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Kurt A. Holtzman
kurt.holtzman@law.northwestern.edu

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CRIMINAL ADVISORY JURIES: A SENSIBLE COMPROMISE FOR JURY SENTENCING ADVOCATES

Kurt A. Holtzman*

ABSTRACT

Supreme Court Justice Neil Gorsuch recently noted that "juries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish." Yet in the majority of jurisdictions, contemporary judge-only sentencing practices neuter juries of their supervisory authority by divorcing punishment from guilt decisions. Moreover, without a chance to voice public disapproval at sentencing, juries are muted in their ability to express tailored, moral condemnation for distinct criminal acts. Although the modern aversion to jury sentencing is neither historically nor empirically justified, jury sentencing opponents are rightly cautious of abdicating sentencing power to laypeople. Nevertheless, jury endorsement of criminal sentencing is critical to the legitimacy of criminal law. It is also necessary if criminal law is to remain responsive to evolving social mores. Unfortunately, today, studies suggest that actual criminal sentences are largely detached, if not divergent, from community preference. The criminal advisory jury is a mechanism to solve these issues by allowing juries to express community sentiment on punishment while preserving the values inherent in autonomous judicial sentencing. The jury is one of the most democratic institutions within the United States and sits readily assembled for most criminal trials. Failing to solicit its views of just desert for the criminal it has convicted is an opportunity wasted; an opportunity the criminal advisory jury construct will seize.

INTRODUCTION

Since the nation's founding, juries have been viewed as a hallmark of the Anglo-American legal system.[1] The ultimate adjudication of both criminal conviction and civil

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[1] *See* Duncan v. Louisiana, 391 U.S. 145, 151-53 (1968) ("Among the resolutions adopted by the First Congress of the American Colonies (the Stamp Act Congress) on October 19, 1765 . . . was the declaration: 'That trial by jury is the inherent and invaluable right of every British subject in these colonies.'"); THOMAS JEFFERSON, The Life and Selected Writings of Thomas Jefferson 442 (Adrienne Koch & William

liability by lay community representatives, rather than government officials or legal elites, legitimizes the law and provides democratic endorsement for the normative goals the law seeks to achieve.[2] Unlike both the judge and the legislator, a jury's expression of moral condemnation is immune from impeachment by institutional and political influences.[3] And in the criminal context, the jury stands as the final intercessor between the coercive power of the state and the individual liberties the state seeks to deny.[4] These principles, germane to the ratification of the jury right within the Constitution,[5] remain paramount today.[6]

Despite the importance of juries and the Sixth Amendment's protection of the criminal jury right,[7] the criminal jury's sentencing power remains hollow.[8] In the majority of jurisdictions, the jury's role in a noncapital criminal trial is relegated to the determination of guilt while punishment is administered by judge alone.[9] Juries, for their part, are asked to mechanically apply broadly applicable laws to nuanced situations and form binary decisions on guilt while remaining deliberately ignorant of those decisions' consequences. Criminal culpability, on the contrary, is not binary;[10] it lies along a continuum of right and wrong defined by social mores and cultural norms. Decoupling punishment from guilt forces a false dichotomy onto juries which is not only unrealistic in the abstract but a practical hazard to the fact-finding function of trials. Without a say in punishment, juries' ability to tailor their moral condemnation to criminal acts is stifled. And, in situations where the law does not align neatly with the idea of justice that particular circumstances

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Peden eds., 1993) (The jury is "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.").

[2] Gianni Ribeiro & Emma Antrobus, *Investigating the Impact of Jury Sentencing Recommendations Using Procedural Justice Theory*, 20 NEW CRIM. L. REV. 535, 536 (2017).

[3] "[T]he truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and *superior to all suspicion*." 4 W. BLACKSTONE, Commentaries on the Laws of England 349-50 (Cooley ed. 1899) (emphasis added). *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 350-53 (2003).

[4] *Duncan*, 391 U.S. at 156.

[5] The Declaration of Independence stated solemn objections to the King's making "Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries," and to his "depriving us in many cases, of the benefits of Trial by Jury." The Declaration of Independence (U.S. 1776).

[6] "[J]uries in our constitutional order exercise supervisory authority over the judicial function by limiting the judge's power to punish. . . . [T]he Constitution's guarantees cannot mean less today than they did the day they were adopted. . . ." United States v. Haymond, 139 S. Ct. 2369, 2376 (2019).

[7] The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." U.S. CONST. amend. VI.

[8] McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact.").

[9] In noncapital felony cases, only six states permit juries to make sentencing decisions. ARK. CODE ANN. § 5-4-103 (West 2018); KY. REV. STAT. ANN. § 532.055 (West 2011); MO. ANN. STAT. § 557.036 (West 2017); OKLA. STAT. ANN. tit. 22, § 926.1 (West 2016); TEX. CRIM. PROC. CODE ANN. art. 37.07 (West 2019); VA. CODE ANN. § 19.2-295 (West 2007). Likewise, sentencing is conducted by the judge in all federal courts. FED. R. CRIM. P. 32.

[10] "[C]riminal law . . . is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability." Mullaney v. Wilbur, 421 U.S. 684, 697-98 (1975).

demand, the only check a jury has against the coercive power of the state is to bend the truth through nullification.[11]

Advocates for expanding the jury's role in sentencing point to the reemergence of retributivism as the leading theory of punishment and the comparative superiority of juries in defining just deserts.[12] Opponents, however, suggest a jury's cure is worse than the disease, characterizing juries as incompetent, emotionally irrational, and erratic.[13] They argue that if sentencing is left to untrained laypeople, not only will it threaten truth-finding by enabling jury compromise,[14] but it will produce fickle and unfair outcomes,[15] deteriorating the confidence society places in the rule of law itself. In other words, although the tyranny of the state should be feared, so too should the tyranny of the crowd.[16] Not only is the jury's current limited role traditionally and constitutionally supported,[17] but the judge, it is argued, represents the best alternative for applying the law in an objective, unprejudiced, and consistent manner.[18] Furthermore, jury competence aside, expanding the jury's role as sentencer will impose additional procedural costs onto a court system already overburdened and under-resourced.[19]

Reasonable minds can and do disagree on whether a jury is suited to assume responsibility for noncapital criminal sentencing. This Note does not seek to settle that debate. Instead, it proposes a modest procedural inclusion of the jury at the criminal

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[11] Juror nullification refers to the power of jurors to return verdicts that are counter to both the law and the evidence. Irwin A. Horowitz, Norbert Kerr, Ernest Park & Christine Gockel, *Chaos in the Courtroom Reconsidered: Emotional Bias and Juror Nullification*, 30 LAW AND HUMAN BEHAVIOR 164 (2006). Although documented incidents of juror nullification are rare, when juries do nullify, it is typically due to a perception that the law or its consequences are unfair. Mary Claire Mulligan, *Jury Nullification: Its History and Practice*, COLO. LAW., Dec. 2004, at 71, 75. For this reason, some observers contend that juror sentencing authority actually negates juror nullification. *See* Comment, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400, 409 (1950) (suggesting nullification can be eliminated by permitting juries to recommend mercy thereby "eas[ing] their consciences . . . by convincing themselves that the penalty will be light.").

[12] Ring v. Arizona, 536 U.S. 584, 614-16 (2002) (Breyer, J., *concurring*); *see* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 991-92 (2003); Iontcheva, *supra* note 3, at 350.

[13] *Duncan*, 391 U.S. at 157.

[14] Compromise verdicts are verdicts resulting from situations in which jurors agree to a lighter sentence in order to break deadlocks on guilt. Hoffman, *supra* note 12, at 989.

[15] 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).

[16] James Madison, while discussing how a representative democracy can ensure the triumph of critical reason over irrational desire, maintained that "it is the reason of the public alone that ought to controul and regulate the government. [But] [t]he passions [of the public] ought to be controuled and regulated by the government . . . Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob." 10 JAMES MADISON, THE PAPERS OF JAMES MADISON 505 (Robert A. Rutland et al eds., Univ. of Chicago Press 1977).

[17] *See* Hoffman, *supra* note 12, at 967, for a discussion on how the dominance of judicial sentencing in state and federal courts resulted from an historical accident. See Hoffman, *supra* note 12, at 972, for a discussion on jury sentencing as it relates to the evolution of Sixth Amendment jurisprudence.

[18] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 7-8 (1998); William W. Schwarzer, *Judicial Discretion in Sentencing*, 3 FED. SENT'G REP. 339, 339 (1991).

[19] Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, 55 J. MO. B. 14, 14-15 (1999).

sentencing stage which relies on neither a radical shift in Sixth Amendment jurisprudence nor a voluntary abdication of judicial sentencing discretion. This Note proposes the adoption of a criminal advisory jury; specifically, one used for noncapital criminal sentencing. To some extent, the idea parallels the current availability of advisory juries in civil cases; however, the proposal does not mirror the civil advisory jury in full. Although this Note's proposal involves multiple facets, its underlying premise is that the use of advisory juries for noncapital criminal sentencing represents a sensible compromise between jury sentencing advocates and jury sentencing opponents by allowing for a community voice at the punishment phase of trial without inviting the significant inefficiencies, potential inconsistencies, or possible mistakes that some fear juries may produce.[20]

This Note proceeds in three parts. Part I provides background for understanding how jury sentencing has evolved over time into its current, limited role and how modern policy arguments weigh against its expansion. Part II examines ways in which both formal and informal advisory juries are currently being used in litigation. This includes the formalized civil advisory jury, non-binding jury sentencing schemes currently in force in a minority of jurisdictions, and informal jury opinions sought or permitted by judges during sentencing. Lessons derived from these examples help shape the criminal advisory jury proposal. Part III outlines that proposal.

I. BACKGROUND

Before discussing the criminal advisory jury proposal, some context is warranted. Neither the history detailed next nor the overview of the jury sentencing debate which follows is meant to be exhaustive. Instead, it simply provides the framework necessary to claim, as the subtitle does, why this proposal represents a compromise.

A. History of Jury Sentencing

In the American legal system today, noncapital criminal jury sentencing is viewed as an anachronism. Only six states preserve some form of the practice.[21] Although the conventional wisdom has trended away from jury sentencing, understanding the historical underpinnings of that trend is necessary for countenancing change. Like most good legal origin stories in this country, the history of jury sentencing begins in England.

Although the ancient Greeks and Romans used juries to decide both guilt and punishment, England had no jury tradition until William the Conqueror established the institution toward the end of the eleventh century.[22] Even after the Norman Conquest, however, jury trials remained exceedingly rare until the medieval alternatives of trial by combat, compurgation, and ordeal began to fall into disrepute around the mid-1200s.[23]

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[20] *See supra* note 15.
[21] *See supra* note 9.
[22] LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 2-3, 13-19 (2d ed. 1988).
[23] 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 37-40 (2d ed. 1898). Trial by combat disappeared by the end of the reign of Edward III in the late-1300s. EDWARD J. WHITE, LEGAL ANTIQUITIES 118 (1913). Trial by compurgation, which involved the accused taking an oath of innocence and then calling a sufficient number of "oath helpers"—often twelve—to vouch under oath to the accused's trustworthiness, ROBERT VON MOSCHZISKER, TRIAL BY JURY §§ 43-45 (2d ed. 1930), was officially banned in 1166 by Henry II. MOORE,

While the rise of juries tempered the cruelty of criminal trials, criminal punishment remained particularly harsh for centuries longer.[24] For instance, almost all serious crimes through the 1600s in England carried the death penalty.[25] For less serious crimes, the punishment was banishment;[26] and for petty crimes, the punishment was either corporal punishment or fines.[27] More importantly, these punishments were mandatory.[28]

This combination—harsh punishments strictly attached to particular offenses—created two practical consequences: first, although in many instances the judge formally imposed punishment, the judge's lack of discretion meant the punishment was set de facto by the jury's verdict.[29] Second, if juries believed the harsh punishments—especially death—were not justified, they often refused to convict.[30] These "pious perjuries," as Blackstone dubbed them (because the jury's refusal to convict reflected a pious yet perjurious violation of their oath), fostered a mistrust of juries among the Crown's judges.[31] Consequently, over the centuries, these king-made judges helped develop an English common law that deprived juries of any formal sentencing authority.[32] This English common law followed American colonists to the new world. It was also this English common law that many American states rejected.[33]

Enthusiasm for self-government and memories of arbitrary Crown-appointed judges motivated many early American states to adopt jury sentencing.[34] An expansion of noncapital sentencing options—particularly made possible by the invention of the penitentiary in 1790 by Pennsylvanian Quakers[35]—also reduced institutional fear of "pious perjuries" and increased trust in oath-honoring juries.[36] Indeed, it was a *mistrust* of elitist, unelected judges that helped expand the use of jury sentencing even as memories of English oppression faded.[37] Although historical records of colonial sentencing practices are almost

supra note 22, at 37-38. Trial by ordeal typically required the accused to survive carrying hot irons or walking over hot coals or to survive being thrown into a pond with their hands bound. VON MOSCHZISKER, *supra*, § 49. The ordeal was banned by Pope Innocent III in 1215. JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT § 28 (F.B. Rothman 1986) (1877).

[24] 4 WILLIAM BLACKSTONE, COMMENTARIES at *98.

[25] *Id*.

[26] John H. Langbein, *Shaping the Eighteenth-Century Jury: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36-37 (1983).

[27] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed. 1990).

[28] 4 BLACKSTONE, *supra* note 24, at *396.

[29] THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 98 (1985).

[30] 4 BLACKSTONE, *supra* note 24, at *238-39.

[31] *Id*.

[32] *See generally* Hoffman, *supra* note 12, at 963; Iontcheva, *supra* note 3, at 310.

[33] *See* Edward A. Linden, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970-71 (1967); Craig Reese, *Jury Sentencing in Texas: Time for a Change*, 31 S. TEX. L. REV. 323, 326-27 (1990).

[34] *See* Charles O. Betts, *Jury Sentencing*, 2 NAT'L PROB. & PAROLE ASS'N J. 369, 370 (1956).

[35] NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4-5 (1974).

[36] Hoffman, *supra* note 12, at 963-64. For example, in 1796, Virginia formally adopted jury sentencing for all criminal offenses in the same reform legislation which adopted imprisonment as the punishment for a variety of felonies. Act of Dec. 22, 1796, §§5-15, 1796 Va. Acts ch. 2.

[37] EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 96-97 (1944). Hostility towards judges who were unresponsive to the popular will grew throughout the nineteenth century, and many states adopted jury sentencing in concert with the movement in the mid-to-late-1800s towards an elective judiciary. *Id.* at 80-135.

nonexistent,[38] it is clear that from 1800 to 1900 roughly half of all states used juries to impose noncapital criminal sentences.[39] Even in those states that did not employ jury sentencing, strict determinative sentencing schemes allowed juries to indirectly dictate sentencing through their verdict just like their English predecessors.[40]

American ideals throughout this era regarded juries as the epitome of decentralized democracy.[41] The jury, as a deliberative democratic institution, represented an essential feature of self-government and a necessary check against unjust legislation and arbitrary judicial power.[42] In fact, during this era, the jury right was viewed not as a right of the defendant but rather as a right of the community.[43] In this vein, juries not only determined matters of fact, but in partnership with judges, determined matters of law.[44] It was not until 1895 that the Supreme Court declared questions of law to be outside the jury's province.[45] This change, however, signaled a shift in values. Thereafter, the twentieth century would see an erosion of jury authority—and consequently, a decline of jury sentencing.[46]

By 1910, progressive beliefs in the possibility of rehabilitation began to prioritize utilitarianism and legal expertise over retributivism and community wisdom.[47] Legal institutions viewed criminal law not as a system to punish criminals for their immoral acts but rather as a system to cure them of their antisocial behavior. The idea that lay jurors could administer these quasi-medical procedures appeared nonsensical.[48] Instead, Congress and state legislatures created a class of professional parole officers, commissioners, and criminal justice experts to help in determining defendants' actual punishment.[49] The rise of law schools and the professionalization of the bar further

[38] Hoffman, *supra* note 12, at 963, n.43.
[39] Wright, *supra* note 15, at 1373.
[40] Iontcheva, *supra* note 3, at 319.
[41] 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 . . .").
[42] Matthew P. Harrington, *The Law-Finding Function of the American Jury*, WIS. L. REV. 377, 395-96 (1999).
[43] In 1930 the Supreme Court authorized defendants for the first time to waive jury trials and choose bench trials, thereby implying that before then defendants were not the principal beneficiary of the jury system. *See* Patton v. United States, 281 U.S. 276, 297-98 (1930).
[44] Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 173 (1964). A legal theory of natural law, which held that higher values intrinsic to human nature could be deduced and applied independent of black-letter law, supported the predominant political philosophy of the eighteenth and early-nineteenth centuries. *Id.* at 172. Because natural law was thought to be accessible by ordinary people, judges of this era frequently advised juries that they were not bound by the court's instructions and could judge the law themselves. *Id.* at 174. It was generally thought, however, that jurors would only disregard court instructions in unusual cases. *Id.* at 172, n.15.
[45] Sparf v. United States, 156 U.S. 51, 102-03 (1895).
[46] *See* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1510-11 (2001) ("The number of jurisdictions that allowed any jury sentencing in non-capital cases dwindled by the mid-twentieth century to thirteen states.").
[47] *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 16-17 (1998).
[48] *See* Hoffman, *supra* note 12, at 965-66, n.55.
[49] Iontcheva, *supra* note 3, at 326.

increased perception of disparate capabilities between lawyer and layman.[50] In turn, judges—equipped with criminologist-crafted pre-sentence reports and their own legal expertise—assumed juries' sentencing duties.[51] By the 1970s, however, the rehabilitative model was under attack.

The rehabilitative model's attempts at individualized treatment of offenders produced gross disparities between punishments issued to different defendants of similar crimes.[52] These disparities, it was perceived, were based in large part on judges' ideological or emotional dispositions.[53] Additionally, the growth in violent crime in the late 1960s and 1970s prompted observers to question the feasibility of "curing" defendants.[54] Thus, retributivism returned to fashion.[55] However, the chosen solution for unequal treatment among defendants and the irrationality of some judicial decision making was not to return to the collective wisdom of twelve impartial jurors; it was something else: math.[56]

By the 1980s, sentencing guidelines and mandatory sentencing laws became popular among the states, and Congress followed suit with the Sentencing Reform Act of 1984.[57] These sentencing guidelines offered a form of predictable determinative sentencing which could be applied even-handedly to all defendants.[58] Just deserts were thus derived not from moral judgments, but from legislatively enacted formulas that applied an array of objective criteria to calculate punishment.[59] And, of course, the pendulum swung. The criminal justice community soon observed that not only were the guidelines unmoored from community sentiment,[60] but they were brutally inflexible.[61] Truly individualized punishment for defendants was a mirage, as the guidelines sharply constrained judicial discretion.[62] Under the guidelines, judges retained marginal leeway on how to apply sentencing factors within formulaic constraints, but juries' voices were excluded entirely.[63] Enter Charles Apprendi.

In 2000, the Supreme Court's decision in *Apprendi v. New Jersey* was a major turning point for jury sentencing power.[64] The case centered on the sentencing of Charles

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[50] CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 3-28 (1980).
[51] *See* Iontcheva, *supra* note 3, at 326-27.
[52] *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 133 (1969).
[53] 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.").
[54] Iontcheva, *supra* note 3, at 327.
[55] *See id.* at 327-28.
[56] *Id*.
[57] *Id.* at 328-29.
[58] 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.).
[59] *See generally* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 39-40 (1988).
[60] Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 CRIME & DELINQ. 337, 354 (1987).
[61] Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CAL. L. REV. 61, 63 (1993). Along with the establishing sentencing guidelines, most sentencing reform efforts (including at the federal level) abolished parole. Iontcheva, *supra* note 3, at 329.
[62] Iontcheva, *supra* note 3, at 329-30.
[63] *Id.*
[64] Apprendi v. New Jersey, 530 U.S. 466 (2000).

Apprendi following his New Jersey conviction for unlawful firearm possession.[65] In New Jersey, this "second-degree" offense carried a punishment of five to ten years imprisonment.[66] However, at sentencing and in accordance with a separate New Jersey "hate crime" statute, the trial judge found by a preponderance of the evidence that Apprendi's "crime was motivated by racial bias."[67] This finding mandated an extended term of ten to twenty years imprisonment, and the trial judge sentenced Apprendi to twelve.[68]

In a 5-4 decision, Justice Stevens explained that due process and the impartial jury trial right, taken together, require that any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.[69] Until this point, legislatures were free to delineate between "elements" of an offense and "sentencing factors," even though the difference was purely semantic.[70] Within this dichotomy, only elements needed to be charged in the indictment and found by a jury beyond a reasonable doubt while sentencing factors could be found by the judge by a preponderance of the evidence.[71] Not any longer. Because Apprendi's judge—not his jury—found his second-degree offense to be racially motivated (a sentencing factor that increased Apprendi's penalty beyond the statutory maximum), the extended term mandatorily applied to his conviction was unconstitutional.[72]

Although *Apprendi*'s holding was limited to sentencing guideline factors that increased the sentence beyond the statutory maximum, *Apprendi*'s progeny quickly expanded its reach.[73] Immediately after *Apprendi*, judges were still free to be the factfinders for guideline-mandated sentencing factors that increased the sentence so long as the increase stayed within the offense's statutory limits.[74] By 2004, however, the Court made clear that the Sixth Amendment reserves to the jury the "function of finding the facts essential to lawful imposition of the penalty."[75] Thus, "[a]ny fact that, *by law*, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."[76] This meant that any increase invoked *Apprendi* protections, not just

[65] *Id.* at 469-70.
[66] *Id.* at 469.
[67] *Id.* at 471.
[68] *Id.* at 469, 471.
[69] *Id.* at 468, 476-77, 490.
[70] "[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements *included in the definition of the offense* of which the defendant is charged. . . . [T]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged in any given case." *McMillan*, 477 U.S. at 85 (quoting Patterson v. New York, 432 U.S. 197, 210-11, n. 12 (1977) (internal quotations removed).
[71] *Id.* at 86.
[72] *Apprendi*, 530 U.S. at 491-92.
[73] In *Ring v. Arizona*, the Court applied *Apprendi* to overrule *Walton v. Arizona*, 497 U. S. 639 (1990)—a case upholding a capital sentencing system that permitted judges rather than juries to find the specific aggravating factors justifying the imposition of death in capital sentencing proceedings. 536 U.S. at 588-89. Additionally, although the Court in *Harris v. United States*, 536 U.S. 545 (2002), initially distinguished between facts that increase a statutory maximum and facts that increase only a mandatory minimum, this "inconsistency" was overruled in *Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013).
[74] *Apprendi*, 530 U.S. at 481.
[75] Blakely v. Washington, 542 U.S. 296, 308-09 (2004).
[76] *Alleyne*, 133 S. Ct. at 2155 (emphasis added).

those which exceeded statutory maxima. Judges were still able to exercise their discretion (including considering evidence that was not admissible at trial) to impose sentences within the range prescribed by statute; however, sentencing guidelines could no longer *legally compel* a particular sentence based on any fact not found by the jury.[77] This revelation logically implied one of two results: either every aggravating fact inherent within sentencing guidelines' computational schemes would need to be tried before a jury (thereby giving juries de facto control over sentences by way of their verdicts much as they had in bygone eras) or the sentencing guidelines could no longer carry the force of law. The Supreme Court chose the latter; sentencing guidelines became advisory.[78]

In a watershed moment for the Sixth Amendment's right to a jury trial, *Apprendi* brought an end to more than two decades of determinate sentencing strictly controlled by legislatures and mandatory sentencing guidelines. The void, however, was filled not by juries but by expansive judicial discretion. Somewhere between when the penological sciences of the rehabilitative era first displaced jury sentencing and when the cold calculations of determinative sentencing proved unworkable, the criminal justice community lost trust in the jury. A mere four years after *Apprendi*, the momentum towards jury sentencing turned into nothing more than a swap-and-replace with judges. It is important to note, however, that the *Apprendi* line of cases was never about jury sentencing. It was simply about what sentencing-relevant facts the jury had to find while deciding guilt. Criminal defendants do not have a right under the Sixth Amendment to have their sentences imposed by juries.[79] Interestingly, for most of our nation's history, this fact was nothing more than an unarticulated assumption.[80] It was not until 1986 when the Supreme Court first made it explicit (albeit with no significant historical discussion).[81] Nevertheless, remnants of jury sentencing survive to this day.[82]

This short history of jury sentencing serves two purposes. First, it demonstrates that for jury sentencing advocates, the solution is statutory, not constitutional. The Sixth Amendment of course does not bar expanded jury sentencing, but it surely will not be its savior. Secondly, it shows that the decline of jury sentencing over the centuries has been for reasons that alone do not settle the debate around jury sentencing. Jury sentencing originated in America as a democratic check against judicial overreach and coercive state power. It was abandoned for an experiment with utilitarian ideas of rehabilitation. That experiment has since failed. Thus, today, the jury sentencing debate hinges exclusively on policy.

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[77] *Id.* at 2163.
[78] United States v. Booker, 543 U.S. 220, 246 (2005). The guidelines, even in advisory form, still retain some legal significance. For instance, the standard for appellate review of sentences is unreasonableness, *Booker*, 543 U.S. at 261, and a trial judge's compliance with the guidelines affords their chosen sentence a presumption of reasonableness, Rita v. United States, 551 U.S. 338, 340 (2007).
[79] *McMillan*, 477 U.S. at 93.
[80] Spaziano v. Florida, 468 U.S. 447, 459 (1984) ("The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.").
[81] *McMillan*, 477 U.S. at 93 ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."). As Judge Hoffman explains: "There was surprisingly little discussion of the right to a jury trial in the records of the constitutional debates, let alone any discussion of whether juries in criminal cases should continue the colonial practice of imposing sentences." Hoffman, *supra* note 12, at 967.
[82] *See supra* note 9.

B. Jury Sentencing Policy Arguments

Proponents of jury sentencing tend to be in the minority. The federal government does not use juries for noncapital criminal sentencing, nor do forty-four of the fifty states.[83] Although history explains the growth of judicial sentencing, it does not justify the distrust of jury sentencing. Instead, resistance to jury sentencing is often supported by one of four propositions regarding jury competence: (1) jurors are more susceptible to prejudice than judges; (2) jury sentences are less uniform than those imposed by judges; (3) juries are harsher than judges; and (4) jury sentencing encourages compromise verdicts.[84]

While these criticisms of jury competence remain debatable, the question of their veracity is largely irrelevant to this Note's proposal. The criminal advisory jury proposal, as will be discussed in Part III, results in nothing more than a non-binding sentencing recommendation. So, even if juries are truly more biased, inconsistent, or harsher than judges, the design mitigates these risks by preserving judicial sentencing autonomy. Similarly, additional procedural safeguards of the design address the concern that jury sentencing will encourage compromise verdicts. These procedural safeguards are also explained in Part III.

Although the criticisms of jury sentencing do not apply with equal force to criminal advisory juries, they do represent prevailing viewpoints. For this reason, it is worthwhile to address counterpoints. The first criticism regards the susceptibility of juries to prejudice. Any claim that juries are susceptible to prejudice requires acknowledging that judges are too. The rejection of the rehabilitative model in the 1970s was, in part, due to its perceived vulnerability to judicial prejudice.[85] Of course, the criticism is not that judges are insusceptible to prejudice, it is that they are less susceptible than juries. However, social science does not support this notion.

For instance, following Alabama's abandonment of jury sentencing in 1978, one study compared the disparity between judge and jury sentences for robbery convictions. Researchers found no statistically significant race-based differences existed.[86] Another study examined ordinary people's views on appropriate punishment for actual crimes.[87] The study compared these views across different racial, gender, and educational groups and found that while different groups held different views on punishment, views *within* each group were remarkably consistent.[88] The implication is that the risk of prejudice from one person, whose membership in a particular group may skew his or her viewpoint, may be less than the risk of prejudice from twelve people, whose memberships in different groups will force them to accommodate different viewpoints.

The second criticism regards jury inconsistency. The proposition is that jury sentencing is less uniform and hence more unpredictable than judicial sentencing. Here, the empirical evidence is inconclusive. Studies directly addressing the question have

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[83] *Id.*
[84] Hoffman, *supra* note 12, at 985-86.
[85] See *supra* note 53 and accompanying text.
[86] 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, 3-6 (1984).
[87] Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's Views*, 14 LAW & SOC'Y REV. 223, 234-48 (1980).
[88] *Id.*

achieved mixed results.[89] At the very least, however, these studies do not bolster the claim that jury sentencing results in significantly more inconsistency than judicial sentencing.[90] Although a comparison of sentencing among *all* juries with sentencing among *all* judges is inconclusive, it is fair to presume that sentencing from an *individual* judge is more consistent (considering an individual jury never hears more than one case).[91] Thus, the more pressing questions policymakers face are: one, what is the right balance between consistency and individualized treatment; and two, what level of consistency warrants exclusion of community participation.

Finally, the third criticism regards jury harshness. Again, the proposition is that jury sentences are harsher than judge sentences. Research, again, reveals this to be specious. Quantitative comparisons of judge and jury sentence lengths must account for disparities between judge and jury sentencing procedures. In other words, a longer sentence may result not from a jury's harsher propensity, but from informational and power inequities between judge and jury.[92] For instance, juries in some states are not authorized the full range of sentencing options available to judges, such as probation or community service.[93] Juries are also not always provided accurate information about parole eligibility and thus may overestimate release probabilities.[94] Further, in some jury sentencing jurisdictions, statutory minimum sentences bind juries while not binding judges.[95] All of these disparities increase the likelihood that a jury sentence will be harsher than a judge sentence.[96]

Although jury *sentences* may be harsher than judge sentences for the reasons stated above, a large body of empirical evidence suggests that actual *jurors* are more lenient than judges.[97] One observer explains:

> Researchers who delve more deeply than general survey and poll questions have discovered a paradox: 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.[98]

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[89] Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1796-97 & n.100 (1999).
[90] *Id. But see* Smith, *supra* note 86, at 1 (concluding that "while states utilizing judge sentencing gave more consistent sentences from 1957 to 1977, recent trends indicate that the disparity in judge sentencing has risen to a level that approximates the disparity in jury-imposed sentences").
[91] *See* Hoffman, *supra* note 12, at 987-88.
[92] Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 888 (2004).
[93] *Id.* at 900.
[94] *Id.* at 899.
[95] *Id.* at 911.
[96] *Id.* at 888-89.
[97] *See* BRIAN H. BORNSTEIN & EDIE GREENE, THE JURY UNDER FIRE: MYTH, CONTROVERSY, AND REFORM 286 (2017); Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 BEHAV. SCI. & L. 73, 74-81 (1989); Hoffman, *supra* note 12, at 988-89; Lanni, *supra* note 89, at 1793-94.
[98] Lanni, *supra* note 89, at 1781.

The reason for this phenomenon, as behavioral research shows, is that laymen systematically misperceive the seriousness of the typical crime for a particular offense.[99] This misperception is caused in part by a media bias toward reporting the most heinous crimes and in part by a natural psychological tendency—known as the "availability heuristic"—that leads subjects to recall more easily stories of atypically severe crimes.[100]

So, there is a disconnect between the public's general call for harsher penalties and citizens' more lenient response when confronted with specific crimes. Unfortunately, this public call translates into an electoral preference for officials who are "tough on crime" and incentivizes legislative overenthusiasm for harsh punishment.[101] The ultimate result is a sentencing scheme that is—from the perspective of citizens sitting in the jury box—overly severe.[102]

To illustrate, consider a study by United States District Judge James Gwin of the Northern District of Ohio. Postulating that the Federal Sentencing Guidelines were not reflective of community sentiment, Judge Gwin surveyed jurors in twenty-two criminal cases following their return of a guilty verdict.[103] Judge Gwin asked each juror individually to recommend a punishment for the defendant they just convicted.[104] Out of 261 total responses, 229 jurors (88%) recommended a sentence below the Federal Sentencing Guidelines' minimum for the offense.[105] In fact, the jurors' recommended sentence was on average less than half of the Guidelines' minimum sentence and a third of the Guidelines' maximum.[106] Interestingly, jurors' average recommended sentences were only longer than the Guidelines' recommended sentence in white-collar cases.[107]

These white-collar cases involved criminal offenses akin to the following. In November 2019, a jury convicted Roger Stone—a longtime Republican operative and friend of President Donald Trump—of seven felony counts, including lying to authorities, obstructing a congressional investigation, and witness intimidation.[108] In accordance with sentencing guidelines, federal prosecutors recommended a sentence of seven to nine years in prison.[109] Before a sentence was imposed, however, President Trump publicly decried the recommended sentence as politically motivated and overly harsh.[110] This instigated a national controversy, prompted the United States Attorney General to personally intervene and overrule his prosecutors' recommendation, and led some to publicly accuse the judge

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[99] *See* Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals' Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333, 342 (1990).
[100] *See* Loretta J. Stalans, *Citizens' Crime Stereotypes, Biased Recall, and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources*, 17 LAW & HUM. BEHAV. 451, 453, 468 (1993).
[101] Lanni, *supra* note 89, at 1782.
[102] *Id.* at 1776.
[103] James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 174 (2010).
[104] *Id.*
[105] *Id.* at 188.
[106] *Id.* at 189.
[107] *Id.*
[108] Sharon LaFraniere, *Roger Stone is Sentenced to Over 3 Years in Prison*, N.Y. TIMES, Feb. 20, 2020, at A1.
[109] Peter Baker, Maggie Haberman & Sharon LaFraniere, *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES, July 10, 2020, at A1.
[110] *Id.*

in the case of being a Democratic activist (along with calls for her impeachment).[111] Ultimately, the judge—United States District Judge Amy Berman Jackson of the District of Columbia—imposed a three-and-a-half-year sentence.[112] Yet, in the midst of the furor, at no point while Judge Jackson, the prosecutors, President Trump, and the national media were debating the fairness of Roger Stone's sentence was the jury in the case asked what sentence they would consider fair. It presents an interesting hypothetical as to how the opinion of twelve anonymous citizens, affected only through civic duty and undistracted by extrinsic concerns, may have depoliticized the sentencing and quelled the public turmoil.

In summary, although juries may issue harsher sentences than judges, this has less to do with punitive preferences and more to do with procedural sentencing disparities. Meanwhile, the notion that individual jurors are overly harsh is a myth. More disturbingly, both sentencing statutes and judicial sentences are largely detached, if not divergent, from community preference. Juries are inherently better than judges at reflecting the conscience of the community and expressing public outrage for the transgression of community norms. Yet today, in the vast majority of jurisdictions, juries have no say in sentencing. Defending herself against public accusations of unfairness in the Roger Stone case, Judge Jackson scoffed, saying "[T]he guidelines are harsh. I can assure you that defense attorneys and many judges have been making that point for a long time, but we don't usually succeed in getting the government to agree."[113] Juries, on the other hand, may well agree. Thus, it is this Note's contention that judges should start asking their opinion.

II. HOW JURIES ARE CURRENTLY USED IN AN ADVISORY FORM

Per the Federal Rules of Civil Procedure, a formal advisory jury is a jury impaneled to provide a judge with non-binding recommendations in civil cases where the parties are not otherwise entitled to a jury.[114] In practice, judges use formal advisory juries in exceptional cases to either affect procedural consistency or solicit community input.[115] However, other informal forms of advisory juries also exist. For instance, in the six states that use juries for noncapital criminal sentencing, all states but Texas allow the judge to override the jury sentence.[116] Kentucky, for example, expressly holds their jury sentences

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[111] Scott Morefield, *Tucker Carlson Calls for Roger Stone Judge's Impeachment: "Democratic Activist Wearing Robes,"* THE DAILY CALLER (Feb. 20, 2020, 10:21 PM), https://dailycaller.com/2020/02/20/tucker-carlson-amy-berman-jackson-roger-stone.

[112] Darren Samuelsohn & Josh Gerstein, *Roger Stone Sentenced to Over 3 years in Prison*, POLITICO (Feb. 20, 2020, 4:33 PM), https://www.politico.com/news/2020/02/20/roger-stone-sentenced-to-over-three-years-in-prison-116326.

[113] *Id*.

[114] FED. R. CIV. P. 39(C).

[115] Note, *Practice and Potential of the Advisory Jury*, 100 HARV. L. REV. 1363, 1366, 1369 (1987).

[116] *See* ARK. CODE ANN. § 16-90-107 (West 2015); KY. REV. STAT. ANN. § 532.070 (West 1974); MO. ANN. STAT. § 557.036 (West 2017); OKLA. STAT. ANN. tit. 22, § 928.1 (West 1999); VA. CODE ANN. § 19.2-295 (West 2007);
see also Beasley v. State, 718 S.W.2d 304, 305 (Tex. App. 1985) ("[O]nce a jury verdict assessing punishment has been received by the court and entered of record, the trial court is not entitled to change the verdict of the jury." (citing Smith v. State, 479 S.W.2d 680, 681 (Tex. Crim. App. 1972))).

to be non-binding.[117] Because ultimate judicial control is preserved in these states, their jury sentences are, in effect, advisory.

Additionally, in rare cases, juries have also contributed to sentencing decisions in more unorthodox ways. In these cases, judges act outside express procedural authority to either direct jury sentencing participation (e.g., by polling juries' opinions)[118] or tolerate it (e.g., by permitting jury statements at sentencing hearings).[119] Either way, the juries only provide advice. Accounting for these instances, as well as the formal advisory jury and non-binding state sentencing practices, a broad definition of an advisory jury includes any jury whose decisions on trial questions are not given determinative effect but are solicited or offered to guide a judge's ultimate adjudication.

With that definition in mind, an examination of the current practices of advisory juries (at least of those forms relevant to sentencing)[120] will be helpful in developing a form suitable for use in noncapital criminal sentencing. This Part begins that examination with a discussion of the civil advisory jury, followed by an analysis of state jury sentencing in felony trials, and ends with a few examples of when informal advisory juries may arise in criminal sentencing. Building on this discussion, Part III follows with recommendations for a formal advisory jury suited for noncapital criminal sentencing.

A. Civil Advisory Juries

Rule 39(c) of the Federal Rules of Civil Procedure provides that "[i]n all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury . . ."[121] Thus, in civil trials when the Seventh Amendment does not afford litigants a jury right,[122] the court has the option to impanel an advisory jury. The practice is not a modern innovation; the use of advisory juries in civil court extends as far back as the fourteenth century.[123] Historically, juries only served as formal fact finders in courts of law; however, in courts of equity, chancellors could impanel an advisory jury to assist in deciding cases.[124] Upon the merger of law and equity in 1937, the Federal Rules of Civil Procedure formally adopted the advisory jury,[125] and most states have since followed suit.[126]

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[117] *See* Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001) (stating that a jury's sentencing recommendation has no mandatory effect).

[118] *E.g.*, United States v. Collins, 828 F.3d 386, 387-88 (6th Cir. 2016).

[119] *E.g.*, State v. Mahoney, 444 N.J. Super. 253, 258 (App. Div. 2016).

[120] For instance, the use of juries for Summary Jury Trials is a form of advisory jury not particularly relevant to this discussion. A Summary Jury Trial is an alternative dispute resolution method rather than a trial procedure. *See generally* Molly M. McNamara, *Summary Jury Trials: Is There Authority for Federal Judges to Impanel Summary Jurors?*, 27 VAL. U. L. REV. 461 (1993).

[121] FED. R. CIV. P. 39(C).

[122] The Seventh Amendment to the United States Constitution provides: "In Suits at common law, . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII. In practice, the Seventh Amendment protects a litigant's right to a jury trial only if the cause of action is legal in nature (as opposed to equitable) and it involves a matter of private right. *See* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 42 (1989).

[123] *See* Richard E. Guggenheim, *A Note on the Advisory Jury in Federal Courts*, 8 Fed. B. Ass'n J. 200, 200 (1947).

[124] JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 39.40[1] (3d ed. 1999).

[125] FED. R. CIV. P. 39.

[126] *See, e.g.*, Ala. R. Civ. P. 39(c); Alaska R. Civ. P. 39(c); Ariz. R. Ct. 39(k); Ark. R. Civ. P. 39(c).

Today, as it was historically, an advisory verdict from a civil advisory jury is not binding upon the court,[127] but "is only part of the data taken into consideration in arriving at the court's independent conclusion."[128] When an advisory jury is used, the case is still formally tried before the judge, who must enter findings of both law and fact.[129] The decision to use an advisory jury, as well as their management once impaneled, is not subject to any formal constraints or guidelines.[130] Thus, given that a judge has absolute discretion to call, manage, and disregard a civil advisory jury, the advisory jury presents essentially no issues for appellate review.[131] For these reasons, judges are not obligated to (and rarely do) explain why they are calling civil advisory juries in the first place.[132]

Although judges are not required to explain their rationale for impaneling an advisory jury, the practice is generally utilized for two reasons: procedural consistency or community involvement.[133] The first rationale—procedural consistency—may be present when the line between law and equity is seen as arbitrary, irrationally resulting in a jury right for legal controversies but not for analogous equitable controversies.[134] For instance, a jury right would exist in a legal action stemming from a contract dispute, but not for an equitable action stemming from a deed or promissory note.[135] Also, an action for damages would confer a jury right if the case was brought in a court of law but not for the same action brought in an admiralty court.[136] In these situations, advisory juries may be desirable as a means to affect procedural consistency. Advisory juries may also provide consistency (and avoid disparate treatment of co-defendants) in complex cases involving co-defendants with common evidence but unequal jury rights (e.g., if a private party and the United States government were joined as co-defendants).[137]

The second rationale—community involvement—may be present when community opinion is sought to support rulings in highly-charged litigation.[138] An example of this is the civil lawsuit brought in the wake of the 1993 tragedy in Waco, Texas.[139] The infamous incident involved a siege by federal law enforcement agents of a compound owned by cult leader David Koresh.[140] As law enforcement attempted to breach the compound, it caught

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[127] Kohn v. McNulta, 147 U.S. 238, 240 (1893) ("But such verdict is not binding upon the judgment of the court. It is advisory simply, and the court may disregard it entirely, or adopt it either partially or in toto.").
[128] Birnbaum v. United States, 436 F. Supp. 967, 988 (E.D.N.Y. 1977), *remedy modified on other grounds*, 588 F.2d 319 (2d Cir. 1978).
[129] FED. R. CIV. P. 52(a).
[130] *See* Jon R. Waltz, *Judicial Discretion in the Admission of Evidence Under the Federal Rules of Evidence*, 79 NW. U.L. REV. 1097, 1103 (1984).
[131] Cox v. Babcock & Wilcox Co., 471 F.2d 13, 14 (4th Cir. 1972); American Lumbermens Mut. Casualty Co. v. Timms & Howard, 108 F.2d 497, 500 (2d Cir. 1939).
[132] CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2335 (5th ed. 2019).
[133] *Practice and Potential of the Advisory Jury*, *supra* note 115, at 1366, 1369.
[134] *Id.* at 1366.
[135] *Id.*
[136] *Id.* at 1366-67.
[137] *Id.* at 1369.
[138] Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 186-87, 222 (2003).
[139] Andrade v. United States, 116 F. Supp. 2d 778 (W.D. Tex. 2000).
[140] Sam Howe Verhovek, *Scores Die as Cult Compound Is Set Afire After F.B.I. Sends in Tanks with Tear Gas*, N.Y. TIMES, Apr. 20, 1993, at A1.

fire.[141] The flames quickly engulfed the entire structure and resulted in the deaths—all televised on national media—of nearly eighty men, women, and children.[142] The subsequent lawsuit sought damages under the Federal Tort Claims Act, which authorized suit against the United States but forbade the jury right in such actions.[143] Although the trial was a bench trial, due to the publicity the incident received and the controversy and public outrage it spawned, the federal district judge impaneled an advisory jury per Rule 39(c) as a means to legitimize the judge's ruling.[144] Ultimately, both the judge and the advisory jury held the United States not liable for any of the deaths.[145]

Although the advisory verdict is not binding on the court, the use of an advisory jury is not without consequence. Compared to a bench trial, jury trials impose additional procedural costs that cause increased delays and expenses for the court and litigants alike.[146] For instance, jury trials must be conducted in one continuous block of time whereas bench trials may be scheduled in segments around a court's other business.[147] Jurors require voir dire, and once selected, induce logistical complications associated with managing them.[148] Moreover, the nature of the trial itself changes when a jury—even an advisory one—is involved. Without a jury, the presentation of evidence can be streamlined, and the rules of evidence are typically less contentious.[149] Opening and closing statements are not needed and some live testimony may be replaced by written form.[150] Further, because a jury is a materially different audience than a trial judge, court presentations are approached differently by counsel.[151] This holds true even when the jury is only advisory given that attorneys recognize the advisory jury's persuasive force.[152] By some estimates, these additional procedural considerations cause a trial to run twice as long with a jury than with a judge alone.[153] And, although made-for-jury presentations are not inherently worse than made-for-judge presentations, the simple fact that there is a change demonstrates that the advisory jury, despite being subject to the judge's absolute control and discretion, is not inconsequential at trial.[154]

In addition to the procedural consequences of advisory juries, there are substantive risks associated with using an advisory jury.[155] First, with knowledge that their advisory

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[141] *Id*.
[142] *Id*.
[143] *See* Zabel, *supra* note 138, at 187.
[144] Paul Duggan, *More Upset Than Interested, Waco Awaits Replay in Court: As Branch Davidian Case Nears Trial, City Distances Itself*, WASH. POST, June 9, 2000, at A3 (quoting the plaintiff's counsel as suggesting, given the circumstances, that the judge "recognizes that a jury verdict will be perceived as more fair by the American people than a verdict by a judge who gets his paycheck from the U.S. government.").
[145] *See* Zabel, *supra* note 138, at 186-87.
[146] *Id*. at 207-13.
[147] *Id*.
[148] *Id*.
[149] *Id*.
[150] *Id*.
[151] *Id*. at 213-15.
[152] *Id*. at 215.
[153] *Id*. at 208. *But see Practice and Potential of the Advisory Jury*, *supra* note 115, at 1369 (arguing that the informality and flexibility afforded by advisory juries may substantially reduce the comparative time cost of advisory juries over juries by right).
[154] Zabel, *supra* note 138, at 215.
[155] *Id*. at 216-19.

verdict is optional and non-determinative, juries may become apathetic to their duties.[156] In theory, an advisory jury who believes their decision lacks consequence may deliberate or consider less before reaching a verdict. This perception of the advisory jury as apathetic to its duties undermines an advisory's persuasive force. It also delegitimizes any verdict from a judge perceived to have been swayed by the advisory.[157] Second, advisory jurors who perceive their role as unnecessary or irrelevant may become disillusioned with their personal sacrifice to serve. Asking jurors to take off work or arrange child care merely to give non-binding advice risks stirring public resentment for jury duty in general.[158] Finally, advisory juries always introduce an additional risk for judges who may ultimately have to rule against them.[159] Most judges are surely not eager to openly disregard community viewpoints in a case after voluntarily soliciting them.[160]

In summary, as just one, non-binding factor a judge may consider to independently decide a case, the civil advisory jury is a useful way to solicit community input without relinquishing any judicial decision-making authority. And, when the actual verdict and the advisory verdict are aligned, civil advisory juries help legitimize the outcome. However, this comes at the cost of significant procedural inefficiencies—the same inefficiencies, at least to some extent, that are present in regular jury trials. Further, the non-binding nature of the advisory verdict creates risks that jurors will be less thorough in their duties and less appreciative of serving. And, when actual verdicts and advisory verdicts end up not aligning, a civil advisory jury may do more harm than good to the legal system's legitimacy.

B. States with Noncapital Criminal Jury Sentencing

Only six states allow for jury sentencing in noncapital felony cases: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia.[161] In all of these jurisdictions, juries select their sentence from within a legislatively defined statutory range, which in some cases can be permissively broad.[162] Beyond this, the particulars of each states' sentencing structure vary widely. Professors Nancy King and Rosevelt Noble summarize these variations:

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[156] *Id*.

[157] *Id*. at 219-24.

[158] Public perception of jury duty generally tends to be negative. Prospective jurors often perceive jury duty as time consuming, financially burdensome, culturally biased, mired in formality and legal complexity, or the blameworthy source of unpopular verdicts. These unflattering portrayals of jury duty engender reluctance to serve amongst the citizenry and increase rates of deliberate avoidance. For instance, in a 2002 study by Losh and Boatright of large U.S. cities (including New York City and Los Angeles), only approximately 10% of summoned jurors reported for jury selection. Public perception notwithstanding, empirical studies show that for most jurors who actually serve, the experience is surprisingly satisfying. Nonetheless, of the jurors who are dissatisfied with their experience, inconvenience is the leading cause, and impressions that their time was poorly used is one aggravating factor. BORNSTEIN, *supra* note 97, at 17-19, 21, 24.

[159] Zabel, *supra* note 138, at 220.

[160] *See* King, *supra* note 92, at 941.

[161] *See supra* note 9.

[162] *See, e.g.*, MO. ANN. STAT. § 558.011 (West 2017) (Missouri recognizes five classes of felonies carrying ranges of ten to thirty, five to fifteen, three to ten, zero to seven, and zero to four years.); TEX. PENAL CODE ANN. § 12.32 (West 2009) (The statutory punishment range for first degree felonies in Texas is five to ninety-nine years imprisonment.).

> [S]tates differ as to whether or not trial is bifurcated into guilt and punishment phases; whether or not the prosecutor can veto a defendant's choice to be sentenced by a judge instead of jury; whether or not judicial sentencing is bounded by sentencing guidelines; which felony offenses and offenders may be sentenced by juries; which sentencing options are available to jurors; whether or not the sentences that juries impose are subject to parole; and what information jurors are permitted to learn about punishment options, the offense, and the offender.[163]

Evaluations of state jury sentencing schemes frequently involve comparisons of judge and jury sentences;[164] and the variations that King and Noble summarize distort these comparisons.[165] Regardless, for the purposes of this Note, it is not necessary to analyze in detail the various procedures used to implement jury sentencing and their consequences. Instead, three generalizations suffice: first, in some states that use juries to sentence in noncapital cases, jury sentences are viewed as harsher than judge sentences;[166] second, in these same states, judges retain the authority to modify jury sentences;[167] and third, these judges rarely do.[168] Thus, for an advisory jury proposal premised on the retention of independent judicial decision-making authority, the relevant issue is why judges do not exercise their discretion to correct harsh jury sentences.

One reason may be the default effect. In five of the six states that allow jury sentencing, a jury's sentence forms the presumptive ruling.[169] However, the procedural requirements to overcome this presumption are not necessarily prohibitive. In Virginia, for instance, if a judge wants to modify a jury sentence, the judge "shall file with the record of the case a written explanation of such modification including the cause therefor."[170] In Arkansas it is even easier. There, the trial court may reduce a jury's sentence without providing written justification.[171] And in Kentucky, the fact that the jury sentence is characterized as non-binding implicates unbounded judicial authority to depart from it.[172] Yet, despite the relative procedural ease with which a judge may modify a jury sentence,[173] doing so still requires some additional cognitive effort. This effort creates a psychological

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[163] King, *supra* note 92, at 891-92.
[164] BORNSTEIN, *supra* note 97, at 275.
[165] King, *supra* note 92.
[166] This generalization is based on studies of jury sentencing in Arkansas, Kentucky, Virginia, and—more narrowly—El Paso, Texas. King, *supra* note 92, at 895; Weninger, *supra* note 15, at 31; *see also* King, *supra* note 92, at 888-89 (discussing how procedural variations in jury sentencing practices may account for their harsher sentences).
[167] *See* ARK. CODE ANN. § 16-90-107 (West 2015); KY. REV. STAT. ANN. § 532.070 (West 1974); MO. ANN. STAT. § 557.036 (West 2017); OKLA. STAT. ANN. tit. 22, § 928.1 (West 1999); VA. CODE ANN. § 19.2-295 (West 2007).
[168] *See* King, *supra* note 92, at 940-46. King and Noble's conclusion that judges rarely modify jury sentences relate only to their study of jury sentencing in Kentucky and Arkansas.
[169] *See supra* note 116.
[170] VA. CODE ANN. § 19.2-295 (West 2007).
[171] ARK. CODE ANN. § 16-90-107 (West 2015).
[172] *See supra* note 117 and accompanying text.
[173] Comparatively, the common-law standard allowing for remittitur or additur (procedures whereby a judge alters a jury award of civil damages) requires that the jury award of civil damages be so high or so low that it "shock[s] the conscience." Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 422 (1996).

inertia (often referred to the "default effect" or nudge theory)[174] to sticking with the default; in this case, whatever the jury decided.

While judges may be subconsciously inclined to stick with the default, another explanation of why they rarely modify jury sentences is that they consciously favor deference. Judges in some jury sentencing states see the jury as perfectly capable of deciding the sentencing question.[175] Others view jury sentencing as "a welcome respite from a morally uncomfortable chore."[176] Alternatively, elected judges face the pressure of upsetting their electorate and are therefore cautious of public perception.[177] These judges may be afraid of appearing "soft on crime" by lowering a jury sentence or may simply believe that jury deference helps maintain a positive community reputation.[178] Hypothetically in these environments, a newspaper headline along the lines of "Judge Cuts Assailant's Jury Sentence in Half" would understandably be unwelcome attention.[179]

One final explanation for the lack of judicial modification is that the jury sentence—or more accurately, the threat of a harsh jury sentence—helps manage the court docket. The theory is that without the prospect of severe jury sentences, the perceived risk of jury trial will decrease, consequently decreasing plea rates, and jury trials will overwhelm the court.[180] Thus, on principle and in order to disincentivize jury trials, judges may refuse to modify jury sentences to effectively discourage defendants from believing the judge will fix a jury's harsh sentence if their choice to seek a jury trial turns out poor.[181]

The lack of judicial modification in jury sentencing states may therefore be explained by any combination of (1) a cognitive ease leading judges to accept the jury sentence as the default, (2) a preference for jury deference for either principled reasons (jurors are better suited to decide normative questions) or pragmatic ones (to avoid upsetting an electorate), and (3) docket management incentives. Of course, modification

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[174] *See generally* P.G. Hansen, *What is Nudging?*, BEHAVIORAL SCIENCE AND POLICY ASSN. (Aug. 16, 2016), https://behavioralpolicy.org/what-is-nudging/.

[175] Interviews with judges in Kentucky and Arkansas produced the following representative responses: "The jury knows everything about the defendant that I know. They find out his criminal record, they hear the victim impact evidence, they hear the evidence of the crime during trial just like I have. I go along with their collective judgment."; "Juries do a good job with most of these cases in this circuit. It is important to defer to the jury of twelve citizens in that a jury's sentencing verdict will usually reflect appropriate punishment within the community for certain criminal conduct."; "Juries have a pretty good sense of what is fair. . . . It seems to work well for us."; "Sentencing is literally power over liberty. The people should have that power. I believe that the choice of submitting the sentencing decision to the people should belong to the defendant, and to the prosecution. Otherwise, it concentrates too much power in the hands of the government." King, *supra* note 92, at 941 n.177.

[176] King, *supra* note 92, at 944.

[177] Republican Party of Minn. v. White, 536 U.S. 765, 782 (2002); *see also Party of Minn.*, 536 U.S. at 789 (O'Connor, J., concurring) ("Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." (citing Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 793-94 (1995)); Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017 (1999) (discussing judicial fear of public persecution and the influence politics plays in decisions to overrule a jury's life sentence in capital cases).

[178] *See* King, *supra* note 92, at 943.

[179] *See also id*. at 941.

[180] *Id*. at 944.

[181] *Id*.

may also be rare because it is not necessary, i.e., because jury sentences are commensurate with judge sentences.[182] The proposals advanced here, however, deliberately avoid resting on that argument. The proposal for a criminal advisory jury instead must address the foregoing impediments to judicial modification, even if the problem modification is meant to address is itself exceptionally rare.

C. Informal Advisory Juries Used in Criminal Sentencing

Beyond the few states that already include juries in an advisory form in their criminal sentencing procedures, criminal advisory juries occasionally occur in judge-only sentencing schemes. On these occasions, the form the advisory jury takes is defined by a particular judge's idiosyncratic preference or the circumstances in which the jury's advice originates. Beyond the idea that these instances are completely dependent on a judge's proactive initiation or willing concession, generalizations are difficult to make because the instances are rare and take on a variety of forms. Nevertheless, two anecdotes are instructive for conceiving the contours of a formal criminal advisory jury.

The first case involves a federal district judge proactively surveying a criminal jury for a recommended sentence. In *United States v. Collins*, federal prosecutors appealed a sentence based on the district judge's use of a jury poll following the conclusion of the trial.[183] The case involved the conviction of a Dayton, Ohio man whose confiscated computer was found to include nineteen videos and ninety-three images of child pornography.[184] The jury found the defendant guilty of both possession and distribution of child pornography, and the defendant's calculated sentencing guidelines range was twenty-two to twenty-seven years (above the statutory twenty-year maximum for the offenses).[185] After the verdict but before the sentencing, however, the judge

> polled the jury to ask them . . . "State what you believe an appropriate sentence is." Jurors' responses ranged from zero to 60 months' incarceration, with a mean of 14.5 months and median of 8 months. With one exception, every juror recommended a sentence less than half of the five-year mandatory minimum accompanying defendant's offenses. . . . [T]he district judge considered the jury poll as "one factor" in fashioning defendant's sentence, noting that it "reflect[s] . . . how off the mark the Federal Sentencing Guidelines are." After discussing numerous [other] sentencing factors, . . . the district judge varied downward, sentencing defendant to concurrent mandatory minimum terms of five years' imprisonment.[186]

On appeal, the Sixth Circuit upheld the sentence.[187] In doing so, the circuit reasoned that although the district judge cited just desert as the most important sentencing factor, the judge also considered the defendant's lack of prior convictions, absence of alcohol or drug

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[182] *See* Lanni, *supra* note 89, at 1793-94.
[183] *Collins*, 828 F.3d at 387-88.
[184] *Id*. at 388.
[185] *Collins*, 828 F.3d at 387-88. The defendant's actual calculated sentencing guidelines range equated to 262 to 327 months. The range in months was converted to years and rounded to whole numbers in order to simplify comparison.
[186] *Id*. at 388.
[187] *Id*. at 391.

abuse, college degree, regular employment, close family ties, and financial responsibility as factors supporting a lighter sentence.[188] Ultimately, the court held that because the jury recommendation was in no way controlling—it "did not conflict with the district judge's duty or ability to . . . independently craft an appropriate sentence"—the sentence was not substantively unreasonable.[189]

A second case provides a valuable juxtaposition. In *State v. Mahoney*, the defendant, charged with first-degree murder for shooting and killing his father, claimed he suffered from battered child syndrome as a consequence of his father's physical and emotional abuse.[190] Based in part on sympathy for the defendant, the jury returned a verdict convicting the defendant of a lesser charge of first-degree aggravated manslaughter.[191] Along with the verdict, however, two individual jurors also wrote letters to both the judge and the defendant indicating their preference that the defendant receive therapy instead of punishment and their desire to read a statement at sentencing.[192] The judge permitted the jurors to read the statement at sentencing and the State appealed.[193] In reversing the trial judge for abuse of discretion, the appellate division clarified that it is a permissible exercise of discretion to allow defense family members or victims to speak at sentencing.[194] However, the jurors had no relevant information to add for judicial consideration because they were limited to addressing the same evidence presented in front of the judge at trial.[195] Further, allowing the jurors to speak at sentencing and to advocate for aggravating or mitigating factors undermined their role as fact finders.[196]

In both *Collins* and *Mahoney*, the trial judge permitted the jury to voice their views on appropriate punishment despite having no formal role in sentencing. In *Collins*, the jury participation was permissible; but in *Mahoney*, it was reversable error. The opposite outcomes reflect stark differences in how the informal jury advisories were issued. The jury poll in *Collins* was conducted immediately following the verdict, and it simply recommended a length of incarceration. It included neither juror commentary on alternative, rehabilitative punishment nor expressions of empathy for either the defendant or victim.[197] Because of this, the juror opinions could reasonably be characterized as the jury's assessment of just desert for the criminal conduct presented at trial, free of influence from aggravating and mitigating sentencing factors. The trial judge in *Collins* was able to weigh this indication of just desert with the information presented at sentencing in order to come to an independent conclusion.[198] The juror recommendation permitted in *Mahoney*, on the other hand, did not focus on retribution for the criminal conduct. Rather, the recommendation was an alternative opinion speaking directly to the defendant's mitigating factors.[199] Thus, instead of weighing the recommendation as one factor in sentencing, the

[188] *Id*. at 390-91.
[189] *Id*. at 390.
[190] *Mahoney*, 444 N.J. Super. at 256.
[191] *Id.*
[192] *Id.* at 256-57.
[193] *Id.* at 258.
[194] *Id.* at 258-59.
[195] *Id*.
[196] *Id.* at 260.
[197] *Collins*, 828 F.3d at 388.
[198] *Id.* at 390.
[199] *Mahoney*, 444 N.J. Super. at 256-57, 260.

trial judge in *Mahoney* was impermissibly influenced by particular jurors' impassioned pleas on how the judge himself should weigh the mitigating factors. Notably, the *Collins* poll also represented opinions from each individual juror, whereas only two of the twelve jurors spoke at sentencing in *Mahoney*.[200]

Of the two cases, *Collins* clearly represents the preferred lodestar for developing a criminal advisory jury. In *Collins*, community sentiment was solicited to form one factor in the judge's independent sentencing decision without fundamentally changing any procedural aspect of the trial or sentencing hearing. The *Collins* example, however, is not without fault. First, the cursory juror poll conducted in *Collins* shares the same risk of juror apathy that is present with civil advisory juries. Second, simply averaging individual juror responses is an inherently weaker decision-making product than a product of juror deliberation and collective agreement. For instance, the act of deliberation, by merging different juror viewpoints, backgrounds, and experiences, reduces individual juror biases, increases overall jury comprehension of evidence and court instructions (thereby resulting in more accurate factfinding), and generates legitimacy for the jury's decision.[201] Finally, because the informal advisory sentence in *Collins* was only made possible through the judge's personal initiative, there is little reason to believe that the practice will become widespread. Only by formalizing the criminal advisory jury will its use become normalized and its potential systematic benefits become possible. Thus, the recommendations in the succeeding Part aim to address these deficiencies.

III. PROPOSED STRUCTURE OF THE CRIMINAL ADVISORY JURY

This Note now turns to the proposal for a formal criminal advisory jury for use in noncapital sentencing. The previous examples of advisory juries guide the discussion by illustrating the vices and virtues of analogous systems. This Part proceeds by first discussing when within the normal criminal process a criminal advisory jury should be used and the benefits such deliberate placement will afford. The discussion then moves to how a court should facilitate an advisory sentence and subsequently how a jury should deliberate on one. Finally, the benefits of the criminal advisory jury are summarized, including the benefits which will derive even if the prediction that an advisory sentence will influence (but not control) a judge-made sentence proves false.

A. The Advisory Sentence's Place in the Criminal Process

The starting point for the proposal is a discussion of when within the normal criminal process the criminal advisory jury should be used. As alluded to at the end of Part II, this Note proposes that the criminal advisory jury become a formal, automatic feature of all noncapital jury trials. The criminal advisory jury is not, however, an additional jury. It is merely a new role regular criminal juries should play following their issuance of a guilty verdict. Unlike the civil advisory jury, which is optionally impaneled in cases where the civil jury right does not exist, the criminal advisory jury should be a feature attached to the

[200] *Collins*, 828 F.3d at 388; *Mahoney*, 444 N.J. Super. at 258.

[201] Iontcheva, *supra* note 3, at 348-49, 364. Because jury deliberations regularly occur in secret, the positive effects of deliberation are difficult to demonstrate. However, one illustration (albeit fictional) is provided by the classic 1957 movie 12 Angry Men wherein each member of the jury, who were wrong in their initial judgment, were eventually led to the right decision because one juror insisted on deliberation. 12 ANGRY MEN (United Artists 1957).

criminal jury right. In this vein, the criminal advisory jury should not be waivable during jury trials, nor should it be available during bench trials (as is the case with civil advisory juries when no jury right exists). This will ensure that, when a defendant seeks a jury trial, the criminal advisory jury is used consistently throughout the jurisdiction and, when a defendant seeks a bench trial, the court is not procedurally burdened with managing a jury it is not already otherwise managing.

Crucially, the point in the trial process in which criminal juries should advise on the sentence is after the verdict but before the sentencing hearing. Isolating the jury from the normal sentencing hearing serves many key functions. First, by dismissing the jury following the verdict, the sentencing hearing itself may remain unchanged. The current practice of scheduling the sentencing hearing a couple of weeks from the conclusion of trial affords the court time to develop a pre-sentencing report and affords each party time to marshal the elements of its case which were inadmissible during trial. This delay would be administratively prohibitive if the jury were to remain impaneled through the end of the sentencing hearing.[202]

Second, the information presented at the sentencing hearing would unduly complicate the jury's role. Experience from capital sentencing shows that the weighing of mitigating and aggravating factors is often one of the most befuddling tasks for a jury.[203] In capital cases, these factors are weighed in order to determine whether a death sentence is just desert.[204] In noncapital cases, however, the sentencing factors tend to serve more utilitarian purposes.[205] A judge may use sentencing information to assess the rehabilitative or deterrent effect of incarceration and evaluate whether alternative forms of punishment, such as parole, electronic monitoring, or community service, are appropriate.[206] A judge's institutional knowledge of these forms of alternative punishment and his or her first-hand experience overseeing their use with a variety of defendants places the judge in a superior position to consider them.[207] On the other hand, a jury, as the conscience of the community, is best positioned to decide just desert for the particular criminal acts committed.[208] If the jury's advisory sentence is characterized as just desert for the crime rather than for the criminal, the advisory sentence will be more readily comparable across different cases and the information presented at the sentencing hearing will not be needed for the advisory sentence's determination. Thus, isolating the advisory sentence from influence by mitigating and aggravating circumstances not only simplifies the jury's task, but helps to establish a retributivist baseline for the underlying crime.

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[202] *See* Hoffman, *supra* note 12, at 1005 n.188 (discussing how substantial delays between verdict and sentencing would be unworkable in a jury-sentencing system).
[203] *See* BORNSTEIN, *supra* note 97, at 227.
[204] *Ring*, 536 U.S. at 614 (Breyer, J., *concurring*) ("[R]etribution provides the main justification for capital punishment . . .").
[205] Gwin, *supra* note 103, at 181 (arguing that the Federal Sentencing Guidelines disfavor judicial consideration of utilitarian sentencing factors, such as those often presented in sentencing hearings, e.g., a defendant's education, employment background, family ties, drug dependence, etc.).
[206] *See* Hoffman, *supra* note 12, at 1005-06.
[207] *Id*.
[208] *Ring*, 536 U.S. at 615-16 (Breyer, J., *concurring*) ("In respect to retribution, jurors possess an important comparative advantage over judges. In principle, they are more attuned to the community's moral sensibility . . . and [are] better able to determine . . . the need for retribution . . .").

Third, by intentionally removing the jury from the sentencing hearing, the advisory sentence will be more readily treated as merely one factor to be weighed by the judge, rather than a separate decision a judge must accept or rebut. Because the jury's picture of the circumstances is necessarily incomplete, it prevents the advisory sentence, through either judicial ease or deference, from becoming the de facto sentence. Surely it would be an abuse of discretion for a judge to rely solely on an advisory sentence proposed without the benefit of a sentencing hearing. In this sense, the advisory sentence will be more akin to the jury poll used in *Collins* and far less resistant to judicial modification than jury sentences in the state sentencing schemes previously discussed.

B. Facilitating the Advisory Sentence

Arguably the most important feature of this proposal is how the advisory sentence will be issued. Although the advisory sentence is to be issued prior to the sentencing hearing, it should not be issued contemporaneously with the verdict. Instead, the verdict and advisory sentence should be issued separately but in immediate succession by the same jury. Bifurcating the deliberation of guilt and punishment is an important feature in current jury sentencing schemes designed to prevent facts relevant only to punishment from unduly influencing decisions on guilt.[209] Even though the jury will not participate in the sentencing hearing, dividing jury decisions on guilt and punishment into two separate deliberations remains beneficial. On this point, *Mahoney* provides insight. In that case, the jury issued a compromise verdict: rather than finding for murder, the jury convicted on a lesser charge of manslaughter in order to accommodate the sympathies of (at least) two jurors.[210] Thus, even though the *Mahoney* jury played no role in sentencing, the consequences of a murder conviction weighed heavily on their finding of guilt. Simply asking juries to ignore punishment while deciding guilt is not sufficient to prevent jury contemplation—even speculative contemplation—of a guilty verdict's consequences. Jury nullification arises out of this same reality. In the rare cases of jury nullification, juries deliberately subvert the truth to declare a defendant not guilty because they disagree with the anticipated punishment.

In truth, juries think about punishment while deciding guilt regardless of any formal role in sentencing.[211] Bifurcating the verdict and the advisory sentence into two separate deliberations helps mitigate this fact. If, during guilt deliberation, jurors could anticipate having a chance to voice their thoughts on punishment, their concerns about the consequences of a conviction could comfortably be set aside while they dispassionately evaluate guilt. The *Mahoney* jury may have been less inclined to bend the truth by finding for manslaughter instead of murder if it had known they could recommend a sentence

[209] *See* Hoffman, *supra* note 12, at 1004.

[210] Due to the secrecy surrounding jury deliberations, conclusions that a verdict represents compromise are frequently nothing more than speculation. In *Mahoney*, however, letters written by certain jurors revealed the mental impressions of the jury, and thus the court was able to definitively label the verdict a compromise. 444 N.J. Super. at 257-58.

[211] *See* BORNSTEIN, *supra* note 97, at 299, for a discussion on how capital juries might weigh the possibility of the death penalty during their guilt deliberations even despite bifurcation. Comparatively, civil juries are known to speculate on factors which are routinely excluded from their purview. For instance, one study conducted in 2000 concluded that 77% of civil jurors interviewed after trial reported discussing attorney fees, often going as far as specifying the amount; an average of 21% discussed whether the plaintiff's insurance would cover expenses, and 40% discussed the defendant's insurance situation. *Id.* at 194-95.

commensurate with their moral understanding of the offense. Thus, jury compromises during the guilt stage should decrease if jurors are given the opportunity to voice their views on punishment separately.

Additionally, bifurcation simplifies jury deliberation. Jury instructions are a well-recognized source of jury confusion.[212] Although it is intuitive to believe additional sentence-relevant instructions added onto the initial conviction-relevant instructions will increase the likelihood that juries will further misunderstand their duties, empirical studies suggest that longer instructions merely correlate with longer deliberations, not increased confusion.[213] Nevertheless, issuing sentencing instructions separate from the conviction instructions can minimize instruction-based confusion.[214]

Some transparency in the initial conviction instructions will convey to the jury that it will indeed have a role in sentencing if sentencing becomes necessary.[215] For instance, a statement at the end of the conviction instructions might read:

> If you return a guilty verdict, then and only then, you will be asked by the court to immediately return to the deliberation room and provide a statement of what punishment you feel is appropriate for the crime committed. Further instruction will be given at that time. Until that time, your focus should remain on applying the law to the facts and objectively evaluating guilt. Any discussion or consideration of appropriate punishment should be saved for the separate sentencing deliberation if indeed the determination of a sentence becomes necessary due to a finding of guilt.

Such an instruction will convey to the jury that it will have an opportunity to voice sentiments on punishment without muddying the task at hand: deciding guilt. The instructions that eventually preempt the advisory sentence deliberation should instruct juries to recommend, at a minimum, a term length of actual incarceration. Juries may additionally recommend an alternative, non-custodial sentence (or a sentence comprised of both custodial and non-custodial elements). However, this alternative should be offered along with, not in lieu of, incarceration. For example, if a jury's preferred punishment is community service, the instructions should require the jury to also recommend a commensurate prison sentence, even if a diminutive term length is necessary to reflect the jury's preferences. This instruction—requiring juries to recommend a purely custodial sentence irrespective of their non-custodial preference—ensures that each advisory sentence will translate to uniform, quantifiable terms comparable across all cases. The judge may then incorporate both the absolute *and relative* import of the jury's recommendation into his or her own final sentencing decision.

The question remains of how exactly a jury is expected to come up with a number that represents just desert. Setting aside the fact that civil juries are trusted to do exactly that when courts ask them to determine punitive damages, there is a real concern that

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[212] Shari Seidman Diamond, Beth Murphy & Mary Rose, *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1605 (2012).
[213] *Id.* at 1557.
[214] *Id.* at 1598 (discussing how the structure of jury instructions, which often resemble a patchwork of different pieces confusingly sewn together, is one source of jury miscomprehension).
[215] *Id.* at 1599-1600 (discussing how jury instruction omissions, arising from the court's unwillingness to confront the realities of what jurors know and expect, is one source of jury miscomprehension).

without guidance or experience in sentencing, a jury's recommendation will be erratic, inconsistent, or random.[216] These concerns highlight why the advisory sentence must be non-binding. Regardless, one solution would be to provide the jury the same sentencing guidelines that the judge receives (albeit in simplified form). This idea, however, as well as any alternative that provides the jury with guidance, risks tainting the advisory sentence with anchoring bias—a cognitive effect that biases decision-making toward initial pieces of information.[217] Because the advisory jury is intended to represent the conscience of the community, principled adherence to the idea that their sentence should be based on nothing more than their conscience is crucial. This blank-slate approach might sound arbitrary, but sentencing guidelines themselves include the same subjective value judgements, just from a different source.[218] And, if advisory jury sentences are ever intended to validate sentencing guidelines, the guidelines cannot form the basis for their own validation.

Finally, the additional sentencing deliberation will no doubt impose additional time commitments on the court, although it is only speculation as to how significant this additional time may be. One could argue that after a jury has settled on a unanimous decision of guilt, any further deliberation by the same jury to propose an advisory sentence will be relatively undemanding, especially because the jury is not being asked to consider any new information not already presented to it at trial. Still, a jury that hangs while attempting to decide on an advisory sentence would be rather vexing to a court given that the advisory sentence is only that: advisory. One solution to mitigate the potential for a hung jury at the advisory sentencing stage is to allow the advisory sentence to be less than unanimous.[219]

Requiring only a 10-2 or 11-1 consensus rather than a unanimous consensus on appropriate punishment will expedite the sentencing deliberation.[220] Furthermore, the jury will have the ability to exclude a juror who is exceptionally harsh or exceptionally lenient.[221] In other words, the advisory sentence will not have to skew to accommodate lone wild cards (to reiterate, the guilt decision still requires unanimous agreement). In some

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[216] *See generally* BORNSTEIN, *supra* note 97, at 271; Hoffman, *supra* note 12, at 987.

[217] *See* BORNSTEIN, *supra* note 97, at 192-93, for a discussion on how damage caps and *ad damnum* create an anchoring effect on civil juries and alter their awards of compensatory damages. *Ad damnum*, in civil cases, represents the amount of damages a plaintiff asks for (i.e., how much they believe they deserve). *Id.*

[218] For instance, while creating the Federal Sentencing Guidelines in 1984, the Sentencing Commission was instructed to "consider the community view of the gravity of the offense." 28 U.S.C. § 994(c)(4). In actually developing the sentencing ranges, however, the Sentencing Commission analyzed sentences imposed in 10,000 previous cases. Gwin, *supra* note 103, at 185. In other words, the Sentencing Commission simply considered the *judge* view of the gravity of the offense rather than, as proposed here, the jury view.

[219] Of course, hung juries may also be mitigated by simply polling the jurors individually, as was done in *Collins*. 828 F.3d at 388. The added benefits of deliberation, however, are worth the small price to pay in additional time.

[220] In general, non-unanimous decision rules are less desirable than unanimous decision rules because, although they decrease deliberation time, they also lead to less thorough analysis of the evidence (and consequently, less accurate decisions), exclusion of holdouts' and racial and ethnic minorities' voices, and less satisfaction and confidence with the verdict among all jurors. However, these negative effects are typically not present with decisions on punitive damages. With punitive damage decisions, unanimous decision rules actually lead to more extreme punitive awards when compared with non-unanimous decision rules because juries operating under unanimous decision rules must accommodate any outliers. BORNSTEIN, *supra* note 97, at 80-81.

[221] *Id*.

sense, this non-unanimous scheme does risk undermining the advisory sentence's mitigating effect on compromise verdicts. For example, under the proposed scheme, a would-be hold-out juror who may otherwise wish to nullify at the guilt stage may be dissuaded from doing so by the prospect of the opportunity to offer a correspondingly diminutive advisory sentence. If, however, that hold-out understands that the other jurors are not beholden to accommodate their exceptional sentencing viewpoint by way of a non-unanimous decision rule, nullification is re-incentivized. For this reason, the fact that the sentencing decision will not need to be unanimous should be kept from the jury until the sentencing instructions are issued.[222]

C. Summary of Primary and Secondary Benefits

The core concept of the criminal advisory jury is that it is not binding on the court. Thus, it allows for community sentiment to be expressed through a punishment recommendation while preserving the traditional judicial authority in doling out sentences. Excluding the advisory jury from the normal sentencing hearing will help cast its advisory sentence as just desert for the crime—one factor a judge may consider to form his or her independent sentencing decision—and help allay concern that the advisory sentence will become the de facto sentence. Bifurcating the jury's duties into guilt and sentencing stages will further allow juries to focus dispassionately on determining guilt with comfort that a conviction's consequences will not be entirely unmoored from their own moral conscience. By forcing the jury to look to its conscience and its conscience alone when forming the advisory sentence, its sentence will represent the purest sense of just desert available to the criminal justice system. And, by implementing these procedures as a feature of the criminal jury right rather than an alternative to the jury right, the system-wide benefits it conveys may be captured with little additional burden on the courts.

Hypothetically, even if all the foregoing proposals are implemented, it is possible that judges may not afford advisory sentences *any* persuasive effect. The realization that some judges are happy to defer to juries to help relieve themselves of the moral burden of imposing sentences cuts against this notion.[223] Nevertheless, one may surmise that judges do not need advice on sentencing and will not follow a recommendation even if given. If so, is there any point to the criminal advisory jury or is it adding costs, however marginal, to the trial process without any benefit whatsoever?

Notably, advisory sentences will benefit the legal system even if their effect on actual sentences is insubstantial. Advisory sentences will become a part of the trial record and the aggregation of such data will be invaluable to sentencing reform efforts. Judges and prosecutors too will benefit over time by learning the community "price" for particular offenses. Further, if actual sentences result in harsher punishment than advisory sentences, defendants may potentially gain a supporting argument for use in future parole hearings or pardon petitions. And if actual sentences result in more leniency, the advisory sentence will at least come to be seen as a telling form of public reprimand. Finally, jurors themselves will take greater satisfaction in their civic duties given the opportunity to express their moral opinions of the criminal acts—an opportunity which the verdict alone does not

[222] Yet another alternative to a non-unanimous decision rule would be to time limit the sentencing decision. If the advisory jury does not reach a unanimous sentencing consensus within a certain time (three hours, for instance), then the jury will forego recommending a sentence to the judge.
[223] *See supra* note 175 and accompanying text.

adequately provide. Ultimately, then, even if advisory sentences are ignored in sentencing decisions, the benefits they will afford to parties, the court, and society will still outweigh their costs.

CONCLUSION

The jury's prime function in the criminal justice system is to express community outrage and thereby provide legitimacy for the exercise of state power. This idea is diluted, however, if the jury is only allowed a voice in the verdict and not in the punishment. The proposals set forth in this Note increase the jury's voice at sentencing without dissolving the trust and flexibility inherent with judicial discretion. These proposals admittedly include intuitive and logical arguments requiring empirical study. However, jury sentencing advocates should view them as modest proposals that expand jury influence incrementally, without the need to alter Sixth Amendment jurisprudence or overcome long-standing legal community aversion to abdicating punishment authority to the layperson.

Likewise, jury sentencing opponents who fear the lay adjudicator may take comfort that the judge still reigns supreme over sentencing. And correspondingly, the legal community may test doubts of jury competence with little consequence or additional procedural burden on the courts. Certainly, the criminal advisory jury is not a perfect solution for any side of the sentencing reform debate. But in the spirit of compromise, let not perfect be the enemy of good.