3-65, 97-3-71 (1972).

[99] Jackson, supra note 17, at 15; Lanni, supra note 17, at 1791 nn.70–71.

[100] Tenn. Code Ann. § 40-35-203 (1997); Oklahoma Truth in Sentencing Act, ch. 133, 1997 Okla. Sess. Law Serv. 501 (West).

[101] See supra note 16. Oklahoma reinstated jury sentencing in 1999. Okla. Stat. Ann. tit. 22, § 926.1 (West 2002).

[102] Stith & Cabranes, supra note 4, at 65–66 (noting that commentators accused the Commission of deliberately obfuscating the rationales for particular design decisions).

[103] Id. The composition of the Commission gave added force to charges that the Commission's decisions were politically motivated. Unlike the experts of the previous regime—the parole officials—the Commission was a much more visibly political body and could not claim neutrality, detachment, or even expertise as its basis for legitimacy. See id. at 49. Moreover, despite its political character, the Commission was "two increments removed" from political accountability and had few of the constraints that other agencies had. See Ronald F. Wright, Sentencers, Bureaucrats, and the Administrative Law Perspective on the Federal Sentencing Commission, 79 Cal. L. Rev. 1, 7–23 (1991).

selected areas, such as robbery and fraud.[104] In these areas, the Commission established sentencing guidelines that were significantly more severe than both past judicial practice and the mandatory minimums imposed by Congress, yet it presented no overarching principle or political mandate that justified these selective departures.[105]

The Commission's work was assailed not only for its lack of transparency, but also for failing to achieve its goal of fair sentencing.[106] In an effort to reduce judicial discretion in sentencing, the Commission created rigid categories that grouped together cases that were dissimilar in important respects.[107] The extreme rigidity of this sentencing regime effectively increased the influence of prosecutors and law enforcement officers over sentencing decisions and thus gave rise to its own disparities.[108] Not surprisingly, recent studies have found that prosecutors circumvent the Guidelines on a regular basis through their charging and plea bargaining decisions.[109] Sentencing inequities have also plagued state regimes that structured sentencing discretion too rigidly.[110] Especially where states superimposed mandatory sentencing statutes onto their

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[104] See Jeffrey S. Parker & Michael K. Block, The Limits of Federal Criminal Sentencing Policy; or, Confessions of Two Reformed Reformers, 9 Geo. Mason L. Rev. 1001, 1019 (2001); Schulhofer, supra note 5, at 838–39.

[105] Stith & Cabranes, supra note 4, at 64.

[106] See, e.g., Schwarzer, supra note 4, at 341 (criticizing the Guidelines for exacting "a high price in terms of the integrity of the criminal justice process, in terms of human life and the moral capital of the system" while yielding "arbitrary results"); Weinstein, supra note 4, at 366 (criticizing the Guidelines for promoting a "bureaucratic mentality" that denies each defendant's identity as a "unique human being"); Collina, supra note 6 (arguing that mandatory sentences have favored the prosecution).

[107] See Alschuler, supra note 5, at 915–18; Schulhofer, supra note 5, at 834–35.

[108] See Bowman & Heise, supra note 3, at 1046; Schulhofer, supra note 5, at 841–42.

[109] Studies of the plea bargaining process have shown that evasion of the Guidelines occurs in twenty to thirty-five percent of all guilty plea cases. Schulhofer, supra note 5, at 845. Although prosecutorial manipulation of the Guidelines may be an attempt to accommodate relevant differences among offenders that were ignored by the Sentencing Commissiou, such flexibility is "of the worst sort, because it is invisible, unstructured and uncontrolled." Id. at 870.

[110] See Richard S. Frase, Is Guided Discretion Sufficient?: Overview of State Sentencing Guidelines, 44 St. Louis U. L.J. 425, 439–40 (2000).

guideline systems, problems of excessive aggregation and prosecutorial manipulation of the sentencing process have emerged.[111]

These inequities have not gone unnoticed by the public. There is evidence that the adoption of mandatory sentencing laws in several states was succeeded by an increase in jury nullification.[112] The experience with the Michigan Felony Firearms Statute is instructive. In the period immediately following the enactment of the law, which prescribed stiff mandatory sentences for felonies committed with possession of a gun, less than ten percent of the defendants tried for assault with a gun were convicted by a jury.[113] Similarly, the 1973 New York Rockefeller laws, mandating harsh sentences for drug offenses, resulted in a decline in conviction rates from eighty-six percent in 1972 to seventy-nine percent in 1976.[114] Likewise, Massachusetts's tough mandatory sentences for gun possession in the late 1970s prompted judges as well as jurors to nullify.[115] In the 1990s, Californians nullified in cases where they knew that the tough "three-strikes" law would apply.[116] More recently, expressing concern with harsh sentencing drug laws, South Dakotans voted on an initiative to inform jurors of their right to nullify—though the initiative was defeated.[117]

The decline of the scientific approach to punishment in the 1970s and the dissatisfaction with more recent determinate sentencing regimes demonstrate that serious problems plague the existing alternatives to jury sentencing. Cognizant of the problems in determinate sentencing regimes, two state legislatures have abolished

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[111] See generally Lowenthal, supra note 96 (discussing the perverse consequences that result from the combination of sentencing guidelines and mandatory sentencing).

[112] Lanni, supra note 17, at 1784.

[113] Milton Heumann & Lance Cassak, Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases, 20 Am. Crim. L. Rev. 343, 352 (1983).

[114] Lanni, supra note 17, at 1784 n.40 (citing Joint Comm. on N.Y. Drug Law Evaluation, Final Report, The Nation's Toughest Drug Law: Evaluating the New York Experience 95 (1978)).

[115] Id. at 1784.

[116] Gail Diane Cox, Jurors Rise Up Over Principle and Their Perks, Nat'l L.J., May 29, 1995, at A1.

[117] Adam Liptak, A State Weighs Allowing Juries To Judge Laws, N.Y. Times, Sept. 22, 2002, § 1, at 1. The initiative was defeated. See Joseph Perkins, No Gateway: The Drug Czar Wins the Pot, Tulsa World, Nov. 10, 2002, at G6.

their sentencing commissions,[118] another two abandoned the idea of sentencing guidelines altogether,[119] and more have modified or repealed their mandatory sentencing laws.[120] It may be the perfect time to reconsider the virtues of jury sentencing.

E. A Revival on the Horizon?

As shown in the previous Sections, the late nineteenth and early twentieth centuries witnessed an increasing professionalization of the criminal justice process. The trend away from jury trials and jury sentencing seemed irreversible. So when the Supreme Court recently invoked the Sixth Amendment to revive some of the criminal jury's factfinding authority, most commentators were taken aback. The seeming reversal of course makes it hard to predict the precise reach and trajectory of the Court's recent Sixth Amendment holdings. The general direction, however, is clear—towards greater jury participation in the legal process.

The first notable recent case indicating the Court's renewed interest in the criminal jury is *United States v. Gaudin*.[121] In *Gaudin*, the Court held that, in criminal cases, certain mixed questions of law and fact, such as the materiality of a false statement, should be submitted to a jury.[122] The holding was especially significant because the history of the jury's role in determining mixed questions of law and fact was ambivalent.[123] Indeed, precedent supported the

[118] Sentencing Guidelines Systems, supra note 93 (identifying Florida and Tennessee as states that have abolished their sentencing commissions).

[119] Frase, supra note 110, at 427 (noting that Louisiana and Wisconsin have repealed their sentencing guidelines).

[120] The states that have already abandoned mandatory sentencing regimes for certain crimes include Louisiana, Connecticut, Indiana, Iowa, Mississippi, California, and North Dakota. Other states, such as Massachusetts, New York, Alabama, Georgia, New Mexico, and Idaho, are contemplating similar changes in their sentencing regimes. Moran, supra note 2.

[121] 515 U.S. 506 (1995).

[122] Id. at 522–23.

[123] Id. at 515–18. Another case in which the Court went out of its way to emphasize the right to jury was *United States v. Scheffer*, in which the majority rested its holding about the admissibility of polygraph tests partly on the ground that the jury's role in making credibility determinations is diminished when it hears polygraph evidence. 523 U.S. 303, 309–14 (1998). The concurring Justices criticized the authors of the principal opinion for overreaching to base the decision on the jury's prerogative to make credibility determinations, noting that the Sixth Amendment rationale employed in

view that judges should rule on questions of materiality. It would not have been difficult, therefore, for the Court to place such matters entirely in judges' hands. Nonetheless, in a majority opinion resonating with respect for the historic importance of the jury as a political and legal institution, the Court affirmed the jury's prerogative to pass on questions of materiality.[124] The American jury, the Court noted, has always been more than a mere factfinder.[125]

More recently, in *Apprendi v. New Jersey*, the Court held that juries, rather than judges, must determine facts that trigger a sentence above the statutory maximum for the underlying offense.[126] Two rationales, both grounded in the Sixth Amendment, motivated the Court's opinion. The first rationale was historical: At common law, the jury was entitled to decide all facts that exposed the defendant to greater punishment "than that otherwise legally prescribed."[127] Under an originalist reading, this conception of the jury's powers was embodied in the Sixth Amendment and still defines the scope of the right to a jury trial (although the meaning of the phrase "legally prescribed" remains contested, since the ranges of punishment prescribed today—mandatory minimums and guideline ranges—were unknown at common law).[128] The second rationale espoused by the majority was pragmatic and reflected a belief in the jury as a safeguard of constitutional liberties. The practice of judicial factfinding abolished by *Apprendi* had become a common feature of state and federal determinate sentencing regimes, and it had dramatically shifted power from jurors to judges and prosecutors.[129] Concerned about governmental overreaching as a result of

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the principal opinion was unnecessary to the holding. Id. at 318–19 (Kennedy, J., concurring in part and concurring in the judgment).

[124] *Gaudin*, 515 U.S. at 518–19.

[125] See id. at 514.

[126] 530 U.S. 466, 490 (2000). The Court held that prior convictions are, however, an exception to the rule and need not be proven beyond a reasonable doubt to a jury. Id. at 488–90.

[127] Id. at 483 n.10.

[128] See Harris v. United States, 122 S. Ct. 2406 (2002). For a compelling argument in favor of interpreting "legally prescribed" punishment to include mandatory minimums and certain guideline ranges, see Rachel E. Barkow, Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing (2003) (unpublished manuscript, on file with the Virginia Law Review Association).

[129] See Nancy Gertner, Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing, 32 Suffolk U. L. Rev. 419, 422 (1999) ("Judges were

this shift, the Court required jury factfinding where a defendant faced the danger of heightened stigma and loss of liberty.[130]

For some members of the Court, recent Sixth Amendment cases have also served as a means to express a larger concern with the fading of the jury as an institution.[131] In *Jones v. United States*, the predecessor to *Apprendi*, the majority noted that if judges were authorized to find facts that raised maximum sentences, "the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping."[132] In the same vein, Justice Scalia observed in *Apprendi* that statutes vesting judges with the authority to find penalty-enhancing facts were fundamentally at odds with the traditional, constitutionally protected role of the jury:

> What ultimately demolishes the case for the dissenters is that they are unable to say what the right to trial by jury *does* guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows.[133]

Even in the face of the high costs occasioned by this recent jurisprudential shift,[134] the Supreme Court has shown a commitment to

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now to find facts under code-like categories, in the relative informality of sentencing with more determinate—and sometimes onerous—outcomes. As a result, it appeared, and was to a large degree true, that the judge, not the jury, made more and more decisions of consequence.").

[130] *Apprendi*, 530 U.S. at 484 ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached."); see also *Harris*, 122 S. Ct. at 2424 (Thomas, J., dissenting) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 103 (1986) (Stevens, J., dissenting)).

[131] See Ring v. Arizona, 122 S. Ct. 2428, 2445 (2002) (Scalia, J., concurring) (noting that "people's traditional belief in the right of trial by jury is in perilous decline").

[132] 526 U.S. 227, 243–44 (1999).

[133] *Apprendi*, 530 U.S. at 498–99 (Scalia, J., concurring).

[134] The trial-like factfinding mandated by *Apprendi* is clearly more costly and time-consuming than judicial determinations at a sentencing hearing, see King & Klein, supra note 25, at 1488, added to which is the cost of thousands of appeals as a result of the dramatic change in sentencing practices mandated by *Apprendi*.

the core holding of *Apprendi*. In *Ring v. Arizona*, the Court overturned its own precedent to hold that only juries could make findings of aggravating factors that are required for the imposition of the death penalty.[135] As in *Apprendi*, the majority's opinion focused on the jury's traditional factfinding powers. Interestingly, the concurring opinions in *Ring* debated the issue of jury sentencing. Justice Scalia, while expressing "veneration for the protection of the jury in criminal cases,"[136] wrote that the "judgment has nothing to do with jury sentencing. What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed."[137]

Justice Breyer, however, found jury sentencing to be applicable to the facts of the case. The reasons he cited included his "belief that retribution provides the main justification for capital punishment," and "the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end."[138] Noting that the deterrent effect of capital punishment is far from certain and that rehabilitation is "beside the point" in capital cases, Justice Breyer would entrust only the jury with the grave choice between life and death.[139] Jurors are "more attuned to 'the community's moral sensibility'" because they "'reflect more accurately the composition and experiences of the community as a whole.'"[140] Implicit in Justice Breyer's opinion is the claim that the jury's comparative advantage consists in the ability to legitimate the sentencing process.[141]

Justice Breyer's endorsement of jury sentencing in *Ring* is still an outlier, however.[142] Moreover, it is confined to the capital punishment context (although, as Part II of this Article shows, Justice

[135] 122 S. Ct. 2428, 2443 (2002).
[136] Id. at 2445 (Scalia, J., concurring).
[137] Id.
[138] Id. at 2446 (Breyer, J., concurring).
[139] Id. at 2446–48.
[140] Id. at 2447 (citing *Spaziano v. Florida*, 468 U.S. 447, 481, 486 (1984) (Stevens, J., concurring in part and dissenting in part)).
[141] See id. at 2447–48.
[142] The central opinions on which Justice Breyer relied in his concurrence were Justice Stevens's dissents in *Harris v. Alabama*, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting), and *Spaziano*, 468 U.S. at 467–90 (Stevens, J., concurring in part and dissenting in part).

Breyer's reasoning largely translates to the non-capital context). The diversity of opinions among Supreme Court Justices on the jury's role in sentencing makes it difficult to assess how expansively the Court will read the Sixth Amendment.[143]

In *Harris v. United States*, the majority refused to extend the *Apprendi* holding to facts that increase mandatory minimum sentences.[144] Five Justices agreed, however, that this would have been the most logical application of *Apprendi*.[145] The dissent argued that both the historical and the practical rationales for *Apprendi* were equally applicable to the facts in *Harris*. As Justice Thomas wrote, "the original understanding of what facts are elements of a crime was expansive" and would include facts that increase mandatory minimums.[146] Furthermore, "[a]s a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense. Consequently, facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards."[147] No clear principle thus seems to support the distinction that the majority in *Harris* drew between mandatory sentencing minimums and maximums.

The reversal of course in *Harris* has also failed to offer a satisfactory answer to other important questions about the jury's role in the sentencing process. For example, why should facts increasing the statutory maximum sentence be treated differently from facts affecting the range under the Guidelines? As two appeals courts have held, the maximum sentencing guideline ranges limit judges' discretion in much the same way that statutory maximums do.[148] Consequently, where a fact triggers a mandatory minimum sentence that is higher than the presumptive range imposed by the

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[143] The record of the Court in the past decade has not been uniform in its support for a wider jury authority. For example, in *United States v. Watts*, the Court upheld the constitutionality of sentence enhancements made by judges, based on conduct of which the jury had already acquitted the defendants. 519 U.S. 148, 157 (1997). (After *Apprendi*, such sentence enhancements can only be made within the applicable statutory maximum.)

[144] 122 S. Ct. 2406, 2418 (2002).

[145] Id. at 2420, 2422.

[146] Id. at 2423–24 (Thomas, J., dissenting).

[147] Id. at 2425 (Thomas, J., dissenting).

[148] United States v. Guevara, 277 F.3d 111, 118–19 (2d Cir. 2001); United States v. Ramirez, 242 F.3d 348, 351–52 (6th Cir. 2001).

Guidelines, the logic of *Apprendi* mandates that this fact also be determined by a jury.[149]

More generally, the *Apprendi*-line of cases fail to address the question of why juries should be allowed to determine facts directly bearing on sentencing, but be kept in the dark about the actual consequences of their findings. In most states, and at the federal level, juries are entrusted with the responsibility of deciding between life and death; yet even after *Apprendi*, they are often denied the power to decide between five years and life imprisonment. The current restriction on informing jurors of the way in which their decision influences the sentence may also adversely affect defendants. As Justice Breyer has implied in his opinions, the scheme endorsed in *Apprendi* poses a difficult conundrum for defendants. They can argue they are innocent, thereby forfeiting their chance to argue about the facts affecting their sentence (for example, the drug quantity at issue). Alternatively, they can put forth evidence about sentencing factors, thereby effectively conceding their guilt.

The end result of these recent Supreme Court opinions is intellectual and practical confusion. Juries today determine some, but not other, facts relevant to sentencing, without a principled distinction between these categories. They are given the power to influence a defendant's sentence, but not told *how* their decision impacts the sentence. As the following Sections show, jury sentencing offers a road out of the confusion and competing rationales created by the recent Sixth Amendment opinions. This does not mean that the Court should find that jury sentencing is constitutionally mandated. Rather, it calls on legislatures to resolve the tensions in the Court's recent rulings and to engage juries both at the trial and sentencing stages. Such legislation would be true to the spirit that motivated *Apprendi*, *Ring*, and *Gaudin*, as well as to the historical understanding of American juries' authority.

II. THE SENTENCING JURY AS A DEMOCRATIC INSTITUTION

The near disappearance of jury sentencing over the last few decades has not been healthy for American democracy. Strictly speaking, the regimes that have replaced jury sentencing are not anti-

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[149] *Guevara*, 277 F.3d at 119; *Ramirez*, 242 F.3d at 351–52.

democratic—they were approved and to some extent designed by legislatures. Yet an examination from the perspective of deliberative democracy shows that citizens have lost something important by abolishing sentencing juries. First, as the role of the jury has receded, in Justice Souter's words, to "low-level gatekeeping," the criminal justice system has become ever more opaque to the average citizen. citizens have lost sense of the day-to-day workings of the criminal justice system. Second, the professionalization of sentencing has not lived up to its promise to make sentencing outcomes more just and publicly acceptable. Instead, the inflexible systems of sentencing have created inequities of their own.

A. Deliberative Democratic Theory

The theory of deliberative democracy, also known as discourse theory,[150] extols the virtue of reasoned, face-to-face discussion in political life.[151] It usually defines itself in opposition to purely representative models of democracy. It posits that the aggregation of individual preferences through voting, though often necessary, is not always the best way to settle political disputes.[152] Majoritarian politics is, therefore, not the definition of democracy. It is better understood as a practical final decisionmaking process that should not replace—and should be complemented by—deliberation on the issues.[153]

Deliberative democracy is better suited to some contexts than to others. While scientific and technical issues might be better left to panels of experts, deeply contested moral and political issues are usually proper subjects for democratic deliberation.[154] Similarly, problems that call for individualized, case-by-case assessment are

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[150] See Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 278–79 (William Rehg trans., 1996).

[151] See Maeve Cooke, Five Arguments for Deliberative Democracy, 48 Pol. Stud. 947, 947 (2000).

[152] See Benjamin R. Barber, Strong Democracy: Participatory Politics for a New Age 145–48 (1984); James S. Fishkin, Democracy and Deliberation: New Directions for Democratic Reform 6–9 (1991).

[153] Cf. Barber, supra note 152, at 198 (observing that majoritarianism is "a tribute . . . to our inability to create a politics of mutualism that can overcome private interests").

[154] See Bernard Manin, On Legitimacy and Political Deliberation, 15 Pol. Theory 338, 353–54 (1987).

often better decided through small-scale deliberation than through the mechanical application of a general policy.

Certain arrangements are particularly conducive to effective deliberation. Openness to new ideas is one of the central tenets of deliberative democratic theory.[155] Discourse theory presumes that individual preferences "may be altered in the light of new perspectives" and that they should be seen primarily as starting points for discussion.[156] When individuals are willing to reconsider their positions, consensual outcomes are achieved much more easily. This is the insight behind the "ideal speech situation," which is a cornerstone of deliberative democracy: Unconstrained deliberation, in which "no force except that of the better argument is exercised," can overcome private and strategic interests and lead to consensual decisions.[157] As will be discussed, jury deliberations arguably approach the ideal speech situation.[158]

Inclusivity is also a critical component of deliberative democratic theory. Citizens of all social backgrounds are invited to bring their ideas into the debate. Deliberative democracy works by "subject[ing] every pressing issue to continuous examination and possible reformulation . . . [and] scrutiniz[ing] what remains unspoken, looking into the crevices of silence for signs of an unarticulated problem, a speechless victim, or a mute protester."[159] Valid and legitimate decisions are more likely to be made by a process that engages members of all groups affected by the outcome. Deliberative forums must, therefore, seek to be inclusive and "actively encourage or solicit previously excluded constituencies."[160] If we apply this insight to jury decisionmaking, we can easily see the importance of the jury selection process.[161]

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[155] Bert van den Brink, The Tragedy of Liberalism: An Alternative Defense of a Political Tradition 116 (2000).

[156] Id. at 110.

[157] Jürgen Habermas, Legitimation Crisis 108 (Thomas McCarthy trans., 1973).

[158] See Richard A. Primus, When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries, 18 Cardozo L. Rev. 1417, 1449 (1997) ("Jury deliberations . . . come closer to [the ideal speech situation] than most other social decision making processes do.").

[159] Barber, supra note 152, at 182.

[160] Jack Knight & James Johnson, Aggregation and Deliberation: On the Possibility of Democratic Legitimacy, 22 Pol. Theory 277, 289 (1994).

[161] See infra Section IV.F.

Democratic deliberation has three distinct advantages: (1) It transforms preferences to advance common interests;[162] (2) it legitimates the final result;[163] and (3) it revitalizes and improves political life as a whole.

The first advantage of deliberative democracy is that, by promoting dialogue among a range of constituencies, it is likely to produce more informed judgments. It offers "the conditions whereby actors can widen their own limited and fallible perspectives by drawing on each other's knowledge, experience and capabilities."[164] Thus one participant may bring to the table solutions or arguments that had not occurred to others. In sentencing discussions, for example, some jurors will emphasize the defendant's chances of rehabilitation, while others will be more concerned about the message that the sentence sends to the community at large. These jurors learn from each other in the process of deliberation and perhaps reach solutions that would not have occurred to them individually.[165] Deliberative results are also more informed in that they are better targeted to the individual case. In the context of sentencing, case-by-case deliberation can combine insights about the general and the specific—about the workings and needs of the sentencing system as a whole, as well as about the individual defendant's character and motivation.

The second major argument for deliberation is that it is more likely to engender legitimate decisions. Discourse theory makes the ambitious claim that legitimate outcomes can be achieved through deliberation, even in the absence of a universally accepted code of

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[162] See Habermas, supra note 150, at 107, 119.

[163] See Jürgen Habermas, Communication and the Evolution of Society 50–68 (Thomas McCarthy trans., 1979) (arguing that deliberation is a means for discovering truth); id. at 186, 188 (arguing that legitimacy requires that collective decisions be criticized and defended through reasoned arguments); Carlos Santiago Nino, The Constitution of Deliberative Democracy 129–34 (1996) (arguing that group deliberation is more likely to produce correct outcomes); Amy Gutmann & Dennis Thompson, Democratic Disagreement, *in* Deliberative Politics: Essays on Democracy and Disagreement 243, 247 (Stephen Macedo ed., 1999) (arguing that "laws that are adopted after mutual consideration of conflicting moral claims are more likely to be legitimate").

[164] Graham Smith & Corinne Wales, Citizens' Juries and Deliberative Democracy, 48 Pol. Stud. 51, 53–54 (2000).

[165] See id. (citing James D. Fearon, Deliberation as Discussion, *in* Deliberative Democracy 44, 49 (Jon Elster ed., 1998)).

moral norms. Democratic discourse urges the revision of individual preferences to produce consensus-based outcomes. It is in the striving for this consensus that legitimacy is created, because truth and validity in political decisions are fundamentally products of human interaction.[166] Because the deliberating group hears and considers diverse opinions and remains free to choose among them, the result carries legitimacy, even when the outcome does not satisfy all points of view.[167]

Finally, the transformative power of deliberation extends beyond the actual decisions made. Deliberative forums serve democracy more broadly in that they impart a sense of political purpose on the participants. By engaging ordinary citizens in government, deliberative democracy gives these citizens confidence about their ability to influence political decisions and thus increases their willingness to participate in politics even after the end of their jury service. Face-to-face deliberation thus reinforces the very skills and qualities on which it thrives.[168]

The potential of face-to-face deliberation to educate and engage people in political affairs and teach them about the main political (or, in the case of juries, legal) issues of the day was well-understood by early democratic theorists such as Mill[169] and Tocqueville.[170] As discussed in Part I, it was promoted by Anti-Federalists in the early republic. The belief that close political deliberation among citizens would invigorate democratic life unites

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[166] Primus, supra note 158, at 1447 ("[Political knowledge] is made communally . . . and cannot be derived by individuals, no matter how intelligent or well-intentioned.") (citation omitted).

[167] Manin, supra note 154, at 359.

[168] As Mark Warren points out:

> [D]emocracy works poorly when individuals hold preferences and make judgments in isolation from one another, as they too often do in today's liberal democracies. When individuals lack the opportunities, incentives, and necessities to test, articulate, defend, and ultimately act on their judgments, they will also be lacking in empathy for others, poor in information, and unlikely to have the critical skills necessary to articulate, defend, and revise their views.

Mark E. Warren, What Should We Expect from More Democracy?: Radically Democratic Responses to Politics, 24 Pol. Theory 241, 242 (1996).

[169] John Stuart Mill, Considerations on Representative Government, *in* On Liberty and Other Essays 205, 254–55 (John Gray ed., 1991).

[170] 1 Tocqueville, supra note 57, at 285 (noting that the jury is "one of the most efficacious means for the education of the people which society can employ").

contemporary political theory with the liberal democratic ideas that inspired the Framers. Furthermore, studies of the relationship between jury service and overall political participation confirm the intuitions of deliberative democrats.[171]

B. Deliberative Democracy and Sentencing

Deliberative democracy is not a very efficient or effective way to settle technical or highly specialized problems. Complex engineering, economic, or medical questions are probably better left to experts—though civil juries frequently choose between the opinions of competing experts. Criminal law, however, is not generally a highly technical field, and sentencing is even less so. Rather, sentencing debates usually entail a conflict between opposing norms and values, a weighing of moral judgment in the context of specific facts. These are the conflicts that deliberative democratic theory suggests are best resolved through face-to-face conversation.

The perennially debated questions of sentencing concern the underlying purposes of punishment: rehabilitation, deterrence, and retribution. Each purpose emphasizes different values, such as the extent to which offenders are morally responsible for the crimes they have committed and the extent to which they can be rehabilitated. Both public opinion polls[172] and legislative policy[173] indicate that no model of punishment has secured a dominant place in sentencing debates. As John Dryzek observes, "[e]ach [model of punishment] can be backed or undermined by empirical studies that are unlikely to convince adherents of different discourses. Each is entwined with ideological positions taken by politicians."[174]

It is possible to judge how deliberative institutions—such as jury sentencing—fit with each model of punishment. Thus critics of jury

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[171] See infra notes 202–05 and accompanying text.

[172] Mark Warr, Public Perceptions and Reactions to Violent Offending and Victimization *in* 4 Understanding and Preventing Violence: Consequences and Control 1, 52 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994) ("[T]here is no single dominant ideology of punishment among the U.S. public. When asked, individuals commonly invoke or support more than one theory of punishment, and no one theory appears to dominate public thinking about punishment.").

[173] See supra note 89 and accompanying text.

[174] John S. Dryzek, Legitimacy and Economy in Deliberative Democracy, 29 Pol. Theory 651, 658 (2001).

sentencing might point out that it is inconsistent with deterrence[175] or rehabilitation[176] aims. Conversely, advocates could point to its compatibility with a retributivist model of punishment.[177] From a deliberative democracy point of view, the value of jury sentencing lies in mediating, through a conversation across rival discourses, among different aims and models of punishment.[178] As long as the normative debate on punishment purposes persists, therefore, democratic deliberation on a case-by-case basis remains the best way to achieve consensual and publicly acceptable sentencing decisions.[179]

Deliberation not only produces legitimate sentencing decisions, but is also well-suited to a process of fine-tuned and informed sentencing decisionmaking. Sentencing requires careful consideration of a host of factors. The sentencer—judge or jury—assesses the harm caused by the offender to individual victims and to society at

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[175] See Cass R. Sunstein et al., Punitive Damages 135–43 (2002) (finding that mock study subjects overwhelmingly reject deterrence rationales for punishment and generally fail to perform basic deterrence calculations).

[176] See Webster, supra note 17 (noting the scientific basis of the rehabilitation model of sentencing and the inability of jurors to take rehabilitation aims into account).

[177] Indeed, some advocates of jury sentencing have defended the practice on the grounds that retribution has once again become the dominant justification for punishment in the United States and that juries are best able to fulfill retributivist aims. See Ring v. Arizona, 122 S. Ct. 2428, 2446 (2002) (Breyer, J., concurring); Morris Hoffman, The Case for Jury Sentencing, 52 Duke L.J. (forthcoming 2003) (manuscript at 28–30, on file with the Virginia Law Review Association); Lanni, supra note 17, at 1779.

[178] This is one way in which jury sentencing fares better than one-judge sentencing. Cf. Jürgen Habermas, Discourse Ethics: Notes on a Program of Philosophical Justification, *in* Moral Consciousness and Communicative Action 43, 68 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990) ("[T]he justification of norms and commands requires that a real discourse be carried out and thus cannot occur . . . in the form of a hypothetical process of argumentation occurring in the individual mind.").

[179] Bernard Manin points out the value of deliberation in resolving conflicts between values:

> [N]o science can resolve this conflict [between opposing norms and values] in a rigorous and necessary manner. However, . . . [s]ome values are more likely than others to win the approval of an audience of reasonable people. It is impossible to *demonstrate* their soundness; they can only be *justified* . . . . The relative force of its justification can be measured only by the amplitude and the intensity of approval it arouses in an audience of reasonable people.

Manin, supra note 154, at 353.

large and then calibrates this assessment to take account of the offender's blameworthiness:

> [T]he moral character of the person who committed the crime ... is very much a part of the sentencing stage. Judges go beyond the limited moral texture of the contemporary substantive criminal law, expanding their inquiry so that they evaluate many features of a case that touch on a broad measure of moral blameworthiness.[180]

Such fine-tuned analysis cannot be anticipated by a general law or policy, or even by the rigid categories of the Guidelines. It would, however, be the natural result of deliberation among an inclusive group of jurors.[181]

Finally, the educative function of deliberative democracy is especially relevant to the sentencing process. Because sentencing today is largely performed by judges and experts, the average citizen has little knowledge and understanding of the sentencing process and the sanctions available for particular crimes.[182] Encouraging popular participation and deliberation in sentencing, therefore, would be critical to increasing public awareness about punishment objectives and options.

C. The Jury as a Model Deliberative Democratic Body

Because deliberative democracy places much emphasis on the process by which decisions are made, institutional arrangements are of central concern to the theory. Accordingly, juries have been mentioned in passing in many accounts of deliberative democracy.[183] Nonetheless, few authors have discussed in detail the extent to which existing legal juries embody deliberative ideals.[184]

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[180] Wheeler et al., supra note 78, at 87.

[181] See *Ring*, 122 S. Ct. at 2447 (Breyer, J., concurring) ("[T]he jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand."); see also Atkins v. Virginia, 122 S. Ct. 2242, 2253–54 (2002) (Rehnquist, J., dissenting) ("[J]uries are ... better suited than courts in evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments.").

[182] See Loretta J. Stalans & Shari Seidman Diamond, Formation and Change in Lay Evaluations of Criminal Sentencing, 14 Law & Hum. Behav. 199 (1990).

[183] Fishkin, supra note 152, at 87–90; Smith & Wales, supra note 164, at 55.

[184] A notable exception is Primus, supra note 158.

Deliberative democratic scholars have celebrated the public sphere generally, and voluntary associations specifically, as the favored forums of deliberation.[185] Detractors have pointed out, however, that deliberative democracy has limited applicability to the context of increasingly specialized political systems and large-scale, multicultural political communities.[186] Contemporary liberal democracies allow little face-to-face deliberation among citizens of diverse backgrounds and views, and decisions are usually made in speech situations that are far from ideal: "In modern societies . . . public deliberation is . . . largely *mediated*, with professional communicators rather than ordinary citizens talking to each other and to the public through mass media of communications."[187] If it is true that the modern public sphere furnishes little space for genuine deliberation among citizens, advocates of deliberative democracy have to think harder about alternative institutions where deliberation might flourish.

In this dark picture of contemporary politics as devoid of opportunities for citizen-to-citizen deliberation, the jury stands out as a precious exception. The American jury is the quintessential deliberative democratic body. Courts and commentators have on numerous occasions affirmed the deliberative ideal that the jury is supposed to embody—"face-to-face deliberation in which juries [a]re asked to bracket narrow loyalty to their own group and join with others in search of norms whose power lies in the ability to persuade across group lines."[188] Certain features of juries are particularly conducive to democratic deliberation. Random sampling,

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[185] Habermas, supra note 150, at 356–59 (arguing that processes of decisionmaking in the central political institutions should be guided by "communication flows" originating in the public sphere, and that a vibrant civil society "embedded in liberal patterns of political culture" is central to the success of deliberative politics); John Dryzek, Ecology and Discursive Democracy: Beyond Liberal Capitalism and the Administrative State, 3 Capitalism Nature Socialism 3, 34 (1992) (arguing that the rejuvenation of civil society is an essential component of deliberative politics).

[186] See Michael Walzer, Deliberation, and What Else?, *in* Deliberative Politics: Essays on Democracy and Disagreement, supra note 163, at 58, 68 ("Deliberation is not an activity for the demos . . . 100 million of them, or even 1 million or 100,000 can't plausibly 'reason together.'").

[187] Benjamin I. Page, Who Deliberates?: Mass Media in Modern Democracy 1 (1996).

[188] Abramson, supra note 46, at 192 (discussing *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972)).

together with a robust jurisprudence prohibiting racial, ethnic, or gender-based discrimination in jury selection, promotes the inclusivity of the jury.[189] In addition, the unanimity requirement—allowing a minority veto—encourages thorough deliberation and careful consideration of all points of view.[190] Sequestration and secrecy also facilitate unconstrained deliberation: Away from the public gaze, jurors are more willing to relax their preferences in light of reasoned discussion. Finally, the small size of the juries encourages substantive debate, "reduces the scope for demagogy and allows all speakers to be heard."[191]

Studies of jury behavior confirm the notion that sustained deliberation leads to some revision of preferences and to more informed judgments. Research on non-legal, citizens' juries (in which individuals from different social backgrounds spent several days discussing one or more public policy issues) has shown that "'jurors almost always change their minds during the sessions, as they become [sic] more involved with the issues.'"[192] Researchers have also remarked on the competence and commitment to deliberation with which citizen jurors approached their task.[193]

As for actual legal juries, researchers have found that in only ten to eleven percent of the cases in which the jury agrees on a verdict[194] does the jury's final verdict differ from the outcome of the pre-deliberation majority vote.[195] Even this number, however,

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[189] See infra note 335 and accompanying text.

[190] Abramson, supra note 46, at 199–200 (discussing studies showing that the unanimity requirement promotes more robust and longer deliberations). It is possible to design non-deliberative juries: In Brazil, instead of deliberating, jurors are individually polled in writing at the end of the trial, and the majority prevails. Id. at 205 n.94.

[191] Jon Elster, Deliberation and Constitution Making, *in* Deliberative Democracy 97, 109 (Jon Elster ed., 1998).

[192] Smith & Wales, supra note 164, at 60 (quoting John Stewart et al., Citizens' Juries 25 (1994)).

[193] Id. at 61.

[194] Harry Kalven, Jr. & Hans Zeisel, The American Jury, 487–88 nn.12–13 (1966) (finding that five percent of jury deliberations result in "hung juries"). Later studies have found about three percent of hung juries at the federal level, and somewhat higher percentages in particular states and localities. Nancy Jean King, The American Criminal Jury, 62 Law & Contemp. Probs. 41, 60 (1999) (citing Michael J. Saks, What Do Jury Experiments Tell Us About Jury Decisions?, 6 S. Cal. Interdisc. L.J. 1, 40 (1997)).

[195] See Kalven & Zeisel, supra note 194, at 488; Marla Sandys & Ronald C. Dillehay, First-Ballot Votes, Predeliberation Dispositions, and Final Verdicts in Jury Trials, 19

means that in close to 20,000 cases a year, discussion transforms the preferences of the majority of jurors.[196] Studies of mock juries have also shown that deliberating jurors exhibit a somewhat higher level of reasoning than individuals who do not deliberate: Deliberating jurors are "more aware of alternative theories and evidence that did not support their selected verdict" and match evidence to alternative verdict options more systematically.[197] Other studies have shown that jury-level memory and comprehension of the evidence and the judge's instructions is significantly better than that of individual jurors, largely due to deliberation.[198] Research has thus confirmed the insight of discourse theory that group deliberation is more likely to result in accurate factfinding: "The view of the evidence produced by deliberation processes is invariably more complete and more accurate than the typical individual juror's rendition of the same material."[199]

Given the unique democratic structure and function of the jury, it is not surprising to find that the public perceives juries to be fairer than the judicial system in general.[200] The numbers are im-

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Law & Hum. Behav. 175, 188 (1995). Kalven and Zeisel also reported that in only twelve percent of cases is the jury initially unanimous for acquittal and in only nineteen percent for conviction, inviting the conclusion that deliberation is "a process of reaching consensus from positions of initial disagreement." Kalven & Zeisel, supra note 194, at 488.

[196] Abramson, supra note 46, at 251 (estimating that there are about 160,000 jury trials in federal and state courts per year).

[197] Monica L. McCoy et al., The Effect of Jury Deliberations on Jurors' Reasoning Skills, 23 Law & Hum. Behav. 557, 570 (1999).

[198] See Reid Hastie et al., Inside the Jury 80–81 (1983); Shari Seidman Diamond & Judith N. Levi, Improving Decisions on Death by Revising and Testing Jury Instructions, 79 Judicature 224, 230 (1996) (reporting that deliberation increases juror comprehension of factual issues); Amiram Elwork et al., Towards Understandable Jury Instructions, 65 Judicature 432, 442–43 (1982) (reporting that deliberating jurors performed seventeen percent better than non-deliberating jurors on a comprehension test of legal instructions and thirty-eight percent performed better when instructions were simplified).

[199] Hastie et al., supra note 198, at 230.

[200] 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) (finding that 68.5% of random phone survey participants perceive juries to be fairest, while 22.5% perceive judges to be fairest, and 9% have no preference); Julian V. Roberts & Loretta J. Stalans, Crime, Criminal Justice, and Public Opinion, *in* The Handbook of Crime & Punishment 31, 47 (Michael Tonry ed., 1998) (noting that although certain high-profile cases have led to periods of discontent, the general public continues to support the jury system based on its perceived

pressive: Robert J. MacCoun and Tom R. Tyler found that ninety percent of those surveyed believe the criminal jury system was somewhat or very fair.[201] More recently, a survey by the American Bar Association revealed that seventy-eight percent of national survey respondents believe that the jury system is the fairest way to determine guilt or innocence, and sixty-nine percent believe that juries are the most important part of the U.S. justice system.[202]

Importantly, jury service itself plays an important role in reinforcing these attitudes. A study by William R. Pabst, Jr. found that ninety percent of those who had served as jurors were favorably impressed with jury duty or felt more favorably toward it than they had before their jury service.[203] Jury service also increases citizens' fairness perceptions of the criminal justice system as a whole. A study of jurors in Dallas County, Texas, reveals that "[j]urors rate the [criminal justice] system as nearly 11% fairer than nonjurors."[204] These findings support the idea that deliberation generates legitimacy.

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procedural fairness). At the same time, the confidence in judges is not as strong. See Am. Bar Ass'n, Perceptions of the U.S. Justice System (1999), at http://www.abanet.org/media/perception/perception32.html (Feb. 24, 1999) (on file with the Virginia Law Review Association) (reporting that only about a third of the respondents were extremely or very confident in judges). Finally, judges themselves have great respect for juries. See John B. Attanasio, Foreword: Juries Rule, 54 SMU L. Rev. 1681, 1684 (2001) (citing a 2001 survey that found both state and federal judges to be nearly unanimous in "believing that jurors did very well or moderately well in actually reaching a just and fair verdict").

[201] MacCoun & Tyler, supra note 200, at 337. Furthermore, ninety-seven percent of the participants in the survey viewed the jury system as "somewhat" or "very" important as a national institution, despite awareness of the potential for error in jury trials. Id.

[202] Am. Bar Ass'n, supra note 200, at http://www.abanet.org/media/perception/perception40.html (on file with the Virginia Law Review Association).

[203] William R. Pabst, Jr. et al., The Myth of the Unwilling Juror, 60 Judicature 164, 165 (1976); see also Nancy J. King, Juror Delinqueucy in Criminal Trials in America, 1796–1996, 94 Mich. L. Rev. 2673, 2675 n.7 (citing "[s]ome studies that show that even unwilling jurors come away with a good attitude about the jury system, [as well as] others [that] seem to suggest that reluctant jurors may instead spread ill will about the system long after they have completed service they feel was extorted from them"); Caroline K. Simon, The Juror in New York City: Attitudes and Experiences, 61 A.B.A. J. 207, 211 (1975) (finding that one-third of New York jurors had a more positive attitude toward the jury system after jury service, with almost fifty percent not having a change of attitude).

[204] Daniel W. Shuman & Jean A. Hamilton, Jury Service—It May Change Your Mind: Perceptions of Fairness of Jurors and Nonjurors, 46 SMU L. Rev. 449, 463

Finally, research on juries tends to corroborate the hypothesis that deliberation will promote civic engagement more generally. John Gastil reports, with respect to criminal juries, that "citizens who served on a jury that reached a verdict were more likely to vote in subsequent elections than were those who served as alternates or sat on criminal juries that were dismissed or deadlocked."[205] Studies of citizens' juries show even more encouraging results—that not only a consensual outcome, but also mere deliberation, favorably changes jurors' attitudes toward political activity. The evidence from these experiments reveals that some "jurors are more civically active long after the jury process has ended."[206]

D. Juries vs. Legislatures, Agencies, and Judges

Because of their deliberative capacity and democratic makeup, juries are better situated than other political institutions to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender. In these respects, juries have a significant advantage over legislatures, agencies, and judges.

As democratically elected institutions, legislatures bring to the sentencing process the authority to articulate sentencing goals and policies that reflect the majority will. While legislatures are also well situated to make difficult choices among opposing moral and ideological viewpoints, the experience with the Sentencing Reform Act shows that the political will for a clear choice is often lacking. Instead, the decision is often delegated to agencies that lack the representativeness and democratic origin of legislatures.

Even when legislators mandate a clear direction, they cannot calibrate statutes to cover every distinct factual situation. Creating

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(1992). Daniel Shuman and Jean Hamilton qualified their findings, however, noting that

> "[t]he process of selecting jurors and the dynamics of participating in a jury decision may independently contribute to the different perceptions of jurors and nonjurors. In the process of selecting jurors, prospective jurors who are seen as harboring views that the system is unfair may be more likely to be excluded from the jury."

Id. at 469–70.

[205] See John Gastil, Is Face-to-Face Citizen Deliberation a Luxury or a Necessity?, 17 Pol. Comm. 357, 359 (2000).

[206] Smith & Wales, supra note 164, at 60 (citations omitted).

an agency to translate broad legislative directives into more detailed rules is a common response to the problem of insufficient specificity. In the context of sentencing, however, agency regulations (the Guidelines) have been an inadequate substitute for individualized moral judgment, particularly because of the lack of scientific or social consensus on the purposes and functions of sentencing.[207]

Where morality and politics are an essential component of sentencing decisions, juries are better positioned than legislatures and agencies to exercise sentencing functions. As a democratic institution, the jury has the legitimate authority to make difficult value judgments—an authority that agencies lack. Jurors can also render case-specific sentencing decisions that are outside the capabilities of legislatures. If jurors are properly informed about average sentencing practices and instructed to apply flexible sentencing guidelines, their case-specific decisions can also avoid the unwarranted disparities that plagued indeterminate sentencing before 1984.

Discourse theory suggests that the jury has yet another advantage over legislatures, an advantage that distinguishes deliberative from representative institutions. The "majority will" expressed through the aggregation of votes and through public opinion is often very different from the decision that citizens would make when given the opportunity to consider an individual case and to deliberate about it.[208] Barry Friedman has criticized the "erroneous assumption . . . that such a thing as 'majority will' exists to legitimate decisions of the 'representative' branches."[209] Citizens rank their preferences on a continuum, "and those preferences are often fluid and relative, contingent upon possible and likely alternatives, or upon information and discussion."[210] As Justice Stevens remarked in one of his recent dissents, "[v]oting for a political candidate who vows to be 'tough on crime' differs vastly from voting at the conclusion of an actual trial to condemn a specific individual to death."[211] Social science studies of popular attitudes toward sen-

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[207] See supra Sections I.C & I.D.
[208] See Lanni, supra note 17, at 1780.
[209] Barry Friedman, Dialogue and Judicial Review, 91 Mich. L. Rev. 577, 638 (1993).
[210] Brown, supra note 64, at 1280 (citation omitted).
[211] Harris v. Alabama, 513 U.S. 504, 518 (1995) (Stevens, J., dissenting).

tencing affirm the skepticism toward decisions made merely by aggregating votes or following general public opinion:

> When asked about sentencing in the abstract, citizens report a desire for harsher penalties, but when presented with detailed descriptions of cases, these same citizens often suggest more lenient penalties than those meted out by judges and, in many cases, than the mandatory minimum sanctions currently in force in their jurisdictions.[212]

The difficulty of discerning a majority will and providing legislation or guidelines detailed enough to cover every individual case has led many commentators to call for a return to a more discretionary judicial sentencing.[213] In the times of discretionary sentencing, judges "considered a wide variety of aggravating and mitigating factors relating to the circumstances of both the offense and the offender."[214] At first glance, judges seem well positioned to make sentencing decisions; the long tradition of judicial sentencing in most states and at the federal level presents an easy argument for returning sentencing discretion to judges. The original reasons for the Sentencing Reform Act and the aforementioned insights from deliberative democracy, however, offer a good counterargument to calls for judicial sentencing.

In the Sentencing Reform Act, Congress shifted discretion from judges to the Commission in the name of reducing unwarranted disparities in sentencing. Sentencing reform proponents objected to judges meting out disparate sentences single-handedly, with few checks on their power. As the staunchest critic of the old regime, Judge Marvin Frankel, wrote: "[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."[215] Judges are often appointed for long terms or even for life and, even when they are elected, they are perceived as elitist and not representative of the popular will. Therefore, the possibility that the political and moral outlook of a judge would in-

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[212] Lanni, supra note 17, at 1781.

[213] See Stith & Cabranes, supra note 4, at 7–8; Alschuler, supra note 5, at 945; Schwarzer, supra note 4, at 339.

[214] Stith & Cabranes, supra note 4, at 14.

[215] Frankel, supra note 86, at 5.

fluence the years served by a criminal defendant greatly undermines the legitimacy of the sentencing process.[216] In a line of pro-jury cases, the Supreme Court outlined another reason for distrusting judges—the possibility that they may be "overconditioned" and may not be able to appreciate the complexities and moral nuances of individual cases.[217] Judges themselves have admitted to this tendency.[218]

Juries, in contrast, bring both the legitimacy and the fresh perspective of a body made up of ordinary citizens. As Justice Breyer recently noted, this gives juries a comparative advantage over judges: "Even in jurisdictions where judges are selected directly by the people, the jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand."[219] Studies of the public perception of the fairness of judges and juries also reveal that citizens overwhelmingly rate jurors as fairer decisionmakers in criminal trials.[220] Thus, giving juries a larger role seems to be the proper response to concerns about the legitimacy of the sentencing system. Finally, jury sentencing has the unique advantage of engaging citizens in legal affairs and educating them about the law. As the Supreme Court recognized in a recent case, jury service is "for most citizens . . . their most significant opportunity to participate in the democratic process."[221]

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[216] Brown, supra note 64, at 1286–87 ("The inability to easily remove judges from the bench gives rise to the fear that an 'eccentric' will remain on the bench once appointed. And because trial judges sit alone, the possibility that any one person's judgment will be idiosyncratic and not countered by others adds to the fear of an individual judge's eccentricity.").

[217] See Duncan v. Louisiana, 391 U.S. 145, 156 (1968); see also Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (stating that juries protect against the "perhaps overconditioned or biased response of a judge").

[218] Weninger, supra note 17, at 19–20 (reporting that, when asked to compare jury to judge sentencing, a few judges noted the problem of judicial callousness that results from overexposure to criminal cases).

[219] Ring v. Arizona, 122 S. Ct. 2428, 2447 (2002) (Breyer, J., concurring).

[220] See supra notes 200–02 and accompanying text.

[221] Powers v. Ohio, 499 U.S. 400, 407 (1991).

III. JURY SENTENCING AND ITS CRITICS

Despite its democratic credentials, jury sentencing is practiced in only six states today.[222] Critics of jury sentencing contend that juries' lack of expertise and experience result in disparate and systematically biased sentences and heavy financial burdens on the judicial system. As this Part argues, the shortcomings of sentencing juries have been greatly exaggerated in comparison to the shortcomings of the alternatives. Moreover, to the extent that any of these alleged defects are present in current jury sentencing regimes, they are relatively easily mitigated; the final Part outlines a model sentencing regime that would avoid or at least minimize their effect.

A. A Sketch of a Prototypical Jury Sentencing Regime

To understand the arguments of jury sentencing critics, it is useful to sketch out how jury sentencing currently functions in the states where it exists. In all six jury sentencing states, the same jury that decides the guilt or innocence of the defendant also makes decisions about punishment. As is the case with ordinary trial juries, the pool of jurors is drawn randomly, and in most cases, the selected jurors have never before served on a jury. Four of the six jury sentencing states bifurcate the criminal proceedings into a trial and sentencing stage so that the jury hears evidence relevant to sentencing only after it has already rendered a guilty verdict.[223] The central goal of the bifurcated proceeding is to keep out character evidence at the guilt stage, but to allow its introduction for sentencing purposes—when the character of the offender is at the center of the proceedings. At the sentencing hearing, the parties are generally allowed to present a range of aggravating and mitigating evi-

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[222] See supra note 16 and accompanying text.

[223] See Ark. Code Ann. § 16-97-101 (Michie Supp. 2001); Ky Rev. Stat. Ann. § 532.055 (Michie 1999); Tex. Code Crim. Proc. Ann. art. 37.07, § 2 (Vernon Supp. 2003); Va. Code Ann. § 19.2-295.1 (Michie Supp. 2002). But see Mo. Ann. Stat. § 557.036 (West 1999) ("The court shall instruct the jury as to the range of punishment authorized by statute and upon finding of guilt to assess and declare the punishment as a part of their verdict...."); Reed v. State, 657 P.2d 662 (Okla. Crim. App. 1983) (holding that bifurcated trials are required under Oklahoma law only for murder and habitual offender cases).

dence, including the defendant's prior record and reputation in the community.[224]

Currently, juries do not have access to sentencing guidelines or sentencing and probation statistics to help them arrive at a verdict consistent with those rendered by other jurors for similar offenses.[225] Instead, jurors are provided only with statutory maximums and minimums establishing a wide range of permissible sentences.[226] Jury deliberation occurs in secret, and a unanimous verdict is required. In some states, if the jurors cannot agree on a sentence, the judge determines the punishment.[227] Indeed, in Virginia, jury sentencing is formally only advisory, and in Arkansas, under certain circumstances, the judge is allowed to impose a more lenient sentence than the one selected by the jury.[228] In all states, jury sentencing occurs in only a small percent of the docketed cases, because over ninety percent of cases are plea bargained;[229] and even where the defendant has the option of being sentenced by a jury after a guilty plea,[230] this choice is, rationally, almost never exercised in practice.[231]

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[224] See infra Section IV.A.

[225] See infra Sections IV.A, IV.B.

[226] See infra Section IV.C.

[227] See infra Section IV.D.

[228] See id.

[229] Bureau of Justice Statistics, U.S. Dep't of Justice, Felony Sentences in State Courts, 1998, at 8–9 tbls.9–10 (2001).

[230] E.g., State v. McDonald, 137 P. 362 (Okla. Crim. App. 1914) (holding that where the accused pleads guilty, the defendant can choose whether to submit the question of punishment to the jury); Basaldua v. State, 481 S.W.2d 851, 853–54 (Tex. Crim. App. 1972) (interpreting Tex. Code Crim. Proc. Ann. art. 37.07, § (3)(a)(1) (Vernon 1981)).

[231] A guilty plea reflects a sentencing bargain with the prosecution, and defendants are reluctant to jeopardize that bargain by submitting the sentencing to a jury. Some may question the significance of the proposal for jury sentencing in light of the high rate of plea bargained cases. Even if we accept the current high rates of plea bargaining, jury sentencing after actual jury trials is still valuable for the following reasons: (1) it serves as a benchmark for plea-bargained cases, see Duncan v. Louisiana, 391 U.S. 145, 158 (1968); John MacCormack, In Texas, Jury System Rules Justice, San Antonio Express-News, Nov. 16, 1997, at G1 (citing prosecutor who says he uses jury sentencing as a benchmark for his plea agreements); (2) it still fulfills the important democratic and educative functions outlined in Part II; and (3) the low rate of jury trials makes jury sentencing more feasible financially.

B. The "Arbitrariness and Disparity" Argument

Perhaps the main criticism of sentencing juries is that their lack of experience and expertise leads them to make decisions based on a fragmented understanding of the sentencing process. Unable to situate the case before them within the larger sentencing framework, juries are said to render disparate judgments in similar cases in violation of the basic principle of equality before the law.[232]

Before reviewing the empirical data on jury and judge variability in sentencing, it is worth noting that disparities in sentencing do not necessarily reflect a defect in the system. Disparity is not equal to arbitrariness. Disparate sentences may be evidence of the jury taking proper account of the individual circumstances of each offender and thus a sign of the virtues of jury sentencing. As the Supreme Court has noted, "a consistency produced by ignoring individual differences is a false consistency."[233] Disparity may also reflect geographical differences in public attitudes toward a given crime; while this notion may trouble some, it is not inconsistent with age-old traditions of federalism and local self-government.

Empirical research on jury sentencing is still scarce, and thus the data on jury sentencing disparities are inconclusive. The argument that juries impose disparate sentences is most often based on anecdotes.[234] Only two isolated surveys—one from El Paso County and the other from Dallas County, Texas—have found greater variability in jury sentencing than in judicial sentencing.[235] At the same time, two earlier studies of jury sentencing found no evidence of systematic disparity in jury verdicts.[236] More support for the vari-

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[232] See ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures 44–46 (1968); Betts, supra note 17, at 372; Webster, supra note 17, at 228; Weninger, supra note 17, at 19; Wright, supra note 17, at 1376–77.

[233] Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

[234] See Jouras, supra note 17, at 303–04; Kerr, supra note 17, at 109–10 (discussing isolated cases where juries gave widely different sentences for similar crimes); Note, Should the Jury Fix the Punishment for Crimes?, 24 Va. L. Rev. 459, 465 (1938) (same).

[235] Webster, supra note 17, at 226; Weninger, supra note 17, at 30–31.

[236] Lanni, supra note 17, at 1796 n.100 (discussing William A. Eckert & Lauri E. Ekstrand, The Impact of Sentencing Reform: A Comparison of Judge and Jury Sentencing Systems 8–10 (1975) (unpublished manuscript, on file with the Virginia Law Review Association)) ("comparing sentences before and after Georgia introduced judge sentencing and finding no evidence of systematic jury-sentencing disparity in any of

ability argument comes from a recent mock study of jury awards of punitive damages.[237] Even as it cites discrepancies among the jury verdicts, however, the study finds remarkable consistency in the normative judgments underlying the jury verdicts.[238]

It is also useful to compare the record of juries to that of judges. Research on judicial overrides of jury sentences in capital cases suggests that judicial sentencing may itself result in unjustified disparities, especially near elections and in politically sensitive cases.[239] The variation among sentences rendered for the same offenses by different judges in the pre-Guidelines regime also attests to the possibility that, in the absence of external constraints, judges may be equally likely to bring personal and ideological considerations into their verdicts,[240] and when they do so, their opinions are not challenged or mitigated by those of eleven other citizens.

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the crime categories studied except aggravated assault"); id. (discussing Brent L. Smith & Edward H. Stevens, Sentence Disparity and the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States, 9 Crim. Just. Rev. 1, 4 (1984)) ("[F]inding a larger deviation from the mean in Alabama in the period of judge sentencing than in the jury sentencing years, although the standard deviation in all three jury states was higher than in the three judge-sentencing states studied.").

[237] Sunstein et al., supra note 175, at 31–32. But see Theodore Eisenberg et al., Juries, Judges, and Punitive Damages: An Empirical Study, 87 Cornell L. Rev. 743 (2002) (finding only slightly higher variability in jury-assessed than in judge-assessed punitive damages).

[238] Sunstein et al., supra note 175, at 31–32.

[239] See, e.g., Carrie A. Dannenfelser, *Burch v. State*: Maintaining the Jury's Traditional Role as the Voice of the Community in Capital Punishment Cases, 60 Md. L. Rev. 417, 438 (2001) (citing a study on Alabama overrides which found that "there is a statistically significant correlation between judicial override and election years in most of the counties where these overrides [took] place"); Michael Mello, The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution, 18 Fla. St. U. L. Rev. 923, 937–38 (1991) (noting that, between 1986 and 1991, the Florida Supreme Court reversed ninety-three percent of the judicial overrides of jury sentencing in capital cases); see also Spaziano v. Florida, 468 U.S. 447, 477 n.17 (1984) (Stevens, J., concurring in part and dissenting in part) ("[I]t is doubtful that judicial sentencing has worked to reduce the level of capital sentencing disparity; if anything, the evidence in override cases suggests that the jury reaches the appropriate result more often than does the judge.").

[240] See Vines v. Muncy, 553 F.2d 342, 346 (4th Cir. 1977) ("It must . . . be recognized that much of the same criticisms [of rendering disparate sentences] can be directed at judge sentencing, which also represents the exercise of unfettered discretion, but on the part of the judge, rather than the jury."); Vivian Berger, "Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Patrick Higginbotham, 41 Case W. Res. L. Rev. 1067, 1085 (1991) ("[T]he uniquely moral

To the extent that variability does exist in jury sentencing, its roots may be no different than those identified in the federal system prior to the Guidelines—that is to say, standardless sentencing regimes.[241] Studies of jury behavior in the punitive damages context suggest two sources of variability and incoherence in jury verdicts, and both of these could be minimized by providing juries with a set of standards by which to assess individual sentences.

The first potential source of variability is the jurors' inability to consistently match monetary awards (or years of imprisonment) to normative judgments about the defendant's behavior.[242] Even where jurors agree amongst themselves about the extent of blameworthiness of the defendant, they often disagree about the appropriate sentence that should attach to what they all see as equally blameworthy conduct. It is thus possible that defendant *A* would receive a bigger fine than defendant *B* even though both juries *A* and *B* would agree that *B* is more blameworthy than *A*.[243] Despite this perceived problem of translating moral outrage into numbers or years of jail, it remains true that the jurors' normative judgments (their "punitive intents") are remarkably consistent.[244] Therefore, a standard that aids jurors in anchoring their punitive intent to a particular dollar amount or sentence length could ensure sufficient uniformity and predictability.[245]

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and emotional nature of the capital sentencing decision virtually ensures that not only jurors but also judges will inject very personal considerations into their verdicts.").

[241] Berger, supra note 240, at 1084 (arguing that arbitrariness in capital cases is a function of standardless regimes rather than of jury sentencing).

[242] See Cass R. Sunstein et al., Predictably Incoherent Judgments, 54 Stan. L. Rev. 1153, 1155 (2002) ("Even when people show coherent and consistent moral intuitions, they may show little consistency and coherence in translating those intuitions into numbers, such as dollars of fines or years in jail.").

[243] Id. at 1169.

[244] David Schkade et al., Deliberating About Dollars: The Severity Shift, 100 Colum. L. Rev. 1139, 1141 (2000) (noting that "[w]ith respect to punishment ratings, juries were neither more nor less consistent and predictable than the mean or median juror").

[245] As Schkade et al. note, "[w]ith the dollar scale, the underlying problem is that people are being asked to scale without a 'modulus,' that is, without a standard that would help give meaning to various numbers on the scale." Id. at 1147–48. ("The key point is that when a modulus is supplied, the variability greatly decreases .... [This point] helps explain the disparities that led to the enactment of the Sentencing Guidelines; before the guidelines, judges were being asked, in effect, to scale without a modulus . . .") id.

The second source of incoherence, which is related to the first, lies in the jurors' perceived inability to situate a sentence for a particular crime within the larger sentencing framework.[246] For example, jurors may sentence money laundering very harshly and aggravated assault less so, but if they saw the two cases at the same time, the two sentences might be different.[247] It is worth noting, however, that "even the most experienced judge must engage in isolated sentencing decisions, and it is highly likely that without guidelines, within-category coherence and global incoherence will be the result."[248] The key, therefore, is to devise sentencing standards (for example, statutory ranges or sentencing guidelines) that would enhance the coherence of jury sentencing decisions. At the same time, one should be careful not to eviscerate the jury's deliberative functions: "Coherence is important," but "it is not a trumping value."[249]

The discussion of variability demonstrates one thing for certain: The importance of providing jurors with more information, such as sentencing statistics and guidelines, cannot be overstated. Historically, juries have had little, if any, information about the average sentence and actual time served for different types of offenses.[250] At the same time, judges have availed themselves of pre-sentencing reports, sentencing guidelines, and in some instances, reports of the average sentencing and parole practices in their district or circuit.[251] Not surprisingly, virtually all of those who have criticized jury sentencing for producing arbitrary sentences have focused their critiques on the lack of information available to the jury.[252]

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[246] Sunstein et al., supra note 242, at 1158–59.

[247] E-mail from Cass Sunstein, Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, University of Chicago Law School, to Jenia Iontcheva, Bigelow Fellow and Lecturer in Law, University of Chicago Law School (Oct. 8, 2002) (on file with the Virginia Law Review Association).

[248] Sunstein et al., supra note 242, at 1195.

[249] Id. at 1203.

[250] See infra Section IV.A.

[251] See, e.g., Jackson, supra note 17, at 17 ("Pre-sentence investigation reports from the Missouri Board of Probation and Parole inform the judge of where the defendant falls within the sentencing guidelines. The report also informs the judge of any sentence received by a co-participant in the same crime or series of crimes.").

[252] See Betts, supra note 17, at 371; Jackson, supra note 17, at 17 ("Disparity in jury sentencing is based upon the unique make-up, opinions, and experiences of each indi-

Unwarranted disparities in jury sentencing are, therefore, largely a function of the institutional context within which juries operate.[253] Mock jury studies confirm that providing jurors with information in the form of reference sentences reduces the discrepancy between juror and judge sentences.[254] As Part IV discusses in more detail, thoughtful institutional design, such as a guidelines system, sentencing statistics databases, and judicial review of jury sentences can reduce and even eliminate arbitrary outcomes in jury sentencing.

C. The "Systematic Bias" Argument

Even if juries were consistent in their sentencing, they may still be faulted for systematically rendering more lenient or harsher sentences than are appropriate. For example, juries are thought to be "more inclined to excuse a defendant because of his youth alone than would be a judge."[255] In contrast, many defendants and criminal defense attorneys believe juries to be harsher sentencers than judges.[256] It is not clear that such bias in jury sentencing, if it in fact exists, reflects an inability to assess the "correct" sentence. A jury bias in favor of harshness may accurately reflect community sentiments—for example, that recidivists should be punished especially

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vidual juror and the unfortunate lack of material information relevant to sentencing."); Linden, supra note 17, at 981.

[253] See Cass R. Sunstein, Deliberative Trouble?: Why Groups Go to Extremes, 110 Yale L.J. 71, 117 (2000) (noting that "group polarization [which leads to inconsistent jury verdicts] can be heightened, diminished, or possibly even eliminated by seemingly small alterations in institutional arrangements").

[254] See Michelle D. St Amand & Edward Zamble, Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System, 25 Law & Hum. Behav. 515, 522 (2001).

[255] LaFont, supra note 17, at 842.

[256] In 2002, only 1.7% of Virginia criminal defendants who went to trial chose to be sentenced by their jury. Va. Criminal Sentencing Comm'n 2002 Ann. Rep. 36 (2002). Similarly, a high percentage of Virginia defense attorneys might still favor the abolition of jury sentencing in Virginia. A 1977 statewide survey found that 63% of Virginia's prosecutors opposed the abolition of jury sentencing, while 65% of the state's criminal defense lawyers favored abolition. Report of the Subcomm. to Study Sentencing for Va. State Crime Comm'n 2 (1977) [hereinafter Va. Sentencing Study]. (These poll numbers may be different today, since Virginia has since shifted to a bifurcated trial system, allowing jurors to receive more information at the sentencing stage and removing the danger of prejudice against the defendant at the trial stage.)

harshly.[257] Conversely, a perceived leniency on the part of juries may really be a reflection of judicial harshness: As judges themselves have admitted, their daily exposure to sentencing and their political ambitions might sometimes harden their outlooks on punishment.[258]

Research on the question of systematic jury bias has provided inconclusive answers.[259] Some studies have found that jurors are generally more lenient than judges,[260] and that deliberation produces substantial leniency effects.[261] At the same time, two studies have found that jurors are consistently harsher than judges in imposing sentences,[262] and research in the context of punitive damages suggests that deliberation often produces a shift in the direction of severity.[263] Yet other scholars have found no significant difference in the severity of sentences imposed by juries versus those imposed by judges.[264]

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[257] Weninger, supra note 17, at 34 (finding that repeat offenders were sentenced significantly more harshly by juries than by judges).

[258] See supra notes 216–17 and accompanying text.

[259] See Lanni, supra note 17, at 1793–96.

[260] See Shari Seidman Diamond & Loretta J. Stalans, The Myth of Judicial Leniency in Sentencing, 7 Behav. Sci. & L. 73, 74–81 (1989) (finding that mock jurors are as lenient or more lenient than judges); see also Smith & Stevens, supra note 236, at 34 (finding that average sentences in Alabama increased with the shift from jury to judge sentencing, but suggesting other factors, such as an increase in punitiveness of public opinion over time, likely contributed to the increase); Stalans & Diamond, supra note 182, at 206 (finding that poll respondents have more lenient sentence preferences than the required minimum sentence for residential burglary).

[261] See James H. Davis et al., The Decision Processes of 6- and 12-person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules, 32 J. Personality & Soc. Psychol. 1, 9 (1975); Robert J. MacCoun & Norbert L. Kerr, Asymmetric Influence in Mock Jury Deliberation: Jurors' Bias for Leniency, 54 J. Personality & Soc. Psychol. 21, 21–22 (1988) (citing studies showing that deliberation produces leniency effects); Michael G. Rumsey, Effects of Defendant Background and Remorse on Sentencing Judgments, 6 J. Applied Soc. Psychol. 64, 67 (1976) (same); Laurence Severance et al., Toward Criminal Jury Instructions That Jurors Can Understand, 75 J. Crim. L. & Criminology 198, 225 (1984) (same).

[262] Weninger, supra note 17, at 31–37; see also Va. Criminal Sentencing Comm'n, supra note 256, at 36–38 (finding that jury sentences in 2002 were higher than the sentences prescribed by sentencing guidelines (and given out by judges), but noting that, unlike judges, juries were not aware of the guideline ranges).

[263] Sunstein et al., supra note 175, at 43–44.

[264] See St Amand & Zamble, supra note 254, at 526; Eckert & Ekstrand, supra note 236, at 8–12.

More disturbing are critiques concerning specific biases that affect juries' judgments. For example, juries are accused of basing their verdicts on irrelevant factors, such as the defendant's or counsel's appearance, or more insidiously, the defendant's race or ethnicity.[265] Several comprehensive studies of capital juries have found racial bias in the decision to impose the death penalty.[266] Although some studies, controlling for case characteristics and prosecutorial decisions, are inconclusive or find no racial disparities in jury sentencing,[267] the quality and amount of evidence in the other direction warrants serious consideration by legislatures devising jury sentencing regimes.[268]

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[265] LaFont, supra note 17, at 842.

[266] David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-*Furman* Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 Cornell L. Rev. 1638 (1998) (finding that in Philadelphia, defendants convicted of killing white victims were more likely to be sentenced to death); William J. Bowers & Glenn L. Pierce, Arbitrariness and Discrimination under Post-*Furman* Capital Statutes, 26 Crime & Delinq. 563 (1980); Thomas J. Keil & Gennaro F. Vito, Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-*Gregg* Outcomes, 7 Just. Q. 189, 189 (1990) (finding that, in Kentucky, blacks accused of killing whites were more likely to be charged with a capital crime and sentenced to die than other homicide offenders).

[267] Va. Sentencing Study, supra note 256, at 9 (finding no racial bias in jury sentencing in rape cases, but comparing sentencing only for "white-on-white" and "black-on-black" crime); Arnold Barnett, Some Distribution Patterns for the Georgia Death Sentence, 18 U.C. Davis L. Rev. 1327 (1985); Stephen P. Klein & John E. Rolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 44 (1991) (controlling for case characteristics and finding no racial disparities in capital jury sentencing in California); Dolores A. Perez et al., Ethnicity of Defendants and Jurors as Influences on Jury Decisions, 23 J. Applied Soc. Psychol. 1249 (1993); Lanni, supra note 17, at 1799 (reviewing studies on racial bias in jury sentencing and finding them inconclusive); see also Howard C. Daudistel et al., Effects of Defendant Ethnicity on Juries' Dispositions of Felony Cases, 29 J. Applied Soc. Psychol. 317 (1999) (finding that Hispanic majority juries in El Paso, Texas, systematically gave longer sentences to Anglo-American defendants, but that the converse was not the case). Studies of other biases are similarly inconclusive. Compare Robert M. Bray et al., The Effects of Defendant Status on the Decisions of Student and Community Juries, 41 J. Soc. Psychol. 256 (1978) (finding some influence of defendants' social status on mock juries' sentencing decisions, but also finding that this influence was largely a function of defendants' violation of social expectations by misusing abilities associated with their status), with Rumsey, supra note 261 (finding that defendants' social background did not influence mock juries' sentencing decisions).

[268] See infra Part IV for suggestions on simple structural reforms that could constrain disparities in noncapital jury sentencing.

While the issue of racial bias is an important factor to consider in evaluating jury sentencing, one must also be careful to compare the record of juries to that of other decisionmakers in the criminal justice system. Research of capital juries tends to show that disparities in sentencing associated with the race of the victim are as much if not more the result of prosecutorial discretion.[269] The research also fails to consider whether such biases are more or less prevalent among juries than among judges. Yet numerous studies have found prejudice on the bench,[270] including at the sentencing stage.[271] Certainly, many judges themselves are not convinced of their unshakable objectivity.[272]

Indeed, whatever biases judges and prosecutors bring to the table, they are less likely to encounter opposing views and overcome those biases in the course of their decisionmaking. Juries fare better in this respect for two reasons. First, they are still more inclusive than the ranks of state judges and prosecutors. As of 1990,

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[269] Abramson, supra note 46, at 228–29; see also Angela J. Davis, Benign Neglect of Racism in the Criminal Justice System, 94 Mich. L. Rev. 1660, 1679–80 (1996) (reviewing Michael Tonry, Malign Neglect: Race, Crime, and Punishment in America (1995)) (citing numerous studies finding racial disparities resulting from unchecked prosecutorial discretion).

[270] See Martin Guggenheim & Randy Hertz, Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest L. Rev. 553, 564–70 (1998) (reviewing a series of bench trial cases showing judicial factfinding bias in favor of the prosecution); Ga. Supreme Court Comm'n on Racial & Ethnic Bias in the Court System, Introduction *to* Let Justice Be Done: Equally, Fairly, & Impartially (1995), http://www2.state.ga.us/courts/supreme/ceintro2.htm.

[271] Shawn D. Bushway & Anne Morrison Piehl, Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing, 35 Law & Soc'y Rev. 733 (2001); Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 B.C. L. Rev. 95, 102 & n.39, 103 & n.42 (1997) (citing a 1993 Minnesota Task Force Report, which found that state trial judges "unequally sentenc[ed] similarly situated African American and white youths" and "credit[ed] the testimony of white witnesses while failing to credit the testimony of comparable African American witnesses").

[272] Frankel, supra note 86, at 21–23.

only 3.8% of all state court judges were African-American,[273] and the results were not very different in jurisdictions with large African-American populations.[274] Similarly, in 2000, African-Americans represented only 4% of the attorneys in the criminal justice system, while only 3% were Hispanic.[275]

Not only are jurors more representative in their makeup, but deliberation among them is likely to transform their individual biases.[276] Faced with fellow jurors of different races, genders, and ethnicity and with a unanimity requirement, individuals are less likely to make biased remarks and more likely to put prejudices aside in light of reasoned discussion. Prejudice can be further constrained through sentencing standards and judicial review. It is significantly more difficult for a juror to justify her biased sentencing decision when she knows that her number departs from the average sentence for the same offense. And in the unlikely event that a jury reaches a clearly arbitrary or biased decision, a judge can modify the verdict in accordance with the sentencing standards.

D. The "Cost and Inefficiency" Argument

Commentators also criticize jury sentencing for imposing a heavy administrative and financial burden on the judicial system. Extending jury duty to the sentencing stage means an increase in jury fees and in the amount of productivity lost to jury duty. More-

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[273] Barbara Luck Graham, Judicial Recruitment and Racial Diversity on State Courts: An Overview, 74 Judicature 28, 32 (1990).

[274] Ifill, supra note 271, at 95–96 ("In New York State, for example, only 6.3% of the state's judges were African American in 1991, although African Americans constituted 14.3% of the state's population. In Georgia, where 27% of the population is African American, only 6% of the state's judges are African American.").

[275] Ellis Cose, The Darden Dilemma, Newsweek, Mar. 25, 2000, at 58.

[276] See Richard R. Izzett & Walter Leginski, Group Discussion and the Influence of Defendant Characteristics in a Simulated Jury Setting, 93 J. Soc. Psychol. 271, 271 (1974) (finding that discussion mitigates bias against unattractive defendants); Martin F. Kaplan & Lynn E. Miller, Reducing the Effects of Juror Bias, 36 J. Personality & Soc. Psychol. 1443, 1451–52 (1978) (finding that deliberation reduces individual jurors' bias with respect to the parties' lawyers); Jeffrey Kerwin & David R. Shaffer, Mock Jurors Versus Mock Juries: The Role of Deliberations in Reactions to Inadmissible Testimony, 20 Personality & Soc. Psychol. Bull. 153, 160 (1994) (finding that jury deliberation reduces extralegal biases of individual jurors); Jerry Shaw & Paul Skolnick, Effects of Prohibitive and Informative Judicial Instructions on Jury Decisionmaking, 23 Soc. Behav. & Personality 319, 324 (1995) (finding that deliberation nullified reverse racial bias in jury verdicts).

over, because juries sit only once, educating each new jury about the sentencing system is costly. As one commentator has argued, "[t]here is no logic in attempting to make each jury an expert in sentencing and in complex sentencing laws when the system has developed that expertise in [the] judiciary."[277] It is also expensive to educate jurors properly about the meaning of the evidence before them.[278]

The simplest response to this criticism is that the cost of jury education is a small price to pay for the important democratic contribution that the jury can make to the sentencing process. Furthermore, informing members of the public about the consequences of sentencing statutes passed by their representatives has the independent value of advancing the ideals of transparency and accountability. When one considers the significant resources already devoted to probation officer interviews and calibration and appeals of guideline determinations, an opening hearing where the same information is presented to a panel of citizens may not seem as starkly inefficient by comparison.[279] Finally, given the high percentage of cases that end with a plea bargain today, the costs of a shift to jury sentencing are unlikely to be excessive.[280]

IV. DESIGNING SENTENCING JURIES

To the extent that jury autonomy occasionally clashes with the modern values of efficiency, consistency, and expertise, this Part outlines a viable jury sentencing regime that seeks to incorporate these values. Because jury sentencing is not constitutionally required, legislatures are free to experiment with the amount and type of constraints on jury authority. Indeed, the flexibility of jury

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[277] Jackson, supra note 17, at 15.

[278] Id. ("It is an unnecessary and time-consuming process to attempt to present to a jury a defendant's past conduct and character, which can much more comprehensively and efficiently be presented to a judge in a pre-sentence investigation report.").

[279] In addition to dispensing with individualized pre-sentencing reports, states might also cut costs by shifting to a supermajority rather than a unanimity decisionmaking rule for sentencing decisions. See infra Section IV.F.2.

[280] Data from Virginia and Texas, showing that jury sentencing represents less than three percent of the state criminal caseload, suggests that the costs are quite manageable. See Va. Criminal Sentencing Comm'n, supra note 256, at 36; Tex. Office of Court Admin., Texas Statewide Summary of Reported Activity (2001) (on file with the Virginia Law Review Association).

sentencing is one of its virtues. It allows each jurisdiction to design a sentencing regime that makes optimal use of the jury's democratic values, while minimizing their potential conflict with other core principles of the criminal justice system.

A. Admissible Evidence and Jury Information

The wider range of punishments imposed by jurors has been linked to the scarcity of information that has historically been provided to the jury at the sentencing stage.[281] Until recently, juries in most states were denied access to the defendant's criminal record[282] and had no information about parole availability or about the "usual sentence imposed and served in similar cases."[283]

Much relevant information about the defendant's background and prospects for rehabilitation is still not being provided to sentencing juries. Several states limit the evidence that is presented to the jury at sentencing to that admissible at trial.[284] Texas is most

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[281] See Betts, supra note 17, at 371; Jackson, supra note 17, at 15–16; LaFont, supra note 17, at 838; Linden, supra note 17, at 978–79; Reese, supra note 17, at 335–36.

[282] See LaFont, supra note 17, at 838; Wright, supra note 17, at 1376–77. Missouri is the only state that has maintained an unusually restrictive approach to the evidence that can be admitted during sentencing. The restrictions are a result of the reluctance to bifurcate the criminal trial into separate guilt and sentencing stages. In order not to prejudice jurors against the defendant at the trial stage, Missouri bans the consideration of prior criminal records or records of substance abuse. See State v. Jacobs, 939 S.W.2d 7 (Mo. Ct. App. 1997); State v. Hampton, 607 S.W.2d 225, 226 (Mo. Ct. App. 1980). To ensure that habitual offenders are sentenced more severely, therefore, it has had to shift to judge sentencing for prior and persistent offenders so that the jury today assesses punishment in fewer than ten percent of all noncapital cases. Jackson, supra note 17, at 14–15.

[283] Wright, supra note 17, at 1376–77.

[284] In Oklahoma and Missouri, there is no special sentencing hearing (except for habitual offenders), so trial evidence rules apply. See supra note 223. In Virginia, evidence admissible at trial and relating to punishment can be presented. Such evidence includes

> factors [that] generally relate to the nature of the offense, the characteristics of the offender, programs available to the defendant, the likelihood of recidivism, restitution, and sentences in similar cases.
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> . . . [Evidence also includes] such factors as the range of punishment established by the legislature, the injury to the victim, the use of a weapon, the extent of the offender's participation in the offense, the offender's motive in committing the offense, prior record and rehabilitative efforts, drug and alcohol use, and age, health, and education.

Thomas D. Horne, Some Thoughts on Bifurcated Sentencing in Non-Capital Felony Cases in Virginia, 30 U. Rich. L. Rev. 465, 475 (1996).

liberal in its approach towards the admissibility of evidence,[285] but the jury still lacks access to comprehensive expert evaluations of the offender (which are commonly included in pre-sentencing reports presented to sentencing judges).[286] Information about parole is also generally not a proper subject for consideration by the jury.[287] In Virginia, such information can only be introduced in cases where parole is abolished.[288] Texas allows jurors to consider parole laws generally, but not evidence of the way parole laws might apply to the defendant before them.[289] In brief, no state provides juries with anywhere near the amount of sentence-related information that is currently provided to judges.[290]

Knowledge about the defendant's background and about sentencing practices and alternatives is essential to the legitimacy and fairness of the process.[291] At the same time, different methods of in-

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[285] Tex. Code Crim. Proc. Ann. art. 37.07, § 3 (Vernon Supp. 2003).

[286] Id. Virginia is the only state that makes such reports available to the jury upon request by the defendant. See Duncan v. Commonwealth, 343 S.E.2d 392, 394 (Va. Ct. App. 1986).

[287] See Haynes v. State, 846 S.W.2d 179, 181 (Ark. 1993); Goodson v. State, 562 P.2d 521, 526 (Okla. 1977). But see Boone v. Commonwealth, 780 S.W.2d 615, 618 (Ky. 1989) (holding that both the prosecution and the defense can introduce evidence of minimum parole eligibility).

[288] Horne, supra note 284, at 475. With the abolition of parole and the requirement that sentenced prisoners serve a minimum specified period of the sentence imposed, the court may be asked to inform the jury that a defendant will be required to serve a minimum portion of his sentence prior to release. Fishback v. Commonwealth, 532 S.E.2d 629 (Va. 2000). This is to be distinguished from the mandate that the jury may not consider parole or the sentencing guidelines. Horne, supra note 284, at 477 (citing *Eaton v. Commonwealth*, 397 S.E.2d 385 (Va. 1990)).

[289] Tex. Code Crim. Proc. Ann. art. 37.07, § 4(a)–(d) (Vernon Supp. 2003).

[290] Kentucky's legislature, which passed a Truth-in-Sentencing Act to educate jurors as fully as possible about sentencing options, has not provided for the preparation of pre-sentencing reports for the benefit of jury deliberations. The statute allows jurors to consider the prior record of a defendant, minimum parole eligibility, and any evidence offered by the defendant in mitigation. Ky. Rev. Stat. Ann. § 532.055(2)(a) (Michie 1999). Similarly, the Texas statute, otherwise very liberal with respect to the information provided to the jury about the defendant's background, calls for a pre-sentencing investigative report only where the sentencing is done by a judge. Tex. Code Crim. Proc. Ann. art. 37.07, § 3 (Vernon Supp. 2003); see also Va. Code Ann. § 19.2-299 (Michie Supp. 2002) (explaining that, in certain cases, a court may order the preparation of a pre-sentencing investigative report to aid the judge during sentencing).

[291] Interviews with jurors in Texas at the time when the jury received little information about the defendant at the sentencing hearings reveal disappointment with the process upon learning about the type of information withheld from the jury. Joe

forming the jury have different costs and benefits. Pre-sentencing reports are time-consuming and expensive and are largely duplicative of the information that could be provided at a sentencing hearing with liberal evidentiary rules. By contrast, the procedure followed in Texas—allowing plentiful evidence about the defendant at the jury sentencing hearing and preparing pre-sentencing reports only when judges sentence—may strike the right balance between efficiency and disclosure.

At present, jurors also lack information that would allow them to gain a more holistic understanding of the sentencing system. Parole and sentencing statistics and sentencing guidelines are generally kept away from jurors.[292] For example, in Missouri, "[i]nforming juries of sentences of defendants in similar cases or the sentences of co-participants in the crime on trial is strictly prohibited under the rules of evidence."[293] Similarly, the Kentucky Truth-in-Sentencing statute, which generally increases the information available to sentencing juries, does not provide for sentencing guidelines and statistics.[294] Kentucky courts have also held parole eligibility statistics inadmissible.[295]

Interestingly, the only jurisdiction that at one time provided jurors with sentencing statistics and guidelines was the military. This practice ended in the late 1950s, however, as the military's judicial philosophy shifted its emphasis away from sentencing uniformity and towards individualized judgments. The United States Court of Military Appeals held that jurors were not to consider sentences in similar cases or to consult the sentencing manual (which contained

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Goulden, Jurors Urge Disclosure of Past Record, Dallas Morning News, Feb. 28, 1960, § 3.

[292] Texas and Virginia, for example, which are otherwise liberal in the information they admit at sentencing, fail to provide jurors with sentencing guidelines and statistics. Va. Code Ann. § 19.2-298.01 (Michie 2000). In Texas, factors "in mitigation of punishment" may be introduced, but those have been limited only to factors that have a relationship to the circumstances of the offense or to the defendant before or at the time of the offense. See Brown v. State, 674 S.W.2d 443, 447 (Tex. Ct. App. 1984).

[293] Jackson, supra note 17, at 17. It is ironic that Missouri has a Sentencing Advisory Commission which has promulgated guidelines that judges—but not juries—are privy to and encouraged to follow.

[294] Ky. Rev. Stat. Ann. § 532.055 (Michie 1999).

[295] See Abbott v. Commonwealth, 822 S.W.2d 417, 419 (Ky. 1992).

flexible sentencing guidelines to benefit jurors during their deliberation).[296]

Furnishing jurors with data on the prevailing sentencing and parole practices would allow them to "combine insights about individual cases with some understanding of the system as a whole."[297] As discussed in Section III.B, if jurors have a broader view of the sentencing system, they are less likely to render arbitrarily disparate sentences. In Scotland, for example, sentencing statistics are provided to judges with precisely that goal in mind.[298] In the early 1970s, the U.S. Parole Commission also devised a matrix based on average past sentencing and parole practices, which was voluntarily followed by some federal judges.[299] At the same time, the U.S. Board of Parole commissioned reports on the creation of a database and an information retrieval system to guide future parole decisionmaking.[300]

At least one commentator has suggested that similar databases and statistics could be generated for sentencing jurors. As Ronald Wright notes, "[a] standard report could inform jurors of the average sentence imposed for persons convicted of the same crimes as the defendant, and for persons who have a similar criminal record. The report could even describe the distribution of sentences for that category of offense and offender."[301] Statistics could be compiled at the county, district, or state level. On the one hand, county-by-county statistics would be more expensive to generate, but they would give jurors a better sense of sentence preferences in the local community. Data at the state level, on the other hand, in addition to costing less, might give jurors more flexibility in arriving at their sentence (jurors may be more willing to depart from

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[296] James Kevin Lovejoy, Abolition of Court Member Sentencing in the Military, 142 Mil. L. Rev. 1, 20 (1993) (citing *United States v. Mamaluy*, 27 C.M.R. 176, 180 (C.M.A. 1959), and *United States v. Rinehart*, 24 C.M.R. 212, 215–16 (C.M.A. 1957)).

[297] Wright, supra note 17, at 1373.

[298] Id. at 1386.

[299] Don M. Gottfredson et al., Guidelines for Parole and Sentencing: A Policy Control Method 25–33 (1978).

[300] See Susan M. Singer & Don M. Gottfredson, Parole Decision-Making: Development of a Data Base for Parole Decision-Making 1 (1972); Max S. Zeigler et al., Nat'l Council on Crime & Delinquency, 10 Parole Decision-Making: Use of an Information Retrieval System for Parole Decision-Making 2–3 (1972).

[301] Wright, supra note 17, at 1377.

data aggregated at the state level in order to account for local sentencing preferences). Finally, reports covering regional sentencing statistics have already been generated for the purpose of devising sentencing guidelines and are being provided to judges in some states, so it would hardly be more burdensome to make them available to juries.

There are, of course, practical limits on the amount of information that could be presented to the jury. Statistics are expensive to generate, and in addition, too much information might result in cognitive overload and confusion for the jury. Furthermore, jurors might all too easily gravitate toward the average sentence and thus end their deliberation about the individual case prematurely. Because of their powerful anchoring effect on juror decisionmaking, statistics might also hinder progressive developments in sentencing. Cognizant of these possibilities, lawyers for each side could distinguish each particular defendant's case from the average case illustrated by the sentencing statistics or even challenge the norms underlying those averages altogether. In the end, the benefits of this proposal outweigh the potential costs: Providing jurors with information about parole and sentencing practices would not only serve the goal of consistency and the fair administration of justice, but would also promote the transparency and accountability of the justice system.

B. Voluntary Sentencing Guidelines for Jurors

Even if some of the information tools described in the previous Section are too expensive to generate, legislatures could at least make available to jurors information that is regularly provided to judges—some form of sentencing guidelines. Mandatory for judges, sentencing guidelines could be voluntary for jurors—that is to say, true "guidelines."

By 1999, fifteen states had enacted legislation enabling the creation of sentencing guidelines, and seven had significantly progressed in developing guidelines systems.[302] Importantly, state sentencing guidelines differ significantly from those promulgated by the Commission. First, several states—especially in more recent

[302] Sentencing Guidelines Systems, supra note 93.

years—have adopted voluntary guidelines.[303] Second, even where the guidelines are mandatory, they are often easier to apply. Some state guidelines prescribe only presumptive sanctions for the "usual case" and allow for a range of departures in atypical cases.[304] By contrast, the federal guidelines are much stricter and allow departures only in exceptional circumstances. They rely on a "base case" approach that assigns a point value to the minimal elements of the offense that must be shown for a conviction, and then proceeds through complex mechanical formulas to add points for aggravating factors or, occasionally, to subtract points for mitigating factors.[305]

Because of their greater flexibility and easy application, state sentencing regimes strike a fairer balance between the values of individualized judgment and uniform sentencing practices than the federal sentencing system. These virtues of state sentencing regimes can and should be incorporated into jury sentencing regimes to promote consistency in jury verdicts. Among the jury sentencing states, Virginia, Arkansas, and Missouri have already created sentencing commissions and charged them with promulgating voluntary sentencing guidelines, although these guidelines have thus far been provided only to judges.[306] State legislatures could commission studies to find which guideline systems are most effective in achieving each jurisdiction's stated sentencing goals and most comprehensible to laypersons.

The guidelines could be included in the written instructions that jurors receive from the judge prior to their deliberation. If jurors receive the guidelines in this fashion, however, they may too easily suspend deliberation on other issues and simply try to comply with the guidelines. The possibility is even higher if the jurors know that their sentencing determination might be overturned upon review by the judge. To prevent this deliberation-halting effect, legislatures could instead allow jurors to receive guidelines only upon request.[307] If the parties refer to the gnidelines during their sentencing

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[303] Id.

[304] See Knapp & Hauptly, supra note 95, at 681–82, 684–85.

[305] Id. at 685–86.

[306] See Sentencing Guidelines Systems, supra note 93; Va. Code Ann. § 17.1-803 (Michie 1999); Va. Code Ann. § 19.2-298.01 (Michie Supp. 2002).

[307] I thank Tracey Meares for this suggestion.

arguments, jurors will likely want to avail themselves of that opportunity.

In the end, however, guidelines are a second-best option to sentencing statistics. They articulate a greater range of relevant sentencing factors than can be presented by statistics. Yet precisely for that reason, guidelines may be more difficult to design, comprehend, and apply. Especially given jurors' lack of experience with sentencing, the guidelines are less likely to promote the desired consistency and proportionality among cases.[308] The main advantage of guideline systems is that many states have already developed them for purposes of judicial sentencing, so they could be presented to the jury at little additional cost.

C. Statutory Sentencing Limits

In all states that currently employ jury sentencing, the jury is limited in its discretion by the statutory ranges set by the legislature.[309] The extent to which legislatures limit the jury's discretion depends on the relative value that each jurisdiction places on sentencing uniformity versus individualized judgment. The dissatisfaction with indeterminate sentencing regimes suggests that the absence of any statutory limits on the jury's sentencing discretion may not be viable because it conflicts too gravely with the value of sentence consistency.

Jury participation is most legitimate and fair when it operates within limits set in advance by the legislature. Supreme Court jurisprudence on jury sentencing in capital cases is instructive on that point: "[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[310] Under the Court's guidance, state legislatures have

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[308] Cf. William J. Bowers, The Capital Jury Project: Rationale, Design, and Preview of Early Findings, 70 Ind. L.J. 1043, 1091–93 (1995) (finding that capital jurors often fail to comprehend sentencing guidelines).

[309] Ark. Code Ann. § 16-90-107(b)(1), (c), (d) (Michie 1987); Ky. Rev. Stat. Ann. § 532.055(2) (Michie 1999); Okla. Stat. Ann. tit. 22, § 928.1 (West Supp. 2003); Va. Code Ann. § 19.2-295 (Michie 2002); Mo. R. Crim. P. §§ 29.04, 29.06 (Vernon 2002).

[310] Gregg v. Georgia, 428 U.S. 153, 189 (1976).

passed statutes that channel the jury's discretion in death penalty cases and promote sentence uniformity.[311]

On the other hand, mandatory minimums and narrow statutory sentencing ranges have been blamed for producing unwarranted severity and unfairness in particular cases.[312] In light of the mounting criticism, legislatures may reconsider the need for mandatory minimums.[313] If both minimums and maximums are maintained, however, statutory ranges should be sufficiently broad to allow the jury to make fair, case-by-case sentencing decisions. Such a solution would strike a good balance between the goals of individualization and consistency in the sentencing process.

D. Judicial Participation in Jury Sentencing

The relationship between the jury and the judge can be structured in different ways, depending on the relative value that each community attaches to jury autonomy versus efficiency, expertise, and defendants' rights. One important way in which judge and jury interact at the sentencing stage is through instructions. The instructions could encourage the jury to deliberate longer, to deliberate in a particular manner, and to consider specific sentencing factors.[314]

Judges could also intervene more directly in the process. They could be given powers to set the sentence in case of jury deadlock, keep jury verdicts within the legal limits, and even adjust sentences to prevent unwarranted disparities. All jury sentencing states except Texas allow the judge to fix the punishment in case the jury fails to agree on a sentence, a decision that reflects an emphasis on

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[311] To that end, the statutes provide for a bifurcated trial, for detailed jury instructions on aggravating and mitigating factors to be considered in the decision on the death penalty, and for appeal of the sentence to the state supreme court. See Proffitt v. Florida, 428 U.S. 242, 248–50 (1976); Woodson v. North Carolina, 428 U.S. 280, 302 (1976) (striking down North Carolina's sentencing statute as failing to adequately constrain jury discretion in capital sentencing cases).

[312] Harris v. United States, 122 S. Ct. 2406, 2421 (2002) (Breyer, J., concurring) (pointing to numerous critiques of the mandatory minimum sentencing statutes); Lowenthal, supra note 96, at 63.

[313] Some have already done so. See Moran, supra note 2.

[314] Studies of citizens' juries show that moderators can exercise great influence over the deliberation process through the instructions and explanations that they provide to the participants. Smith & Wales, supra note 164, at 59. Similarly, studies of jury instructions show that jurors spend substantial time and effort attempting to apply judicial instructions. Diamond & Levi, supra note 198, at 225.

efficiency over unbounded jury autonomy.[315] Arkansas allows the judge to modify the jury's sentence, but only in favor of the defendant. The threshold for judicial intervention is rather low—the judge may reduce the sentence imposed by the jury whenever she finds that the punishment "is greater than, under the circumstances of the case, ought to be inflicted."[316] Oklahoma law provides for appellate review of jury sentences.[317] Virginia has gone even further and has established a two-stage sentencing proceeding, where the jury makes a sentencing recommendation, but the judge pronounces the final sentence.[318] Although the recommendation is merely advisory, it is usually accorded great deference.[319]

Mixed tribunals of professional and lay judges, used in Germany, provide yet another model of judge-jury interaction.[320] Professional and lay judges deliberate together at both the trial and sentencing stages. While the decision is arrived at jointly, the professional judges are in charge of preparing a written opinion stating the court's findings and reasoning.[321] Advocates of the mixed court cite two advantages that it has over the jury-only system. First, a mixed court is allegedly more efficient because participation by the judges dispenses with the need for procedural tools for jury control, such

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[315] Ark. Code Ann. § 16-90-107(a) (Michie 1987); Ky. Rev. Stat. Ann. § 532.055(4) (Michie 1999); Mo. Ann. Stat. § 557.036(2) (West 1999); Okla. Stat. Ann. tit. 22, § 927.1 (West Supp. 2003). In Texas, a deadlocked sentencing jury results in a mistrial, and another sentencing hearing is held. Tex. Code Crim. Proc. Ann. art. 37.07, § 3(c) (Vernon 1981).

[316] Ark. Code Ann. § 16-90-107(e) (Michie 1987). Missouri also allows the judge to reduce the jury sentence, albeit under more limited circumstances. State v. McClanahan, 954 S.W.2d 476, 481–82 (Mo. Ct. App. 1997).

[317] James v. State, 818 P.2d 918, 922 (Okla. Crim. App. 1991), cert. denied, 502 U.S. 1111 (1992).

[318] Horne, supra note 284, at 466 (noting that, in Virginia, "[the] 'ultimate sentence . . . does not [therefore] rest with the jury' alone but is always subject to the control of the trial judge. This procedure makes the jury's finding little more than an advisory or first-step decision.") (citation omitted).

[319] Id. at 468; Va. Criminal Sentencing Comm'n, supra note 256, at 38 (finding that judges modified jury sentences in less than one-fourth of the cases in 2002 and that modifications were often slighter than would be warranted under the voluntary sentencing guidelines).

[320] Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931, 991–92 (1983); John H. Langbein, Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?, 1981 Am. B. Found. Res. J. 195, 197–205.

[321] Langbein, supra note 320, at 199–200.

as the exclusion of potentially prejudicial evidence and the crafting of jury instructions.[322] Second, "the presence of professional judges in deliberations, the requirement of reasoned opinion, and liberal appellate review" guard against juror inexperience and inconsistent sentencing.[323]

Legislatures concerned with unbridled jury authority could follow Virginia's example and create a system of judicial review akin to the deferential review accorded to federal agencies,[324] or they could set up mixed tribunals similar to those used in Germany. Both of these systems address concerns about arbitrary sentences resulting from a particular jury's prejudices or lack of comprehension of the evidence or the instructions.[325] As the United States Court of Appeals for the Fourth Circuit remarked with respect to jury sentencing procedures in Virginia:

> Any criticism of jury sentencing because it lacks the objectivity and principled decision of a judge is thus overcome by the existence of the power in the trial judge to bring his so-called superior judgment to bear upon the issue of proper punishment in reaching his decision whether to suspend the sentence or not.[326]

Although both the German and the Virginia models promote consistent sentencing, both can be assailed on deliberative democracy grounds. The German mixed court model places too great a restraint on juror deliberation because jurors are likely to defer to the judge too often and too quickly. A study of German mixed courts found that, during sentencing, laypersons influence only thirty-two percent of the cases in which there is initial disagreement.[327] Even under the Virginia model, some jurors might follow

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[322] Id. at 202. It is doubtful, however, that the full-time participation of judges in the jury deliberation is more efficient than a jury-only deliberation, even where the costs of instructing the jury and presenting evidence are subtracted.

[323] Id.

[324] Chevron v. Natural Resources Defense Council, 467 U.S. 837, 865 (1984).

[325] See Horne, supra note 284, at 466 (noting that the provision for review in Virginia guards against arbitrariness in jury sentencing).

[326] Vines v. Muncy, 553 F.2d 342, 349 (4th Cir. 1977).

[327] Gerhard Casper & Hans Zeisel, Lay Judges in the German Criminal Courts, 1 J. Legal Stud. 135, 189 (1972). Judges and juries initially disagreed with respect to about twenty percent of the sentencing decisions. Notably, lay influence on sentencing was greater than on guilt determinations, in part because sentencing disagreements were often resolved by compromise. Id. at 153–54, 189.

sentencing statistics or guidelines mechanically in order to avoid reversal.[328] In the end, however, the Virginia model of judicial review is clearly better than mixed courts at capturing the value of the jury's democratic and deliberative decisionmaking. Therefore, to prevent the occasional wayward sentences and yet preserve the legitimacy and deliberative functions of their jury sentencing regimes, states should follow Virginia's model and establish a practice of deferential judicial review.[329]

E. Juries and the Defendant

The proper balance between jury autonomy and defendants' rights is another important question implicated in structuring a jury sentencing regime. As the previous Section noted, Arkansas has tipped the scale in favor of defendants' rights by allowing the judge to reduce the sentence imposed by the jury. Another way to accommodate individual rights is to grant the defendant an unconditional right to waive jury sentencing.[330] Allowing unconditional waivers interferes with the ability of the community to participate in sentencing decisionmaking and allows for "forum-shopping" by criminal defendants. For that reason, defendants in the federal system and in many states are not allowed to waive their right to a jury trial without the consent of the prosecution.[331] Similarly, Ken-

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[328] Interviews with civil jurors whose punitive damage awards have been reversed show the great disappointment of those jurors with the reversals. William Glaberson, Juries, Their Powers Under Siege, Find Their Role Is Being Eroded, N.Y. Times, Mar. 2, 2001, at A1. In that sense, frequent reversals might also erode public confidence in the system.

[329] Experience in the punitive damages context also confirms the ability of courts to review jury verdicts even in the absence of a written opinion justifying those verdicts.

[330] Two states authorize such waivers. See Mo. Ann. Stat. § 557.036(2)(1) (West 1999); Lanni, supra note 17, at 1793 (commenting on defendants' ability to waive jury sentencing in Virginia). In Texas, the defendant must request jury sentencing prior to trial; accordingly, the failure of such a request is tantamount to a waiver of the right. Caro v. State, 771 S.W.2d 610, 619 (Tex. Ct. App. 1989).

[331] Fed. R. Crim. P. 23(a) (stating that the prosecutor must consent to the defendant's waiver of jury trial); Singer v. United States, 380 U.S. 24, 26 (1965) (holding that the Rule does not violate due process); id. at 36 (listing states that make waiver contingent on approval by the prosecutor or the court).

tucky allows waivers of jury sentencing only with the assent of the prosecution,[332] and Oklahoma requires judicial approval as well.[333]

Unconditional waivers and the Arkansas model of judicial review could be defended as protections against jury unfairness. They are only an imperfect guard against arbitrariness, however; a better way to ensure fairness is to institute the structural changes proposed in earlier Sections. Therefore, a robust regime of jury sentencing would only allow waivers upon the assent of the prosecution and permit both upward and downward judicial modifications of jury verdicts.[334]

F. Enhancing the Process of Jury Deliberation

The legitimacy of the sentencing juries' decisions depends not only on the outcomes of the jury's deliberations, but also on the process by which the outcomes are attained. The selection of jurors, the conditions of deliberation, and the decisionmaking rules are therefore of crucial importance to the success of a jury sentencing regime.

1. Inclusivity

To fulfill the role of a deliberative democratic body, the jury needs to be inclusive of diverse viewpoints in the community at large. While Supreme Court jurisprudence in the past half century has banned the exclusion of jurors based on race, gender, and ethnicity, and has endorsed the ideal of a jury as a representative of a "cross-section of the community,"[335] affirmative measures are still needed to promote genuine inclusivity of diverse views.[336] To that

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[332] Commonwealth v. Collins, 933 S.W.2d 811, 819 (Ky. 1996) (noting that the defendant could not waive jury sentencing without Commonwealth's consent).

[333] Case v. State, 555 P.2d 619, 625 (Okla. Crim. App. 1976) (holding that both prosecutor and judge must assent to defendant's waiver of jury sentencing). Arkansas also lacks a provision for waiver of jury sentencing by the defendant.

[334] In practice, such waivers would be used most often in cases of plea bargaining.

[335] Batson v. Kentucky, 476 U.S. 79, 89 (1986) (holding that race-based peremptory challenges violate the Fourteenth Amendment); Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (holding that the jury must represent a "fair cross-section" of the community).

[336] Recent studies reveal that certain groups, including minorities and the poor, are still underrepresented on juries. See Hiroshi Fukurai, Race, Social Class, and Jury

end, some commentators have suggested increasing the pay for jurors, limiting the grounds on which jurors may be excused from service, and punishing shirking with heavy fines.[337] Others have proposed increasing the size of juries to ensure representativeness.[338] Finally, some have argued for the abolition of peremptory strikes (and the reconsideration of strikes for cause) to increase the representativeness of the jury.[339] Abramson, in particular, has lamented the exclusion from the jury of persons showing any interest or engagement in public affairs.[340] Abolishing peremptory strikes and enacting measures to increase compliance with jury duty are easy and economically viable steps toward a more inclusive jury. Because a diverse jury is central to deliberative democracy and a fair sentencing process, states should take all necessary means to ensure such diversity.

2. Fostering Sustained Deliberation

Even if these measures achieve a formal representation of diverse views on the jury, power imbalances might prevent some members from participating fully in the jury's deliberations and contributing their unique perspectives to the decisionmaking process. Therefore, genuine inclusivity cannot be achieved without some regulation of the deliberation process itself, just as thoughtful deliberation cannot come about without some regulation of the jury's composition.

Participation: New Dimensions for Evaluating Discrimination in Jury Service and Jury Selection, 24 J. Crim. Just. 71, 84–85 (1996).

[337] Amar, supra note 58, at 168–70. For an extensive review of the relative success of different measures against jury dodging, see generally King, supra note 203. See also Mark Curriden, No Excuses: New York Cracks Down on Those Avoiding Jury Duty, Dallas Morning News, Oct. 24, 2000, at A1 (reporting on the success of the measures implemented by New York City to increase compliance with jury duty).

[338] Douglas Gary Lichtman, The Deliberative Lottery: A Thought Experiment in Jury Reform, 34 Am. Crim. L. Rev. 133, 136 (1996) (proposing that cases be heard and deliberated by twenty-four jurors, of whom only twelve, selected at random, would vote on the verdict).

[339] Abramson, supra note 46, at 53–55; Amar, supra note 58, at 170–71; cf. Lichtman, supra note 338, at 149 ("[C]onsensus-creating tools ('for cause' challenges and peremptory strikes) exclude jurors with extreme viewpoints. This exclusion tends to make juries more homogeneous and, hence, more likely to agree at the outset. This means that juries are less likely to debate than our statistics predict.").

[340] Abramson, supra note 46, at 53–55.

A relatively straightforward way to promote thoughtful and respectful deliberation is to preserve the requirement for a unanimous jury decision. Unanimity is not among the jury's most celebrated features. Even ardent defenders of the jury have opposed unanimity: It is thought to be undemocratic because it gives undue power to recalcitrant holdouts[341] and redundant once representativeness is ensured through other means.[342] The Supreme Court has similarly held that unanimity is not essential to the enforcement of the Sixth Amendment.[343]

However intuitively plausible, the argument for the abolition of unanimity has been challenged by studies on the deliberation effects of unanimity requirements. Researchers have observed that, when less than unanimity is required to reach a decision, deliberation ceases a few minutes after the votes needed for the verdict have been counted.[344] Mock studies have also shown that majority-verdict juries overall spend less time deliberating and correcting errors of fact.[345] The same studies have found that, in juries bound by a majority rule only, the majority deliberates in a more bullying and combative manner, cognizant of the holdouts' irrelevance to the verdict.[346]

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[341] Akhil R. Amar, Reinventing Juries: Ten Suggested Reforms, 28 U.C. Davis L. Rev. 1169, 1191 (1995).

[342] Amar, supra note 58, at 176 ("[I]f everyone now gets to serve on a jury and we eliminate all the old undemocratic barriers, preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders.").

[343] Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972). The Court rejected the defendants' argument that unanimity was indispensable to the participation in the jury deliberations of members of previously excluded groups. Abramson, supra note 46, at 187 ("While members of racial, religious, or ethnic minorities, women, poor people, young people or other previously excluded groups may now be represented on juries, a rule permitting a less than unanimous verdict makes it possible for a verdict to be rendered without their acquiescence and indeed without the consideration of their views.") (citing Defendant's Brief in *Apodaca*).

[344] Abramson, supra note 46, at 199; Hastie et al., supra note 198, at 95.

[345] See Abramson, supra note 46, at 200; Hastie et al., supra note 198, at 76, 163 (finding that non-unanimous juries tended to deliberate less); Davis et al., supra note 261, at 8–9 (same).

[346] Abramson, supra note 46, at 200.

In addition to improving the quality of deliberation, unanimity might enhance the legitimacy of the verdict.[347] Unanimous juries are perceived as more accurate, more thorough, more likely to listen to holdouts, and generally fairer.[348] Jurors who serve under a unanimity rule are also more satisfied with and confident in the jury's verdict, perhaps because juries operating under unanimity are more likely to produce consensus at the end of the deliberation.[349]

At the same time, unanimity is more likely to result in hung juries.[350] Hung juries both raise the costs of jury sentencing and likely leave jurors less satisfied with the jury's work. A unanimity requirement at the sentencing stage is also more likely to lead exhausted jurors to resort to "quotient verdicts," whereby they simply tally up each juror's preferred sentence and record the average as the final verdict.[351]

The costs of unanimity may well prompt some legislatures to opt for a super-majority voting rule, supplemented by other deliberation-forcing mechanisms. Such methods might include judicial instructions on the duty to deliberate conscientiously, emphasizing the virtues of deliberation and perhaps mentioning explicitly the prohibition against quotient verdicts.[352] In addition, jurors might be

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[347] Id. at 203 ("Common sense alone tells us that public confidence in the accuracy of verdicts is greater when the verdict is unanimous.").

[348] Hastie et al., supra note 198, at 76; MacCoun & Tyler, supra note 200, at 337–38, 338 tbl.1.

[349] Hastie et al., supra note 198, at 76, 79.

[350] Id. at 60.

[351] Linden, supra note 17, at 985 (citing observations by a Commonwealth's Attorney and a Virginia judge about the danger of "quotient verdicts"). In most states, if defendants raise the issue of a "quotient verdict," they are entitled to an evidentiary hearing at which they can cross-examine jurors about the sentencing deliberations. See, e.g., Taylor v. State, 761 P.2d 887, 889 (Okla. Crim. App. 1988). Usually, defendants exercise this right if they find some evidence, for example, scraps of paper, indicating the possibility that the jurors did not deliberate, but merely tallied up their individual sentence preference to deliver a quotient verdict. See Storie v. State, 390 So. 2d 1179, 1182–84 (Ala. Crim. App. 1980) (holding that a new trial on the grounds of a "quotient verdict" should not be granted although counsel found scraps of paper with sentence calculations in the trash basket of the jury room); Wheat v. State, 202 So. 2d 65, 69–72 (Ala. Ct. App. 1967) (similar); Matter of J.F., Jr., 948 S.W.2d 807, 810 (Tex. Crim. App. 1997) (similar). But see State v. Simmons, 563 S.W.2d 91 (Mo. Ct. App. 1978) (holding that jurors will not be heard to impeach their own verdict).

[352] In Texas, for example, a new trial shall be granted to an accused where "the verdict has been decided by lot or in any manner other than a fair expression of the ju-

required to certify that they deliberated carefully,[353] in compliance with the judge's instructions.

Yet it is also true that unanimity at the sentencing level is less expensive than at the trial level. While trial juries have a binary choice between a verdict of guilty or not guilty, sentencing juries can negotiate a sentence that takes into consideration a wider gamut of opinions. Furthermore, whereas hung trials postpone judgment at significant cost to society, hung sentencing juries need not lead to mistrials. In fact, most states that currently employ jury sentencing authorize the judge to fix the punishment where the sentencing jury fails to reach a decision after prolonged deliberation.[354]

Given the deliberation-forcing quality of unanimity, it may be wise to retain it at the sentencing stage. Unanimity need not obviate other mechanisms that foster discussion, however. Judicial instructions to deliberate conscientiously remain important in ensuring thoughtful jury decisionmaking and preventing quotient verdicts.

CONCLUSION

In an era where scientific rationality, consistency, and expertise reign supreme among the values of the legal world, it is no surprise that lay participation in adjudication and sentencing has attracted wide criticism. Critics of the jury, however, have ignored the redeeming values of the institution and have failed to examine whether there are particular contexts in which these values outweigh the costs of jury decisionmaking. As this Article argues, sentencing is a context in which the need for sensitive moral and political determinations and for case-by-case decisionmaking makes jury participation particularly appropriate.

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rors' opinion." Tex. R. App. P. 21.3(c) (Vernon Supp. 2002); *Matter of J.F., Jr.*, 948 S.W.2d at 810.

[353] E-mail from Neal Katyal, Professor of Law, Georgetown University Law Center, to Jenia Iontcheva, Bigelow Fellow and Lecturer in Law, University of Chicago Law School (Oct. 2, 2002) (on file with the Virginia Law Review Association).

[354] To avoid a complete shift of discretion to the judge in those situations, legislatures could require judges to poll the jury and take into account the jurors' preferences in making the final sentencing decision.

Because of its ability to render individualized judgments and to reconcile conflicting views through deliberation rather than aggregation, the jury is better situated than legislatures to make concrete sentencing decisions. Importantly, the jury can make such case-specific sentencing decisions "while holding a stronger democratic pedigree than a sentencing judge."[355] This ability of the jury to legitimate the sentencing process seems especially important in light of studies showing that perceptions of the fairness of sentencing influence compliance with the law and cooperation with law enforcement.[356]

As discussed earlier, the history of the early American republic provides ample historical precedent for a movement back in the direction of jury sentencing. The recent decisions of the Supreme Court in *Apprendi*, *Gaudin*, and *Ring*, represent the first signs of a new recognition of the jury's contributions. With these decisions, the Court has taken a half-step in the direction of jury sentencing, which may create a host of thin distinctions that will remain until the entire step is completed.

Legislatures should take the initiative and create jury sentencing regimes that build on the jury's democratic contributions, while minimizing the jury's disadvantages. A review of the existing jury sentencing regimes shows that many states have chosen to place checks on the jury's authority where unbridled discretion would imperil other important sentencing values. Areas remain, however, in which the current sentencing regimes need to be reformed in order to capitalize on the jury's democratic potential. Legislatures need to give jurors the information and instructions necessary to promote thoughtful and respectful deliberation. Providing jurors with sentencing statistics or guidelines and instituting judicial review is also essential to ensuring the consistency of the jury's sen-

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[355] Wright, supra note 17, at 1378.

[356] Tom R. Tyler, Why People Obey the Law 57–68, 161–69 (1990) (finding a direct correlation between the perceived fairness in sentencing and compliance with the law); see also George Akerlof & Janet L. Yellen, Gang Behavior, Law Enforcement, and Community Values, *in* Values and Public Policy 173, 185 (Henry J. Aaron et al. eds., 1994) ("Community members are assumed to be less willing to cooperate the higher the gap, positive or negative, between the penalties leveled against offenders and those considered fair by the community. Thus, if penalties are either too low or too high, observers of crimes are less likely to reveal information to the police.").

tencing decisions and promoting the ideal of equality before the law.

These proposed reforms reflect a vision of the jury working side-by-side with other institutions of the criminal justice system to serve the sometimes conflicting ideals of democracy and justice. If recovered as a central institution in our system of checks and balances, juries can bring to sentencing a unique mix of qualities that would enhance both the legitimacy of that process and the health of our democracy.