THE CASE FOR JURY SENTENCING

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ABSTRACT

There are powerful historical, constitutional, empirical, and policy justifications for a return to the practice of having juries, not judges, impose sentences in criminal cases. The fact that Americans inherited from the English a mild preference for judge sentencing was more a historical accident than a case of thoughtful policy. Jury sentencing became quite widespread in the colonial and postcolonial eras as a reflection of deep-seated mistrust of the judiciary. The gradual drift away from jury sentencing was driven not by a new-found faith in the judiciary, but rather by the now discredited paradigm of rehabilitationism. Now that that paradigm has shifted to neoretribution, and that the essential moral character of the criminal law has been rediscovered, jurors should likewise be rediscovered as the best arbiters of that moral inquiry. A return to jury sentencing would also mesh nicely with the Court's struggle in its Apprendi *line of cases to find a sensible way to distinguish between elements and sentence-enhancers under the Sixth Amendment. A Sixth Amendment interpreted to include the right to jury sentencing would also restore the textual symmetry between the Sixth and Seventh Amendments. There are no constitutional, empirical, or policy reasons why a defendant accused of committing negligence has the right to have both his guilt and damages assessed by a jury, but a criminal defendant has only half that right.*

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† District Judge, Second Judicial District (Denver), State of Colorado. The views expressed here are of course my own, and do not necessarily reflect the views of the District Court for the Second Judicial District or any of my colleagues on that court. I want to thank Adriaan Lanni, whose Note in the *Yale Law Journal* in 1999 was the first article in eighty-one years to call for a return to jury sentencing. I have borrowed liberally from that Note, especially in discussing the empirical case. I also want to thank my law clerk, Steven Wienczkowski, and my intern, Jane Grinney, for their research and editorial help.

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INTRODUCTION

One of the paradoxes of the American criminal justice system is that it reposes almost unassailable confidence in jurors' ability to reach just verdicts on guilt or innocence, but almost no confidence in their ability to impose just sentences. When Bad Bart is tried and convicted of a noncapital crime, in all federal courts, and in almost all state courts, his jury will have no role in his sentencing.[1] The jury's responsibility will begin and end with the guilt phase, and the trial judge will decide how Bart must pay for his crime, usually within limits set by legislatures or sentencing commissions, but with no input from the jury that convicted him.

Yet when Bart is sued in tort in the same courthouse for the same criminal act, his civil jury will decide both the guilt phase—that is, whether Bart acted negligently or intentionally—and the damages phase—that is, how much Bart should have to pay for his actions.[2]

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1. In noncapital felony cases, only five states—Arkansas, Missouri, Oklahoma, Texas, and Virginia—permit juries to make the sentencing decision. ARK. CODE ANN. § 5-4-103 (Michie 1997); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. tit. 22, §§ 926.1, 927.1 (West Supp. 2003); TEX. CRIM. PROC. CODE ANN. art. 37.07(2)(b) (Vernon 1981); VA. CODE ANN. § 19.2-295 (Michie 2000). I do not include Kentucky in this list because, even though its sentencing statute authorizes juries to impose sentences, KY. REV. STAT. ANN. § 532.055(2) (Banks-Baldwin 1988), cases have interpreted Kentucky's scheme as contemplating only nonbinding recommendations by juries. *See* Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001) (stating that a jury's sentencing recommendation has no mandatory effect).

All noncapital sentencing in the federal courts is done by the judge, FED. R. CRIM. P. 32, subject of course to the constraints of the Federal Sentencing Guidelines and occasionally to organic sentencing constraints contained in some federal criminal statutes.

2. No state takes the decision about compensatory damages away from juries in ordinary, common-law-based civil cases. Only two states—Connecticut (in some kinds of cases) and Kansas—take the decision about exemplary damages away from juries. CONN. GEN. STAT. ANN. § 42-110g(a) (West 2000); *id.* §§ 31-290a(b), 35-53(b) (West 1997); *id.* § 36a-618 (West 1996); *id.* § 46a-98(d) (West 1995); *id.* § 52-240b (West 1991); KAN. STAT. ANN. § 60-3701(a) (1994). Of course, most states have remittitur and additur procedures that give trial judges varying degrees of authority to alter a jury's award of compensatory damages, and typically even more leeway to alter a jury's award of exemplary damages. *See infra* note 76 and accompanying text (discussing the Seventh Amendment's Reexamination Clause).

Few can imagine a civil system, or a Seventh Amendment, in which the jury's role would be limited to deciding liability and the trial judge would assess damages.[3] Yet few can imagine anything but that same artificial division of labor when it comes to noncapital criminal cases.

To further deepen the paradox, if Bart commits a murder and faces the death penalty, suddenly, the jurors trusted to award civil damages but not to impose noncapital sentences are the only ones trusted to decide life or death.[4] Apparently, jurors are necessary and trustworthy only at the two ends of the "importance" continuum—in civil cases where only money is at stake and in capital cases where a life is at stake. They are somehow unnecessary or untrustworthy in the vast middle, where only judges are trusted to impose prison sentences that can run from one day to a lifetime.[5]

Noncapital jury sentencing is not only rare in modern practice, it has received almost no support from the academy. There have been dozens of articles—most written in the 1950s and 1960s during the zenith of the rehabilitation movement—extolling the virtues of judge sentencing,[6] but only three suggesting that the orthodox view

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In the federal courts, the Supreme Court has ruled, rather recently, that the Seventh Amendment guarantees litigants the right to have juries decide compensatory damages, but does not guarantee them the right to have juries decide exemplary damages. *See infra* notes 75, 79–80 and accompanying text.

3. *See infra* Part II.A, B.

4. Of the thirty-eight states with capital punishment, twenty-nine leave the sentencing decision to the jury. At least before *Ring v. Arizona*, 536 U.S. 584 (2002), only five states—Arizona, Colorado, Idaho, Montana, and Nebraska—gave the trial court judge, or a panel of judges, the exclusive power to decide the capital punishment issue. ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (trial judge); COLO. REV. STAT. ANN. § 16-11-103 (West 2001) (three-judge panel); IDAHO CODE § 19-2515 (Michie 1997) (trial judge); MONT. CODE ANN. § 46-18-301 (2001) (trial judge); NEB. REV. STAT. ANN. § 29-2520 (Michie 1995) (trial judge). Four more states—Alabama, Delaware, Florida, and Indiana—gave the final power to the trial judge with varying degrees of input from the jury. ALA. CODE §§ 13A-5-46, 13A-5-47 (1994); DEL. CODE ANN. tit. 11, § 4209 (2001); FLA. STAT. ANN. § 921.141 (West 2001); IND. CODE ANN. § 35-50-2-9 (Michie 1998). After *Ring*, many, if not all, of these schemes leaving the ultimate sentencing decision with the judge may now be unconstitutional. *See infra* Part II.D.2.

5. Professor Albert Alschuler has written about a similar paradox: the system imposes, by virtue of the doctrine of limited judicial review, great confidence in jurors after they reach a verdict, but, by virtue of the tradition of peremptory challenges, almost no confidence in them during jury selection. Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 154–55 (1989).

6. *E.g.*, ABA ADVISORY COMM. ON SENTENCING & REVIEW, STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES 43–48 (Approved Draft 1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 145–46 (1967); Charles O. Betts, *Jury Sentencing*, 2 NAT'L PAROLE & PROBATION ASS'N J. 360, 371–74 (1956); H.M. LaFont, *Assessment of Pun-*

might be wrong.[7] Even in the handful of states where jurors still do participate in noncapital sentencing, some commentators have been calling for judge sentencing.[8] At the federal level, the axiom that only judges should perform noncapital sentencing is so entrenched that the only meaningful debate over the last several decades has been in the context of the Federal Sentencing Guidelines—whether, and how, federal trial judges' sentencing discretion should be curbed.[9]

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ishment—A Judge or Jury Function?, 38 TEX. L. REV. 835, 848 (1960); Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 SW. L.J. 221, 230 (1960); Comment, *Consideration of Punishment by Juries*, 17 U. CHI. L. REV. 400, 408–09 (1950); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1153–57 (1960).

7. Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. (forthcoming 2003); Lewis McQuown, *Reformation of the Jury System*, 6 KY. L.J. 182 (1918); Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775 (1999). I do not include in my head count Professor Ronald Wright's fine article critiquing *Fear of Judging* by Professor Kate Stith and Judge Jose A. Cabranes, discussed *infra* note 9, because, in the end, Professor Wright rejects jury sentencing as an alternative. Ronald F. Wright, *Rules for Sentencing Revolution*, 108 YALE L.J. 1355 (1999) (book review). Neither do I include those many articles that debate the virtues of jury sentencing in capital cases. *Compare* Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE W. RES. L. REV. 1047, 1048 (1991) (expressing hesitations about juries deciding death sentences), *with* Vivian Berger, *"Black Box Decisions" on Life or Death—If They're Arbitrary, Don't Blame the Jury: A Reply to Judge Higginbotham*, 41 CASE W. RES. L. REV. 1067, 1070–82 (1991) (arguing that juries should decide death sentences). Finally, I do not count as a "pro-jury sentencing article" Professor Colleen Murphy's remarkable article that presaged the *Apprendi* revolution, though that article has extraordinarily important things to say about the relationship between the Sixth and Seventh Amendments. Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723 (1993).

8. *E.g.*, Randall R. Jackson, *Missouri's Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, J. MO. B., Jan./Feb. 1999, at 14, 14; James P. Jouras, *On Modernizing Missouri's Criminal Punishment Procedure*, 20 U. KAN. CITY L. REV. 299, 315 (1952); Note, *Jury Sentencing in Texas: Time for a Change?*, 31 S. TEX. L. REV. 323, 337–38 (1990); Craig Reese, Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 1001 (1960).

9. *Compare* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82–85 (1998) (criticizing the Federal Sentencing Guidelines), *and* Charles J. Ogeltree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938, 1951–55 (1988) (same), *with* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 86–102 (1973) (arguing for determinate sentencing), *and* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 98–106 (1976) (same), *and* Frank O. Bowman, III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 299–300 (2000) [hereinafter Bowman I] (criticizing the Federal Sentencing Guideline critics), *and* Frank O. Bowman, III, *The Quality of Mercy Must be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 704–32 [hereinafter Bowman II] (same). For a fascinating critique of the Guidelines' authors' failure to learn from the mistakes of state sentencing commissions, see generally Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773 (1992).

But the Supreme Court's decisions in *Apprendi v. New Jersey*[10] and *Ring v. Arizona*[11] may have opened a new chapter in the heretofore muted debate about the wisdom of the orthodox rule. There are compelling historical, constitutional, empirical, and policy reasons to believe that trial judges' sentencing discretion should not only be curbed, it should be eliminated entirely and transferred to juries.[12] In this Article, I analyze these reasons, and try to demonstrate that, with well-developed limitations, including ranges fixed by legislatures, jurors are better than judges at imposing appropriate criminal punishment.

I. THE HISTORICAL CASE

A. Ancient and Medieval Juries

Most ancient and medieval juries were "presentment juries"—they acted like modern grand juries or preliminary hearing judges, and decided only whether there was sufficient evidence for the defendant to be further subjected to an inquiry by the king or other ruler.[13] Presentment juries were investigatory as well as accusatory. They were the ruler's watchdogs, and were selected by royal agents precisely because they may have had personal knowledge of the

10. 530 U.S. 466 (2000).

11. 536 U.S. 584 (2002).

12. Subject to the practical limitations discussed *infra* Part V. Speaking of practical limitations, one must never forget about plea bargaining—the fuel upon which 95 percent of the criminal justice system runs. MATTHEW R. DUROSE ET AL., U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 1998, at 8–9 tbl.9–10 (Oct. 2001) (NCJ 190103) (reflecting that 94 percent of state felony cases are plea bargained); U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 fig.C (2001) (reflecting that 96.6 percent of federal felony cases in 2001 were plea bargained). Any discussion of trial reforms is by definition a discussion of the system only at the very small margins of trial. Because the vast bulk of criminal cases are resolved by guilty pleas, judge sentencing—with all its alleged benefits, *see infra* Part III—will remain the rule rather than the exception. In this sense, the call for jury sentencing is substantially less draconian than other sentencing reforms. The Federal Sentencing Guidelines and state equivalents, for example, operate to displace the sentencing discretion of trial judges in both plea-bargained cases and cases that go to trial. *See infra* note 160 and accompanying text.

13. WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 106 (James Appleton Morgan ed., Burt Franklin 2d ed. 1971) (1875); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 622–23 (2d ed. 1898).

alleged crime or, more often, personal knowledge of the accused or of the victim.[14]

The notion that jurors were a kind of witness, rather than independent judges of the credibility of trial witnesses, was so deeply ingrained in the ancient and medieval presentment jury that it remained part of the English system until late into the fourteenth century.[15] Indeed, until that time, English law did not recognize the concept of an "impartial" juror. Jurors were selected by the king's agents to investigate crimes, and the more the prospective jurors already knew about the crimes, the better.[16]

Some historians believe the first precursors to the medieval jury were groups of citizens whose role was limited to deciding which particular trial by ordeal a defendant should face,[17] and that it was only later that they assumed the more traditional presentment role.[18] In either case, because these ancient and medieval jurors had no role in what is today called the "guilt phase," they of course also had no role in the punishment phase. The kings or other rulers decided ultimate guilt and imposed any punishment.[19] But that was not uniformly the case. There were some ancient juries that were trial juries and not presentment juries; that is, they decided ultimate guilt or innocence. Tellingly, those kinds of early trial juries also decided punishment.

For example, from the time of Solon in 700 B.C., ancient and then classical Greek juries—called *dikasteria* in Athenian law—not only decided criminal liability, but also imposed punishment.[20] The

14. LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 40 (2d ed. 1988).

15. *Id.* at 56; FORSYTH, *supra* note 13, at 125–38.

16. There were only three early English challenges for cause—being related to the defendant by blood, marriage, or economic interest. JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 141 (1977). These disqualifications had everything to do with the king's fear that the prospective jurors would so favor the defendant that they would not be able to exercise their investigatory and accusatory functions, and nothing to do with modern notions of "impartiality" to both sides. *Id.*

17. For a discussion of trial by ordeal, see *infra* note 31.

18. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 120 (Little, Brown & Co. 5th ed. 1956) (1929).

19. FORSYTH, *supra* note 13, at 106.

20. MOORE, *supra* note 14, at 2. The court in which the *dikasteria* served in Athens—called the *Eliaia*—began as a method by which citizens could appeal the judgments of local magistrates. DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 29–33 (1978). By the end of the fifth century B.C., disgruntled citizens were appealing their judgments to the *Eliaia* so

verdict of the *dikasteria* was final; no appeal was permitted.[21] The Romans inherited the *dikasteria* in an institution they called the *Judice*, which was a group of senators convened to resolve important disputes involving other senators or members of the imperial family. These trials were held in the Senate before a subgroup of fifty-one senators, who, as with the *dikasteria*, not only decided guilt or innocence, but also imposed punishment.[22]

Thus, the ancient and medieval division of trial labor, at least on the Continent, was drawn between the presentment role on the one hand, and the guilt and sentencing role on the other. Ancient and early medieval systems did not recognize separate guilt and punishment phases; they were part of the single act of trial. If jurors were involved in trials, they were perforce also involved in punishment. If they only acted as presentment jurors and not trial jurors, then of course they had no role in punishment, because they had no role in deciding ultimate guilt or innocence.

B. English Juries

There is a powerful myth, perpetrated most recently by critics of the Federal Sentencing Guidelines, that English juries had no role in sentencing, and that when the Sixth Amendment was adopted, the sentencing system that the Founders intended to incorporate was one with a long-standing and monolithic tradition of judge sentencing.[23] The real history is substantially more complicated. As one commentator has lamented, "[t]he single consistent tendency over

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often that the magistrates stopped bothering to render judgments at all. Instead, they simply referred disputes directly to the *Eliaia*, and then presided over the proceedings there. *Id.* at 32. They did not attempt to influence the outcome, and acted merely as announcers of the *dikasteria*'s verdict. *Id*. This quite limited role of the presiding "judge" was so common that it even found its way into various passages in *The Iliad* and *The Odyssey*, in which Homer described elders rendering their judgments simply by listening to the applause of the gathered crowd. *Id*. at 18–21. It should be humbling food for judicial thought to recognize that, in a very fundamental way, these prototype Greek judges acted more like town criers than philosopher kings.

21. MACDOWELL, *supra* note 20, at 40.

22. PETER GARNSEY, SOCIAL STATUS AND LEGAL PRIVILEGE IN THE ROMAN EMPIRE 19–25 (1970); MOORE, *supra* note 14, at 3.

23. *See, e.g.*, STITH & CABRANES, *supra* note 9, at 9–11 (identifying the earliest federal criminal laws as the root of judicial sentencing discretion). For a powerful critique of Stith and Cabranes in general, and the myth of judge sentencing in particular, see generally Bowman I, *supra* note 9. *See also* Wright, *supra* note 7, at 1358–61 (concurring with Professor Stith and Judge Cabranes' attack on the Federal Sentencing Guidelines, but criticizing the authors' misuse of the history of judge/jury sentencing).

approximately the past three centuries about the role of judges in setting criminal sentences has been the absence of any consistency."[24]

There is no doubt that in many English criminal courts the traditional unitary European jury trial became bifurcated, so that even when the presentment juries had fully evolved into trial juries, the sentencing role remained with the judge.[25] But it is also clear that English jurors in many different kinds of courts often imposed sentences, and that they continued to do so throughout the Middle Ages, and even, at least in some manorial courts, as late as the seventeenth century.[26]

To fully appreciate the hodgepodge that was the English criminal system, and therefore the far from homogeneous English "rule" of judge sentencing, one must understand five rather unique things about the history of the English jury.

First, England had no jury tradition before the Conquest. Although there was a time when antiroyalist historians claimed that the English had inherited the jury trial directly from the Romans through the Anglo-Saxons, historians now generally agree that that was not the case, and that there were no jury trials in England before William the Conqueror brought them with him as a royal institution.[27]

Second, the criminal jury came into ascendancy in England only by default. From the time of Charlemagne until the mid-1200s, criminal jury trials in all of Europe were exceedingly rare, and England after the Conquest was no exception.[28] Almost all criminal cases were decided by one of the three other recognized medieval trial forms: battle,[29]

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24. Bowman I, *supra* note 9, at 310.

25. 3 WILLIAM BLACKSTONE, COMMENTARIES *396.

26. Bowman I, *supra* note 9, at 310–11.

27. MOORE, *supra* note 14, at 13–19 (relying on HEINRICH BRUNNER, THE ORIGIN OF JURIES (1872)); *see also* 1 POLLOCK & MAITLAND, *supra* note 13, at 140–42 (crediting the origin of the jury trial in England to the Frankish inquest).

28. 1 POLLOCK & MAITLAND, *supra* note 13, at 37–40.

29. MOORE, *supra* note 14, at 26–30, 41, 123; JOHN PROFFATT, A TREATISE ON TRIAL BY JURY, INCLUDING QUESTIONS OF LAW AND FACT §§ 11–20 (F.B. Rothman 1986) (1877).

It seems that trial by battle, also called trial by combat, was practiced in a variety of societies almost from the dawn of recorded history, including the ancient Israelites, pre-Roman era Germanic tribes, and Swedish Goths. EDWARD J. WHITE, LEGAL ANTIQUITIES 112–13 (1913). Spread through Europe by the Vikings, trial by battle found its way into acceptable European trial methods, at least as a way to resolve disputes between healthy noblemen. *See, e.g.*, 4

compurgation,[30] or ordeal.[31] It was only after those much more common trial forms were either outlawed or fell into cultural disrepute that trial by jury became, by sheer necessity, the accepted English method for determining serious felony cases.[32]

BLACKSTONE, *supra* note 25, at *346–48 (identifying the introduction of combat as a means of determining civil suits); FORSYTH, *supra* note 13, at 81 (same).

30. Trial by compurgation, also known as the wager of law, was grounded on ancient and medieval confidence in the sanctity of the oath. In criminal courts it was a rather simple procedure. The accused first took an oath of innocence, and then called a sufficient number and quality of "oath helpers" (depending on the seriousness of the charge and the social standing of the accused and of the oath-helpers), who then vouched under oath for the trustworthiness of the accused. If the oaths were properly taken and of sufficient quantity and quality, the accused was acquitted without any messy inquiry into the actual facts. *See* ROBERT VON MOSCHZISKER, TRIAL BY JURY §§ 43–45 (2d ed. 1930) (describing trial by compurgation).

Compurgation is probably not quite as old or ubiquitous as battle or ordeal, but it was practiced in various forms by some ancient peoples, including the Babylonians and Israelites. WHITE, *supra* note 29, at 197. Its medieval form was inherited rather directly from the Romans, and, unlike the jury trial, was therefore practiced in England long before the Conquest. *Cf. supra* note 27 and accompanying text.

31. There were three principle medieval ordeals for serious crimes: hot iron (in which the defendant was required to carry a piece of hot iron, or in some variations walk over a hot surface); hot water (in which the defendant was required to reach his hand into a pail of boiling water); and cold water (in which the defendant was thrown into a pond or lake, usually with his hands bound). If the defendant survived the hot ordeals without being burned, or survived the cold water ordeal at all, it was seen as an intervention by God, and therefore as a divine sign of innocence. 4 BLACKSTONE, *supra* note 25, at *337–38; VON MOSCHZISKER, *supra* note 30, § 49.

Trial by ordeal also has quite ancient, and widespread, origins. Egyptians from the time of Ramses II, ancient Greeks, Israelites and even Hindus recognized various forms of trial by ordeal. WHITE, *supra* note 29, at 141. Pollock and Maitland describe the history of the ordeal as "a long chapter in the history of mankind; we must not attempt to tell it. Men of many, if not all, races have carried the red-hot iron or performed some similar feat in proof of their innocence." 2 POLLOCK & MAITLAND, *supra* note 13, at 598.

32. Trial by battle fell out of favor in England shortly after the Conquest, as the Norse heirs settled down to a softer life, and generally as the influence of the Church began to temper many pagan Viking traditions. The practice of allowing disputants to hire champions rather than fight their own battles hastened its demise. Although trial by battle was not officially banned until 1819, MOORE, *supra* note 14, at 123, it had all but disappeared by the end of the reign of Edward III. WHITE, *supra* note 29, at 118. In fact, just a single generation after the Conquest, in his Charter to the City of London, Henry I exempted all citizens of London from trial by battle. *Id.* at 119.

Similarly, as medieval man lost confidence in the sanctity of the oath, compurgation also became disfavored. It seems never to have caught on in post-Conquest England, being unofficially limited to misdemeanors from the outset. Perhaps that famous English pragmatism looked upon compurgation with a cynical eye: oath-takers could be bribed, and, indeed, even on the Continent, compurgation was generally not deemed appropriate for certain crimes involving lack of trustworthiness, such as bribery and perjury. VON MOSCHZISKER, *supra* note 30, §§ 46–48. Compurgation was officially banned for most felonies in 1166 by Henry II's Assize of Clarendon. MOORE, *supra* note 14, at 37–38; PROFFATT, *supra* note 29, §§ 25–26.

Third, the early English court system was remarkably heterogeneous, decentralized, and, in fact, rather haphazard.[33] The idea that judge sentencing was common in English courts during their formative years is belied by the fact that virtually nothing was "common" to these early courts. The increasingly divided nature of the English government exacerbated this decentralization. Any efforts by the king to standardize trial procedures were met with resistance from Parliament, whose antiroyalist members were increasingly the objects of royal prosecution. Indeed, almost all of the important and unifying trial reforms adopted after the ascendancy of the English criminal jury trial were imposed by Parliament as limitations on the prosecutorial powers of the king.[34]

Fourth, almost all serious crimes in England—from the formative jury period in the late 1100s and early 1200s all the way through the

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The ordeal was banned by Pope Innocent III in 1215, primarily because the clergy came to view the affairs of man as too trivial to be judged so regularly by God. *Id.* § 28. In addition, some reform-minded priests objected to the ordeal's potential for corruption, especially after one priest admitted that he felt a moral obligation to help achieve a "correct" result. PLUCKNETT, *supra* note 18, at 114–15. The papal ban on the ordeal found its way officially into English law in 1219. *Id.* at 119.

33. Early (thirteenth and fourteenth century) English courts were of two main types: so-called "feudal courts," which were simply juridical extensions of the obligation of every lord to hold court for his tenants; and so-called "franchise courts," which were specialized judicial franchises awarded by the king for particular purposes (e.g., courts granted to particularly large landowners, or to the chancellors of Oxford and Cambridge). H.G. HANBURY & D.C.M. YARDLEY, ENGLISH COURTS OF LAW 31 (5th ed. 1979). These early courts were very much systems unto themselves, and there were virtually no unifying principles of procedure, or indeed even of jurisdiction, either between the two types or amongst a single type. In London alone, for example, there were the Hustings of Common Pleas, the Hustings of Pleas of Land, the Mayor's Court, the Sheriff's Court and the Eyre, not to mention a similar menagerie of courts of equity. HELEN CAM, LAW-FINDERS AND LAW-MAKERS IN MEDIEVAL ENGLAND 85–94 (1963). Even after the great unifying judicial reforms of Edward I in the late 1200s, the three resulting common law courts—Common Pleas, King's Bench, and Exchequer—were still a swirling and unbounded hodgepodge of competing and overlapping jurisdiction. HANBURY & YARDLEY, *supra*, at 31–32.

34. For example, in 1305, Parliament banned the practice that the king's prosecutors could have an unlimited number of peremptory challenges. An Ordinance for Inquests, 33 Edw. (1305) (Eng.). In 1390, it imposed limits on the king's power to pardon certain homicides. Stat. 2, 13 Rich. 2, c. 1 (1390) (Eng.). In 1695, it created the first right to counsel, limited to treason cases, An Act for Regulateing of Tryals in Cases of Treason and Misprisioning of Treason, 7 & 8 Will. 3, c. 3 (1695) (Eng.), and in 1836 it repealed the prohibition against the assistance of counsel in felony prosecutions, An Act for Enabling Persons Indicted of Felony to Make Their Defence by Counsel or Attorney, 6 & 7 Will. 4, c. 114 (1836).

seventeenth century—were capital crimes.[35] As tensions between the ruled and rulers mounted, English juries began to nullify when they believed that a particular crime did not justify death. These nullifications were dubbed "pious perjury" by Blackstone, to reflect the justified but nonetheless perjurious violation of the juror's oath.[36] As pious perjuries increased, so did the king's prosecutors' mistrust of jurors.

Fifth, and perhaps most importantly, even when English judges imposed sentences, they had almost no discretion. There were, of course, none of the supervisory kinds of sentences seen in modern courts—deferred judgments, probation, or community corrections. Even imprisonment was not yet a recognized form of punishment.[37] Choices at sentencing were few: death for most serious crimes, banishment (or what the English called "transportation") for less serious crimes, and corporal punishment and/or fines for the least serious of crimes.[38] Most offenses had mandatorily set punishments.[39] Once the verdict was in, the judge's role in sentencing was simply to announce the mandatory punishment. Thus, Professor Thomas Green describes mid-fourteenth century jury verdicts as "judgments about who ought to live and who ought to die, not merely determinations regarding

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35. 4 BLACKSTONE, *supra* note 25, at *98. In a memorable passage in *A Tale of Two Cities*, Charles Dickens laments that, even as late as the French Revolution, English law imposed the death penalty for virtually every offense:

> [P]utting to death was a recipe much in vogue with all trades and professions, and not least of all with Tellson's [Bank]. Death is Nature's remedy for all things, and why not Legislation's? Accordingly, the forger was put to Death; the utterer of a bad note was put to Death; the unlawful opener of a letter was put to Death; the purloiner of forty shillings and sixpence was put to death; the holder of a horse at Tellson's door, who made off with it, was put to Death; the coiner of a bad shilling was put to Death; the sounders of three-fourths of the notes in the whole gamut of Crime were put to Death.

CHARLES DICKENS, A TALE OF TWO CITIES 62 (Signet 1960) (1859).

36. 4 BLACKSTONE, *supra* note 25, at *238–39, *cited in* Apprendi v. New Jersey, 530 U.S. 466, 479 n.5 (2000).

37. Penitentiaries were invented by the Americans in 1790. *See infra* note 52 and accompanying text.

38. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 584 (3d ed. 1990) (discussing systems of fines and whippings for misdemeanors); John H. Langbein, *Shaping the Eighteenth-Century Jury: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36–37 (1983) (discussing death and transportation).

39. 3 BLACKSTONE, *supra* note 25, at *396; John H. Langbein, *The English Criminal Trial on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY, 1700–1900, at 36–37 (Antonio Padoa Schioppa ed., 1987).

who did what to whom and with what intent."[40] Professor John Langbein makes similar observations in describing English criminal jury trials even as late as the eighteenth century: they were "sentencing proceedings," whose whole function was to persuade the jury "to reduce the sanction from death to transportation, or to lower the offense from grand to petty larceny, which ordinarily reduced the sanction from transportation to whipping."[41] Juries imposed the real sentences by their verdicts on the charged or lesser offenses; judges sentenced in name only. As discussed in more detail in Part I.D, it was not until the 1800s that the American invention of the penitentiary gave judges any significant sentencing discretion.[42]

It was in this cacophony of historical mash that the English developed their "tradition" of judge sentencing. And it was that weak "tradition" that followed the colonists to America.

C. Colonial and Post-Colonial Sentencing Schemes

Several colonies rejected what they perceived was the traditional English rule of judge sentencing, as weak as it was, and involved their jurors in both capital and noncapital sentencing.[43] This push toward jury sentencing was not just the result of the colonists' deep suspicion of judges; it also reflected the fact that the colonies were quicker than the English homeland to reduce the number of offenses carrying a

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

41. Langbein, *supra* note 38, at 41. Justice Stevens makes this very point in *Apprendi*:

> "[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence . . . ." As Blackstone, among many others, has made clear, "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law."

530 U.S. at 479–80 (citations omitted) (quoting Langbein, *supra* note 39, 36–37; 3 BLACKSTONE, *supra* note 25, at *396).

42. *See infra* notes 52–53 and accompanying text.

43. Historical records related to colonial sentencing practices are almost nonexistent. This lack of evidence has left scholars in some disagreement about the extent to which colonial juries did or did not participate in noncapital sentencing. *Compare* Lanni, *supra* note 7, at 1790 ("Jury sentencing in noncapital cases was a colonial innovation."), *with* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) ("American juries at the time of the adoption of the Bill of Rights played a minor role in sentencing."). This dispute is really only a matter of timing, since it is well settled that jury sentencing was widespread by the early 1800s. *See infra* note 48 and accompanying text. The timing, of course, may be significant to the constitutional issues. *See infra* Part II.

mandatory death penalty.[44] The fear of pious perjury, and therefore of nullifying jurors, was thus substantially reduced.[45]

Federal courts had virtually no role in the criminal process in the early republic, let alone a sentencing role. Federal criminal law did not begin to become a significant part of the national criminal firmament until Prohibition.[46] As one commentator put it, "[i]f one is seeking the imprimatur of a traditional, typically American distribution of sentencing authority, the place to look is in the history of state, not federal, courts."[47]

Most states continued the mixed colonial tradition of jury sentencing. In fact, from 1800 to 1900, juries imposed sentences in noncapital cases in about half of all the states.[48] A handful of other states permitted juries in noncapital cases to make sentencing recommendations.[49] Thus, for the entire nineteenth century, sentencing schemes with no input from the jury were the American exception, not the rule.

Even in those states that invested trial judges with the exclusive power to sentence, their discretion, not unlike the discretion of English judges, was mostly a mirage.[50] Nineteenth-century sentencing schemes were tightly controlled by legislatures. As late as 1870, state legislatures commonly set a specific period of incarceration for each

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44. *Statutory Structures for Sentencing Felons to Prison*, *supra* note 6, at 1155 ("[J]ury sentencing in this country is said to be a reaction to the harsh penalties imposed by royal judges in England and in the colonies, and the early distrust of government power."). Professors King and Klein describe the sentence reforms this way:

> In many American jurisdictions as of 1791, jurors encountered far fewer offenses for which executions were mandatory. To be sure, some colonies, suffering from their generation's crimewave during the mid- to late-1700s, expanded somewhat the number of capital offenses just before the Revolution. But in the 1780s, this trend began to reverse, declarations of sentencing reform appeared in the constitutions of some new states, and there was a widespread view that whipping and capital punishment had lost their deterrent power.

King & Klein, *supra* note 43, at 1507. Of course, these reforms coincided with the development of the American penitentiary. *See infra* notes 52–53 and accompanying text.

45. *See supra* notes 35–36 and accompanying text.

46. Bowman I, *supra* note 9, at 313–14.

47. *Id.* at 314.

48. Wright, *supra* note 7, at 1373.

49. *Id.* at 1373–74.

50. *See supra* notes 37–39 and accompanying text (discussing English judges' lack of discretion in serious cases).

offense.[51] As in England, the real sentencers continued to be the jurors by way of their verdicts.

D. The Penitentiary and Rehabilitation

Judge sentencing did not begin to make significant inroads into the colonial and postcolonial practice of jury sentencing until the penitentiary became the predominant form of punishment. The penitentiary was a uniquely American invention, begun by the Quakers in Pennsylvania in 1790.[52] When penitentiaries became the punishment of choice, suddenly sentencers had enormous discretion, at least in the early years before legislatures stepped in, to decide how long a particular miscreant should spend in penance for a particular crime. It was perhaps an understandable reaction to this completely new form of punishment to turn its enforcement over to judicial professionals. By the beginning of the 1900s, jury sentencing in state courts was beginning to be the exception, not the rule, though it was by no means uncommon.[53]

When the rehabilitative ideal began its ascendance in the early 1920s and 1930s, judge sentencing became even more common and jury sentencing even less common. The idea behind rehabilitation was that the primary purpose of the criminal law was not to punish or to deter, but rather to cure criminals of their antisocial tendencies.[54] Once this quasi-medical model became dominant, the idea that mere jurors could decide how long a criminal "patient" needed to be "hos-

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51. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 892 (1990).

52. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4–5 (1974). A few historians claim that the original penitentiary was the so-called "People Pen" constructed by Massachusetts Pilgrims in Boston in 1632. *See, e.g.*, PHILIP D. JORDAN, FRONTIER LAW AND ORDER: TEN ESSAYS 140 (1970) (beginning a discussion of early jails by referencing the "People Pen"). Even if that were true, it is clear that Philadelphia's Walnut Street Jail, and not Boston's People Pen, was the prototype for the early American penitentiary. *See* MORRIS, *supra*, at 4–5 (noting that the Quakers' "vision and initiative gave us our hulking penal institutions").

53. *See* King & Klein, *supra* note 43, at 1510–11 ("The number of jurisdictions that allowed any jury sentencing in non-capital cases dwindled by the mid-twentieth century to thirteen states.").

54. For a discussion of the rise and fall of the rehabilitative ideal, see *infra* notes 165–71 and accompanying text.

pitalized" was absurd. Only qualified, trained judicial professionals could hope to have any insight into such treatment.[55]

Despite these trends, the colonial tradition of keeping the sentencing power with jurors was so strong that as late as 1960—at the very apogee of the rehabilitation movement—roughly one-quarter of all states (thirteen of them) still retained jury sentencing in noncapital cases.[56] Even as late as 1990, eight states retained the tradition of jury sentencing,[57] though today there are only five holdouts.[58]

E. Judge Sentencing as a Vestigial Historical Accident

Given this history, a case can be made that the weak English predilection against jury sentencing had its origins in the rather arbitrary fact that presentment jurors never got to participate in the guilt

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55. For a history and critique of the rehabilitative ideal, see generally FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981). *See also infra* notes 161–71 and accompanying text.

There is no small irony in the fact that the rehabilitative ideal also triggered the movement toward indeterminate sentencing. Apparently, though trained professional judges are needed to impose these quasi-medical sentences, the sentences they ended up imposing were usually: "Go to prison until you are cured." It is not at all clear why jurors would not have been equally capable of telling criminals, "Go to prison until you are cured," especially when the institution deciding whether a particular criminal has or has not been cured was typically in the executive branch (parole boards), and not in the judiciary.

In any event, when the remnants of the rehabilitative ideal turned their attention to mental health law and drug policy, judges became much more active in treatment even than their indeterminate sentencing ancestors, creating the modern movement that calls itself "therapeutic jurisprudence." *See infra* note 175 and accompanying text.

56. Ten states had general jury sentencing provisions for noncapital felonies. ARK. STAT. ANN. § 43-2145 (1947); GA. CODE ANN. § 27-2502 (Harrison 1953); ILL. ANN. STAT. ch. 38, § 754a (Smith-Hurd Supp. 1959); KY. REV. STAT. ANN. § 431.130 (Banks-Baldwin 1959) (citing RUSSELL'S KENTUCKY PRACTICE AND FORMS, CRIMINAL CODE § 258 (William Edward Baldwin ed.)); MO. ANN. STAT. § 546.410 (West 1953); MONT. REV. CODE ANN. § 94-7411 (Smith 1947); OKLA. STAT. ANN. tit. 22, § 926 (West 1958); TENN. CODE ANN. § 40-2707 (1955); TEX. CODE CRIM. PROC. ANN. art. 693 (Vernon 1941); VA. CODE ANN. § 19.1-291 (Michie Supp. 1960). Three other states mandated jury sentencing for some, but not all, noncapital felonies. ALA. CODE tit. 14, §§ 322, 355, 409 (1958); IND. CODE ANN. §§ 9-1819 (Michie 1956); N.D. REV. CODE § 12-0605 (1943).

57. ARK. CODE ANN. § 5-4-103(a) (Michie 1987); KY. R. CRIM. P. 9.84 (1990); MISS. CODE ANN. § 97-3-67 (Supp. 1988); MO. ANN. STAT. § 557.036(2) (Vernon Supp. 1989); OKLA. STAT. ANN. tit. 22, § 926 (West 1981 & Supp. 1986); TENN. CODE ANN. §§ 40-20-106 to -107 (1982); TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1981 & Supp. 1990); VA. CODE ANN. § 19.2-295 (Michie 1983 & Supp. 1989).

58. The five states are Arkansas, Missouri, Oklahoma, Texas, and Virginia. *See supra* note 1. Oklahoma abandoned jury sentencing in 1997, but re-adopted it in 1999. Oklahoma Truth in Sentencing Act, ch. 133, 1997 Okla. Sess. Laws 603; Truth in Sentencing—Repealer, ch. 5, 1999 Okla. Sess. Laws 429.

phase, let alone in the sentencing phase. Contrast the history of the criminal presentment jury with the history of civil juries. Assizes were regularly convened throughout England as early as the Norman Conquest, for the specific purpose of having jurors hear *and resolve* civil disputes. One of William the Conqueror's first official acts was to convene assizes in every English county to settle land ownership disputes between the Norman conquerors and the Saxon conquered.[59] Indeed, the beginning of the golden age of English juries is generally credited to Henry II, who in 1166 established a uniform and permanent set of assizes for resolving real estate disputes.[60] The fact is that in the formative years of the jury trial, the English simply did not treat criminal cases very seriously, at least early on, when the king's prosecutors were not yet nipping at Parliament's heels.[61]

When the historical accident of judge sentencing eventually became dominant in American state and federal courts, that dominance was itself the direct result of two conditions that no longer exist today: judges had almost unlimited discretion to impose penitentiary sentences, and the purpose of those sentences was to rehabilitate. Today, indeterminate sentencing is largely a thing of the past. Almost every state, either directly by legislatures or indirectly by state sentencing commissions, has imposed relatively narrow limits on potential prison sentences depending on the nature of the crime. Congress has imposed the mother of all limitations in the form of the Federal Sentencing Guidelines.

The virtual extinction of indeterminate sentencing was the result of the spectacular demise of the rehabilitative ideal.[62] Today, the sys-

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59. MOORE, *supra* note 14, at 35.

60. *Id.* at 37–38.

61. Another indication of the relative seriousness with which the English took property cases versus criminal cases is in the history of harmless error. The original, quite forgiving, English rules about harmless error were first formulated in criminal cases, and later abandoned in civil cases, probably because the English required property trials to be much more reliable than criminal trials. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1419 n.146 (2001) ("Perhaps these two very different ways of looking at the role of juries and the reliability of their verdicts is a remnant of the ancient English preoccupation with accuracy in real property cases.").

62. For a discussion of the fall of the rehabilitative ideal and the rise of neoretributionism, see *infra* notes 165–74 and accompanying text. There are pockets of rehabilitation that have survived, and indeed prospered, after the retribution revolution. The growing numbers of therapeutic drug courts represent the biggest, and, from my perspective, most troubling, remnant of rehabilitation. *See generally* Morris B. Hoffman, *The Rehabilitative Ideal and the Drug*

tem punishes criminals because criminal acts deserve proportionate retribution, not because criminals deserve to be rehabilitated. As discussed in more detail below,[63] there is no better place to lodge the moral obligation of determining what particular punishment a particular crime deserves than in the very jury that heard all the particulars.

II. THE CONSTITUTIONAL CASE

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. Edmund Randolph's original draft of Article III had no provisions guaranteeing either criminal or civil juries.[64] The unamended Constitution that came out of the Philadelphia convention mentions jury trials in only one place: Article III, Section 2, Clause 3 secures the right to jury only in *federal* criminal cases, which, as discussed in Part I.C, were rare indeed.[65] Although there was considerable discussion about judicial review of jury verdicts,[66] and also about what seems today to be the rather arcane question of whether the federal venire should be drawn from a unit as large as a whole

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Court Reality, 14 FED. SENTENCING REP. 172 (2002) (decrying drug courts as a "psycho-judicial branch").

63. *See infra* Part III.B.

64. SAUL K. PADOVER, TO SECURE THESE BLESSINGS 419 (1962).

65. Article III provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by a Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2, cl. 3. Although this language does not itself appear to be limited to federal courts, it is contained in Article III, which sets forth the powers and limitations of the federal judiciary. Thus, the Supreme Court held in *Nashville, Chattanooga & St. Louis Ry. v. Alabama*, 128 U.S. 96, 101 (1888), and again in *Marvin v. Trout*, 199 U.S. 212, 226 (1905), that this language applies only to criminal trials in *federal* courts. This provision and the Sixth Amendment are entirely duplicitous as far as the *right* to jury trial is concerned, though of course the Sixth Amendment secures not only the right to jury trial, but also the rights to a speedy and public trial, to an impartial jury, to notice of the charges, to confront witnesses, to compel process, and to be represented by counsel. U.S. CONST. amend. IV. The Court held in *Schick v. United States*, 195 U.S. 65 (1904), that the more specific provisions of the Sixth Amendment control over the general provisions of Article III. *Id.* at 68–69.

66. *See, e.g.*, THE FEDERALIST NO. 81, at 488–91 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing whether the Supreme Court should be able to reexamine facts determined by juries).

state,[67] there are no recorded discussions about the allocation of sentencing power as between judge and jury. In fact, the only significant preratification discussion of jury trials at all was Alexander Hamilton's explanation in *Federalist No. 83* for why Article III, Section 2, Clause 3, secures the right to a jury only in federal criminal cases and not in civil cases.[68] And although Hamilton wrote extensively about the allocation of judicial power among the federal courts[69] and between the federal and state courts,[70] he did not discuss the allocation of power between judge and jury.

The texts of the Sixth and Seventh Amendments likewise make no mention of whether the right to a jury guaranteed in those amendments includes the right to have the jury impose sentence and award damages.[71] Until recently, almost all of the Court's discussions

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67. VAN DYKE, *supra* note 16, at 7 ("Many people expressed fears . . . that the vincinage requirement was too broad . . . ."). That debate was resolved in favor of having the federal venire drawn from the entire state. U.S. CONST. amend. VI. ("[T]he 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 . . . .").

68. THE FEDERALIST NO. 83 *passim* (Alexander Hamilton) (Clinton Rossiter ed., 1961). It may seem surprising that the Constitution initially secured the right to jury trial only in federal criminal cases, in light of the fact that the colonies and early republic inherited the English emphasis on civil juries. *See supra* note 61 and accompanying text. Indeed, John Adams's famous Braintree Instructions attacked the nonjury Admiralty Courts principally because it was through those courts that English taxes were collected. DAVID MCCULLOUGH, JOHN ADAMS 61 (2001). The original federal neglect of the civil jury becomes somewhat more understandable when one recognizes, as Hamilton did, that by 1789, most states enforced tax laws by the much more summary, and efficient, process of distress and sale, rather than in court proceedings. THE FEDERALIST NO. 83, *supra*, at 500. Hamilton also points out that the right to civil juries was already protected in some cases by the common law, by various state constitutions, and by specific laws, and that it would not be wise for the federal government to displace the diverse manner in which each state decided this issue. *Id.* at 501–05. Thus, even when the Seventh Amendment was adopted, it echoed these very same concerns by applying only to actions at common law, and only in federal courts. *See infra* notes 71–72 and accompanying text.

69. *See generally* THE FEDERALIST NO. 81, *supra* note 66.

70. *See generally* THE FEDERALIST NO. 82 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

71. The Sixth Amendment 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be other-

about the constitutional role of the jury have focused on the Seventh Amendment, not on the Sixth Amendment, though what the Court has *not* said about the Sixth Amendment, and what it has said by way of comparing the two, has been instructive. It is therefore to the Seventh Amendment that I first turn.

A. The Seventh Amendment

Unlike the Sixth Amendment, the Seventh Amendment does not apply to the states,[72] though it does apply in federal diversity cases,[73] provided, of course, that the substantive state claim is the

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wise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

72. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the Sixth Amendment's guarantee of the right to a jury trial in criminal cases was so fundamental that it was part of the irreducible panoply of rights guaranteed by the Due Process Clause of the Fourteenth Amendment. *Id.* at 149. Thus, by incorporation through the Fourteenth Amendment, the Sixth Amendment also guarantees the right to criminal jury trials in state courts.

But the Court has declined to apply the incorporation doctrine to the Seventh Amendment, so its guarantee of the right to a jury in civil cases remains limited to federal courts. Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 & n.14 (1996) (citing Walker v. Sauvinet, 92 U.S. 90, 92 (1876) ("The Seventh Amendment . . . governs proceedings in federal court, but not in state court . . . .")).

A few state constitutions guarantee their citizens the right to juries in civil cases in language that mimics the Seventh Amendment. *E.g.*, HAW. CONST. art. I, § 13. But most use phrases identical or very similar to "the right to jury trial shall remain inviolate." In most states, this constitutional language has been interpreted to mean that the right to a civil jury is preserved only for those actions triable by a jury under English common law as of the date the constitutional provision was adopted by the particular state. *E.g.*, Hung v. Wang, 11 Cal. Rptr. 2d 113, 124 (Cal. Ct. App. 1992) (provision adopted in 1850); Skinner v. Angliker, 559 A.2d 701, 703 (Conn. 1989) (provision adopted in 1818); Idaho Dep't of Law Enforcement *ex rel.* Cade v. Free, 885 P.2d 381, 384 (Idaho 1994) (provision adopted in 1889); Sofie v. Fibreboard Corp., 771 P.2d 711, 718 (Wash. 1989) (provision adopted in 1889). One state—Michigan—has explicitly interpreted this kind of language to be equivalent to the language in the Seventh Amendment. Anzaldua v. Band, 550 N.W.2d 544, 554 (Mich. Ct. App. 1996) (choosing the "nature-of-action" approach over the "historical-analogue" approach in construing the provision). One state—Colorado—has interpreted this kind of language to confer no right to a civil jury whatever. Firelock, Inc. v. Dist. Court, 776 P.2d 1090, 1097 (Colo. 1989) (holding that the provision was not violated "because there is no constitutional right to a jury trial in civil cases").

73. *E.g.*, Atl. & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 360 (1962); Byrd v. Blue Ridge Rural Elec. Coop., 356 U.S. 525, 538–40 (1958). These applications of the Seventh Amendment, decided under the rule of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), may no longer be entirely self-evident after the Court's decision in *Gasperini*, discussed *infra* note 76.

kind of legal claim that would otherwise be triable to a jury.[74] The language of the Seventh Amendment is arguably the clearer of the two, not only guaranteeing a jury in all "suits at common law," but specifically limiting that right to cases involving more than twenty dollars' worth of controversy. By coupling the right to a jury trial with these scope and damage limitations, it may seem evident that the Seventh Amendment contemplates that parties in these kinds of common law actions have a right to have the jury decide both liability and compensatory damages. Interestingly, the Supreme Court did not expressly adopt that view until 1998, in *Feltner v. Columbia Pictures Television, Inc.*[75]

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74. That is, "[s]uits at common law, where the value in controversy shall exceed twenty dollars." U.S. CONST. amend. VII.

75. 523 U.S. 340, 355 (1998). The Court had earlier skirted at the edges of this issue in *Dimick v. Schiedt*, 293 U.S. 474 (1935), a diversity case in which it held that a trial court's conditional addittur—an order granting the plaintiff a new trial unless the defendant consents to a judge-determined increase in the amount of the jury's damages—violated the Seventh Amendment's Reexamination Clause. *Id.* at 486–87. For a discussion of the Reexamination Clause, see *infra* note 76 and accompanying text. The *Dimick* Court acknowledged the well-settled English rule that the assessment of damages is "'peculiarly within the province of the jury,'" but did so only in the context of the trial judge's authority to reexamine the jury's award, and not in the context of a litigant's right to have damages decided by a jury in the first instance. *Id.* at 480 (quoting MAYNE'S TREATISE ON DAMAGES 571 (9th ed. 1920)).

In fact, in *Tull v. United States*, 481 U.S. 412 (1987), a case arising under the Clean Water Act, Justice Brennan, writing for a 7-2 majority on this point, concluded that the Seventh Amendment does not require jury resolution of damages:

> The *Seventh* Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." Is a jury role necessary for that purpose? We do not think so.

Id. at 425–26 (quoting Colgrove v. Battin, 413 U.S. 149, 157 (1973)). Justices Scalia and Stevens dissented on this issue, arguing, quite correctly, that there is no historical precedent for the proposition that English or colonial suits at common law could be bifurcated between liability and damages, with juries determining the former but judges the latter. *Id.* at 428.

In a rather remarkable and abrupt turnaround, the Scalia-Stevens dissent became a unanimous majority just twelve years later in *Feltner*, a case in which the Court held that a plaintiff in a federal copyright infringement case had a right under the Seventh Amendment to have his damages assessed by a jury:

> The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any . . . . It has long been recognized that "by the law the jury are judges of the damages." . . . And there is overwhelming evidence that the consistent practice at common law was for juries to award damages.

523 U.S. at 353 (citations omitted).

Because *Feltner* was a copyright infringement case, and not a common law action, it involved the threshold question of whether Congress intended to create a statutory right to have a jury award damages when it provided in § 504(c) of the Copyright Act that damages are to be

The Seventh Amendment is more explicit than the Sixth Amendment in another important way: after granting the right to jury trial in certain civil cases, that right is reinforced by the so-called "Reexamination Clause." That clause provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."[76]

B. The Sixth Amendment as the "Not Seventh Amendment"

Until *Apprendi*, some of the most significant insights about whether the Sixth Amendment might require jury sentencing came from what the Court *had not* said about the issue. When the Court declared that the Sixth Amendment's right to a criminal jury is so fundamental that its guarantees are part of basic due process, and therefore applicable to the states, there was no suggestion that this fundamental right might extend beyond the guilt phase to punishment.[77] More recently, when the Court upheld the constitutionality of the Federal Sentencing Guidelines, the debate, of course, was not whether the Sixth Amendment forbade judge sentencing, but rather

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assessed "by the court." The Court held that the Copyright Act did not by these terms grant a statutory right to jury trial, and that the constitutional issue could thus not be avoided. *Id.* at 345. Although the copyright action in *Feltner* was statutory, the Court noted that that kind of action, unlike certain other statutory actions unknown to the common law, had a rich common law tradition. *Id.* at 348–49; *accord* Lorillard v. Pons, 434 U.S. 575, 583 (1978) (holding that an ADEA provision directing the "court" to grant appropriate legal and equitable relief reflected Congress's intent to provide the right to a jury trial).

76. U.S. CONST. amend. VII. In *Gasperini*, a diversity case, the Court not only held that the Reexamination Clause does not forbid federal appellate courts from reviewing federal district court denials of motions for new trial based on excessive damages, but also that state court procedures permitting such review are "substantive" for *Erie* purposes. 518 U.S. at 419, 426. Thus, the *Gasperini* Court held that the federal appeals court was *compelled* by New York law to review the federal trial court's denial of the defendant's motion for new trial based on excessive damages, though it must do so on an abuse of discretion basis. *Id.* at 419. There was a vigorous dissent written by Justice Scalia and joined by Chief Justice Rehnquist and Justice Thomas, and the case has been roundly criticized, not only as a matter of the Seventh Amendment, but also for its application of *Erie*. *See, e.g.*, C. Douglas Floyd, Erie *Awry: A Comment on* Gasperini v. Center for Humanities, Inc., 1997 BYU L. REV. 267, 269, 298 (criticizing the majority's lack of "awareness of the difficult issues raised by the Court's previous decisions construing *Erie*," and its "oddly incomplete view of the Seventh Amendment"); J. Benjamin King, Note, *Clarification and Disruption: The Effect of* Gasperini v. Center for Humanities, Inc. *on the* Erie *Doctrine*, 83 CORNELL L. REV. 161, 164 (1997) (stating that the decision "render[ed] uncertain a previously settled area of law"); Richard L. Steinberg, Note, *Re-Examination Clause Re-Examined: The Supreme Court Removes Seventh Amendment's Re-Examination Protection in Diversity Cases in* Gasperini v. Center for Humanities, Inc., 52 U. MIAMI L. REV. 909, 922 (1998) (noting the Court's disregard of "hundreds of years of precedent").

77. *Duncan*, 391 U.S. 145, 148–62.

whether the nondelegation and separation of powers doctrines forbade anything less than absolute and monolithic discretion by sentencing judges.[78]

On rare occasions, the Court has made slightly less oblique comparisons between juries assessing damages and juries imposing sentences. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[79] the Court compared the award of punitive damages in a civil case to the imposition of a fine in a criminal case, and used that analogy to conclude that the Seventh Amendment does not apply to the award of punitive damages.[80] Justices Scalia and Stevens, in their partial dissent in *Tull v. United States*,[81] made similar analogies.

Despite the unarticulated assumption behind all of these longstanding analogies—that criminal defendants do not have a right under the Sixth Amendment to have their sentences imposed by juries—the Court did not expressly announce that rule until 1984, in *Spaziano v. Florida*,[82] a death penalty case upholding Florida's trifurcated capi-

78. Mistretta v. United States, 488 U.S. 361, 371–411 (1989).

79. 532 U.S. 424 (2001).

80. *Id.* at 432–37. Actually, *Cooper* involved the Reexamination Clause of the Seventh Amendment, *see supra* note 75 and accompanying text, since the case raised the question of whether a reviewing court could, de novo, set aside a jury's award of punitive damages. In concluding that it could, Justice Stevens, writing for an 8-1 majority, said:

> Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. The latter, which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation.
>
> . . . .
>
> "Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." Because the jury's award of punitive damages does not constitute a finding of "fact," appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent . . . .

Id. at 432, 437 (quoting *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting)). I shall examine whether these distinctions between damages and fines, compensation and punishment, and findings of fact and moral condemnation, are as clear as conventional wisdom assumes. *See infra* Part II.C, D, E, and F.

81. 481 U.S. 412, 428 (1987) (Scalia, J., dissenting) (remarking how the determination of the civil remedy in dispute brought to mind "the role of the sentencing judge in a criminal proceeding").

82. 468 U.S. 447, 459 (1984).

tal sentencing scheme.[83] The Court concluded that neither the Eighth Amendment nor the death penalty cases decided under it required that a distinction be made between death cases and nondeath cases for purposes of who must impose the sentence. It announced, with no citation and no historical discussion, that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination [on sentencing in noncapital cases]."[84] That assumption was made explicit, though again with no significant historical discussion, two years later, in *McMillan v. Pennsylvania*,[85] a case in which the Court upheld Pennsylvania's firearm statutes, under which the visible possession of a firearm was designated as a sentencing factor that could increase the mandatory minimum sentence.[86]

After *Cooper*, *Spaziano*, and *McMillan*, the orthodoxy seemed comfortably in place. There were bright lines between the Sixth Amendment and the Seventh Amendment, between the jury's civil role as awarder of compensatory damages and the judge's criminal role as sentencer, between trial and sentencing, between finding facts and doling out opprobrium, between guilt and punishment. But these bright lines would not stay bright for very long.

C. The Boundaries Between Guilt and Punishment Begin to Fade

A series of federal criminal cases in the 1990s, most dealing with mandatory minimum sentencing provisions under various federal drug laws, started to make the unthinkable thinkable—that the Sixth Amendment might actually require jury sentencing. These cases opened the door not because of what they said directly about the scope of the Sixth Amendment, but rather because of what they said about the permeability of the theretofore impermeable boundaries between "elements" and "sentencing factors," and, therefore, between guilt and punishment.

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83. *Id.* at 466. Under that scheme, the jury first decides guilt, then also hears the penalty phase and recommends life or death. The trial judge may then override the jury's sentencing recommendation, in either direction. *Id.* at 451–52.

84. *Id.* at 459; *see also* Cabana v. Bullock, 474 U.S. 376, 385–86 (1986) (stating, without more, that "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury").

85. 477 U.S. 79 (1986).

86. *Id.* at 93. ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."). See *infra* Part II.E for a discussion of the issue of facts that increase minimum sentences rather than maximum sentences.

Here was the problem: several federal drug laws require mandatory minimum sentences if the amount of certain kinds of drugs exceeds a certain level. For example, 21 U.S.C. § 844(a) (2000) imposes a nonmandatory maximum sentence of one year in prison for the intentional or knowing first offense of simple possession of any controlled substance, but imposes a mandatory five-year minimum and a twenty-year maximum if the substance was cocaine and the defendant possessed more than five grams of it. In a prosecution under this statute for simple possession of more than five grams of cocaine, are the type and amount of drugs elements of the offense, which the government must plead then prove beyond a reasonable doubt to the jury? Or are they merely sentencing factors, which the government need not plead and may prove to the judge at sentencing, by a preponderance?

Of the eight circuit courts of appeals deciding this issue, five followed what I call the traditional rule—trial was trial, sentencing was sentencing, and never the twain should meet, even when factual issues were required to be resolved to decide what potential punishment a defendant could face.[87] But three circuits adopted what became known as the "elements rule,"[88] which can be summarized this way: with the exception of prior convictions, if the resolution of any fact will subject a defendant to penalties in excess of what he or she would otherwise be facing, then that fact is an element, and must be pleaded, proved beyond a reasonable doubt, and decided by the jury, unless of course the defendant pleads guilty and/or waives a jury.

The Supreme Court entered these perilous waters in 1999, in a case, interestingly enough, that was not about mandatory drug sentencing. *Jones v. United States*[89] involved the federal carjacking stat-

87. United States v. Butler, 74 F.3d 916, 923 (9th Cir. 1996) (noting that quantity is not an element of the crime); United States v. Smith, 34 F.3d 514, 519 (7th Cir. 1994) (stating that the judge is to make an independent determination of quantity); United States v. Deisch, 20 F.3d 139, 146 (5th Cir. 1994) (holding that quantity is only relevant for sentencing); United States v. Monk, 15 F.3d 25, 27 (2d Cir. 1994) (noting that quantity is not an element to be proven to the jury beyond a reasonable doubt); and United States v. Michael, 10 F.3d 838, 839 (D.C. Cir. 1993) (finding that quantity is only relevant for sentencing).

88. United States v. Stone, 139 F.3d 822, 828 (11th Cir. 1998) (holding that the presence of cocaine is an additional element of 21 U.S.C. § 844(a), and not merely a sentencing factor, such that § 844(a) is not a lesser included offense of § 841(a)); United States v. Sharp, 12 F.3d 605, 606 (6th Cir. 1993) (concluding that quantity is an element and not a sentencing consideration); and United States v. Puryear, 940 F.2d 602, 603 (10th Cir. 1991) (same).

89. 526 U.S. 227 (1999).

ute, which provides for a sentence of up to fifteen years for ordinary carjacking, but up to twenty-five years if the victim suffers serious bodily injury, and up to life if the victim dies.[90] Mr. Jones was charged with carjacking in an indictment that did not allege that the victim suffered serious bodily injury, and the jury that convicted him made no findings about serious bodily injury by way of special interrogatories or otherwise. At the sentencing hearing, the trial judge found by a preponderance of the evidence that the victim had in fact suffered serious bodily injury, and sentenced Mr. Jones to twenty-five years in prison.[91]

The Supreme Court reversed, adopting the elements rule, at least where it could divine that Congress intended the subject fact to be an element rather than a sentencing factor. The *Jones* majority did not directly hold that the Sixth Amendment required the harm to the victim to be treated as an element; it was instead a statutory interpretation case. The Court found the federal carjacking statute ambiguous on this point, and based its interpretative decision on the doctrine of constitutional doubt—it interpreted the statute in the way it did because it had doubts about whether a contrary interpretation would violate the Sixth Amendment.[92] In a tantalizing footnote, the Court suggested that its doubts on this point might be more than doubts, and that the Sixth Amendment might impose limits on Congress's ability even to unambiguously label facts as sentencing factors rather than elements.[93]

D. Apprendi *and* Ring*: The Boundaries Vanish*

The suggestion made by the *Jones* footnote caused some rumblings in the academy and in the trial courts. What justifies the prior conviction exception to the elements rule?[94] Are all "sentencing fac-

90. 18 U.S.C. § 2119 (2000).

91. *Jones*, 526 U.S. at 231.

92. *Id.* at 239–40.

93. *Id.* at 243 n.6:

> [U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.

94. If the division of labor between judge and jury has anything to do with perceived competence, the prior conviction exception to the elements rule seems exactly wrong. Whether a defendant has been previously convicted of a crime is precisely the kind of narrow fact with which the system may comfortably charge jurors. It is almost always an easier inquiry than "Did

tors," even ones unambiguously labeled by legislatures as sentence enhancers, really "elements" if they impact the maximum sentence? What if they trigger an increased, or even mandatory, minimum sentence but leave the maximum as is?[95] Does the elements rule apply to death penalty statutes that give the sentencing decision to judges—that is, do aggravating factors "increase" the maximum sentence even though the entire death penalty scheme contemplates the possibility of death? Are the Federal Sentencing Guidelines now unconstitutional, because they in effect require narrow sentence ranges with certain small degrees of upward and downward departure depending on specific facts which judges, not juries, determine? Perhaps most fundamentally, whenever judges impose sentences, we make a myriad of factual findings within the interstices of the jury's typically binary verdict; are some or all of these findings really for the jury to make?

1. Apprendi. The Court began to answer some of these questions in *Apprendi v. New Jersey*.[96] The New Jersey legislature, like many state legislatures, had enacted a so-called "hate crime" statute. The New Jersey statute increased the sentencing range for certain crimes if, at the sentencing hearing, the trial judge found by a preponderance of the evidence that the defendant intended "to intimi-

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the defendant pull the trigger?" or "How much should the defendant be punished?" On the other hand, the fact of a prior conviction is, on its face, such an easy inquiry that perhaps it is sensible to leave that inquiry to the judge and not bother the jury with it. Indeed, in Colorado, where I am a trial judge, our habitual criminal statute used to require the habitual phase to be tried to the jury, but as of June 3, 1995, habitual counts are now tried to the court. COLO. REV. STAT. § 18-1.3-803(1) (WESTLAW through 2002 sessions).

But here again one bumps up against the paradox of the system's deeply ambivalent views about the jury: it trusts them to assess damages in civil cases and to impose punishment in really important (capital) criminal cases, but does not want to bother them with trivial habitual counts that themselves can send a defendant to prison for life. And of course, even if not bothering jurors with habitual counts is good public policy, that does not answer the constitutional question of why the Sixth Amendment requires jurors to resolve easy elemental facts (such as whether the crime was committed within the court's geographical jurisdiction), but does not require the jury to decide whether the defendant was convicted of any prior felonies (even though, on occasion, that inquiry might not be trivial at all, when, for example, there is an issue about identification and therefore about the accuracy of fingerprints).

95. The Court had already held, in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), that facts that increase minimum sentences do not necessarily have to be decided by juries. *Id.* at 93; *see supra* notes 85–86 and accompanying text. But *McMillan* was decided before the Court suggested in *Jones* that the Sixth Amendment might mandate the elements rule.

96. 530 U.S. 466 (2000).

date an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[97]

Mr. Apprendi was indicted by a state grand jury on multiple counts, most arising out of allegations that he fired a gun into the home of an African-American family that had moved into his previously all-white neighborhood.[98] He pleaded guilty to three counts, one of which carried the possibility of an enhanced sentence (ten to twenty years instead of five to ten years), expressly preserving his constitutional objection to any enhancement on that count.[99] At the sentencing hearing, the trial judge found that Mr. Apprendi's actions on that count were indeed motivated by racial animus, and sentenced him to twelve years, two years in excess of the unenhanced maximum.[100] Mr. Apprendi appealed, arguing that the elements rule announced in *Jones* prevented New Jersey from enhancing his sentence without first alleging racial animus and then proving it to a jury beyond a reasonable doubt. The New Jersey appellate courts affirmed the conviction,[101] but the Supreme Court reversed.

In a 5-4 decision, written by Justice Stevens and joined by Justices Scalia, Souter, Thomas, and Ginsburg, the Court made certain the constitutional doubts it had earlier expressed in *Jones*:

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.[102]

In a dissent written by Justice O'Connor and joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, the dissenters attacked the decision as a historical departure from the well-settled rule that a sentencing judge has almost unlimited discretion to decide

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97. N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 2000) (repealed 2001).

98. *Apprendi*, 530 U.S. at 469.

99. Actually, two of the three counts to which Mr. Apprendi pleaded guilty were second degree offenses subject to enhancement, but as part of the plea bargain, the state agreed it would reserve its right to seek enhancement only on one of the two. *Id.* at 470–71.

100. *Id*.

101. 731 A.2d 485, 497 (N.J. Sup. Ct. 1999); 698 A.2d 1265, 1266 (N.J. Super. Ct. App. Div. 1997).

102 *Jones*, 530 U.S. at 484.

many "facts" that bear on punishment.[103] The dissenters contended that the admittedly difficult decision of whether some facts are "elements" or "sentencing factors" should continue to be left to a case-by-case, statute-by-statute determination, and, perhaps most significantly, that the majority's attempt to fashion a bright-line rule threatens to displace virtually all state and federal determinate sentencing schemes, specifically including the Federal Sentencing Guidelines.[104]

Indeed, most of the majority's opinion seems to have been crafted to allay the fears of the runaway train expressed by the dissenters. The majority expressly restated the prior conviction exception, though again without much discussion.[105] It also promised that the rule it announced was not intended to render unconstitutional either state death penalty schemes in which judges decide the sentence[106] or the Federal Sentencing Guidelines.[107] Ten months later, an

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103. They even quoted Professor Stith's and Judge Cabranes' overstatement of that historical discretion. *Id.* at 544–45 (quoting STITH & CABRANES, *supra* note 9, at 9); *see supra* note 23 and accompanying text. The dissenters also pointed out that the majority's result is at odds with all the Court's pre-*Jones* decisions, including *McMillan* and *Walton*. *Apprendi*, 530 U.S. at 534–39.

104. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. . . . The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines).

Apprendi, 530 U.S. at 543–44 (O'Connor, J., dissenting).

> [O]ur approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make the equivalent factual determinations under a determinate-sentencing scheme.

Id. at 548 (O'Connor, J., dissenting).

105. *Id.* at 488. In fact, Justice Stevens's opinion specifically recognizes that the broad principles announced in the case may seem antithetical to the continuation of the prior conviction exception. *Id.* at 489–90; *see supra* note 94.

106. *Apprendi*, 530 U.S. at 496–97.

107. To be fair to the *Apprendi* majority, it did not make explicit promises about the decision's lack of impact on the Guidelines. But even though both Justice Stevens and Justice Thomas pointed out that the Guidelines were not before the Court in *Apprendi*, they also both acknowledged that, in the absence of a statute that contains its own trumping sentencing scheme, the Guidelines have force equivalent to sentencing statutes, suggesting that there is no reason sentencing factors recognized by the Guidelines should not be subject to an *Apprendi* inquiry just like any other sentencing factors. *Id.* at 497 n.21; *id.* at 523 n.11 (Thomas, J., concurring). The argument, of course, will be whether the "statutory maximum" is the Guidelines sentence without any upward departures, in which case the Guidelines will not survive *Apprendi*, or

even larger majority would break the first of these promises and put the second in grave doubt.

2. Ring. Arizona's death penalty statute,[108] like those of four other states,[109] provided that the judge, not the jury, determines punishment, after a sentencing hearing containing all the substantive and procedural protections required by *Furman v. Georgia*[110] and its progeny. In 1990, in *Walton v. Arizona*,[111] the Court held that this Arizona death penalty statute was constitutional, specifically rejecting Mr. Walton's argument that he had a right under the Sixth Amendment to be sentenced by his jury.[112] Despite the *Apprendi* majority's promise that the rule it was announcing would not jeopardize judge sentencing in death penalty cases, was not inconsistent with *Walton*, and would not cause *Walton* to be overruled, the Court overruled *Walton* just ten months later, in *Ring v. Arizona*,[113] holding that the very same death penalty statute it upheld in *Walton* was now unconstitutional.

In *Ring*, seven Justices—the *Apprendi*-five plus Justices Kennedy and Breyer—concluded that because the Arizona statute (like all death penalty statutes after *Furman*) required at least one aggravating factor before a defendant could be sentenced to death, that aggravating factor was the kind of fact that had the effect of exposing a defendant to a penalty (death) greater than was otherwise authorized by the statute, and therefore, under *Apprendi*, the aggravating factor had to be proved to the jury beyond a reasonable doubt.[114] The two dissenters, Chief Justice Rehnquist and Justice O'Connor, repeated their objections to *Apprendi*.[115]

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whether the "statutory maximum" is the Guidelines sentence plus the maximum upward departure, in which case they will survive.

The *Apprendi* majority also expressly declined to address the so-called "indictment question"—whether sentence-enhancing facts that must be proved beyond a reasonable doubt to a jury must also be pleaded. *Id.* at 477 n.3. This reluctance may have special implications now that the Court has extended *Apprendi* to death penalty cases. *See infra* Part II.D.2.

108. ARIZ. REV. STAT. ANN. § 13-703 (West 2001).

109. *See supra* note 4.

110. 408 U.S. 238 (1972).

111. 497 U.S. 639 (1990).

112. *Id.* at 647–49.

113. 122 S. Ct. 2428 (2002).

114. *Id.* at 2443.

115. *Id.* at 2448–50.

E. Harris v. United States*: Confusion Reigns*

On the same day the Court announced *Ring*, it announced *Harris v. United States*,[116] a case that answers one of the discrete questions left open by *Apprendi*: does the elements rule apply only when a fact increases the maximum sentence, or also when it increases the minimum sentence?[117]

Mr. Harris was convicted after a bench trial of violating various federal narcotics and firearms laws, including 18 U.S.C. § 924(c)(1)(a).[118] That particular statute provides a mandatory minimum sentence of five years, but a mandatory minimum sentence of seven years if a firearm is brandished during a drug sale and a mandatory minimum of ten years if the firearm is discharged during the sale.[119] The indictment charging Mr. Harris did not charge him with brandishing, and the trial court made no findings as to brandishing until the sentencing hearing.[120] At that time, the trial court found, by a preponderance, that Mr. Harris did in fact brandish a firearm, and sentenced him to seven years in prison.[121] Mr. Harris appealed, arguing *Apprendi*. The Fourth Circuit affirmed.[122]

The Supreme Court also affirmed, in an opinion written by *Apprendi* dissenter Kennedy, and joined not only by fellow *Apprendi* dissenters Breyer, O'Connor, and Chief Justice Rehnquist, but also by *Apprendi* concurrer Scalia.[123] The majority concluded that the ele-

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116. 122 S. Ct. 2406 (2002).

117. Although the facts in *Apprendi* were about increasing a maximum sentence, the majority opinion phrased the rule a few different ways. Several times, the Court described the holding as being limited to facts that increase maximum sentences, but in one particular part of the opinion, it phrased the rule as applying to facts that take a sentence outside "*the range* prescribed by statute." Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (emphasis added). Increasing a minimum would of course take a sentence outside the "range." Indeed, in his concurrence, Justice Thomas expressed the view that the rule should apply to facts that increase minimum sentences, *id.* at 521–22 (Thomas, J., concurring), and he continued that view in his dissent in *Harris*, 122 S. Ct. at 2423–25 (Thomas, J., dissenting).

118. *Harris*, 122 S. Ct. at 2410. One might ask whether Mr. Harris waived his *Apprendi* objection by waiving his jury trial. After all, when the judge is both the finder of fact and the imposer of sentence, the difference between elements and sentencing factors is, except for the level of proof required, merely a matter of timing. *See infra* Part V.D (discussing the problem of partial waiver).

119. 18 U.S.C. § 924(c)(1)(a)(i)–(iii) (2000).

120. *Harris*, 122 S. Ct. at 2411.

121. *Id*.

122. United States v. Harris, 243 F.3d 806, 812 (4th Cir. 2001).

123. *Harris*, 122 S. Ct. at 2408–09.

ments rule announced in *Apprendi* applied only when the legislature articulates a fact as increasing the maximum penalty, but not when a fact increases a minimum penalty, even a mandatory minimum.[124]

The dissent, written by *Apprendi* concurrer Thomas and joined by *Apprendi* concurrers Stevens, Souter, and Ginsburg, chided the majority's constitutional distinction between a fact that increases a maximum sentence and one that increases a minimum sentence.[125] And indeed, it is hard to dispute that a defendant facing a mandatory twenty-year minimum sentence if a certain fact is proved is substantially more interested in that fact than a defendant for whom the proof of the fact merely increases by a few years his nonmandatory maximum.

F. What These Cases May Mean for Jury Sentencing

If there is one lesson to learn from the speed and inconsistency of these cases, it is that predictions in this area are almost worthless. Who could have guessed that seven Justices would have overruled *Walton* just ten months after five of them said they would not? Who could have guessed that in *Ring*, Justices Kennedy and Breyer would join the majority, at least in the result, just ten months after dissenting in *Apprendi*? And, perhaps most puzzling, who could have guessed that Justice Scalia would pull back the way he did in *Harris*?

The Court seems balanced on an impossibly difficult saddlepoint: if the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to a jury trial by the simple artifice of labeling elements as "sentencing factors"; yet there seems to be no principled basis upon which to truly distinguish elements from sentencing factors. This dilemma is so sharp that the slightest change of perspective or wording by one or two Justices seems to have a magnified effect on the outcomes in these cases.

Would I bet good money that *Apprendi* and *Ring* will soon drive the current Court to throw up its hands at the element/sentencing factor distinction, and rule that the Sixth Amendment requires that both must be decided by juries? No.[126] But of course strange things have

124. *Id.* at 2415.

125. *Id.* at 2423–25 (Thomas, J., dissenting).

126. After his surprising concurrence in *Harris*, it is hard to imagine that Justice Scalia, who seems to be a particularly important pivot on this issue, would take to an extreme that would in one fell swoop invalidate not only the Federal Sentencing Guidelines but also the noncapital

happened in this area. It is not at all unimaginable that even a single change in perception—either from an existing Justice or a new one—could begin to form a coalition willing to reexamine the venerated but not at all venerable assumption that the Sixth Amendment is fundamentally different than the Seventh Amendment, and does not require juries to finish the job of trial.

Apart from sheer nose-counting and crystal ball reading, there are principles in these cases that seem ineluctably to lead to the conclusion that jury sentencing is constitutionally compelled. Once the Court recognized that the Sixth Amendment imposes limitations on the power of legislatures to label facts as "sentencing factors" instead of "elements," it seems quite illogical and ultimately fruitless to devise a constitutional test for this distinction that is formalistic and entirely dependent on the particular architecture legislatures elect to use in constructing their sentencing schemes.

For example, as long as *Harris* remains the law, legislatures will be free to avoid *Apprendi* entirely, simply by increasing maximum sentences to accommodate what would otherwise have been an enhanced sentence, and then imposing higher and/or mandatory minimum sentences to reflect the enhancement. Thus, New Jersey could accomplish results almost identical to those of their stricken scheme by enacting a system in which ordinary intimidation is punishable by a nonmandatory sentence of five to twenty years (rather than five to ten), but race-based intimidation is punishable by a mandatory minimum ten-year sentence.

There will be no small amount of irony if *Apprendi*, which seems to be grounded on the fundamental idea that defendants should know the penalty they face before starting a trial, has the unintended consequence of increasing the presumptive maximum for all defendants, regardless of the presence of any sentence enhancers. Such a reaction will subject all defendants to an enormous increase in the uncertainty of their punishment, as the price for certainty about the maximum. Widening sentencing ranges in this manner is not only unfair to de-

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criminal sentencing schemes in forty-six of fifty states. It is even more difficult to imagine Justice Breyer moving to that extreme, as a staunch supporter of the Federal Sentencing Guidelines and as a reluctant passenger on the *Apprendi* train. Those two, together with the three *Apprendi* and *Ring* dissenters, form a solid coalition on this issue that seems almost impregnable to the idea that the Sixth Amendment might require jury sentencing.

fendants who face no enhancement,[127] it runs counter to the principles of retribution and determinate sentencing that now seem so well settled.[128]

But *Apprendi's* formalism runs even deeper than the artificial distinction between minimum and maximum sentences. The Court seems fixed on the idea that once the legislature steps in and constructs a differentiated sentencing scheme, then and only then does the Sixth Amendment demand that the facts defining that differentiation be decided by the jury. But there are all kinds of "differentiation" in state sentencing schemes, and all kinds of differentiating "facts." One of my favorite examples is a provision in Delaware's drug laws, which imposes certain nonmandatory penalties for drug defendants whom the court finds at the sentencing hearing are addicts, but which imposes severe mandatory minimum penalties for defendants whom the court finds are nonaddicts.[129] But for *Harris*, how could this scheme possibly survive *Apprendi*? And why should it? Are judges really more competent to decide whether someone is an "addict" than twelve citizens?

A more widespread and more troubling example is in the many states that set a presumptive range for particular classes of crimes, but a higher range if the trial judge decides in his or her discretion that the facts warrant a higher range. Indeed, this is the sentencing architecture recommended by the Model Penal Code, so it is quite common.[130] How does *Apprendi* apply in this very common situation? The

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127. To illustrate what is wrong with unbounded legislative power to convert elements into sentencing factors, consider this extreme example. A legislature repeals all of its noncapital crimes and replaces them with a single crime—"being a criminal." "Being a criminal" has a single element—intending to harm another person—and it has a single penalty range—a minimum of one hour in jail to a maximum of life in prison. All the former crimes are then redefined as "sentencing factors" to be decided by judges, not juries. So for example, if in a particular case "being a criminal" is accompanied by an act of robbery, as found by the judge after the guilt phase on "being a criminal," then the statute would require the judge to sentence the defendant in the old robbery range. Such a scheme would be perfectly constitutional under *Harris*, since in all cases a defendant would be on notice of the maximum penalty for "being a criminal"—life in prison. Judges would be perfectly free to decide all the "elements" of every traditional crime, because those "elements" would have been redefined as sentencing factors without displacing the maximum sentence. And all the unfortunate defendants charged with "being a criminal," but whose underlying acts were nothing more serious than spitting on the sidewalk or shoplifting, will be facing a maximum sentence of life in prison.

128. *See infra* Part IV.B.

129. DEL. CODE ANN. tit. 16, § 4751(d) (2001).

130. The original Model Penal Code defined three levels of felonies carrying presumptive, albeit indeterminate, sentence ranges, or what the Code called "Ordinary Terms." MODEL

Court has been careful to insist that the judge retains discretion to pick a sentence *within* a range, but does the judge retain discretion to *aggravate* a range?

It is no answer to say that such schemes are permissible because a defendant always knows the *potential* for the higher range. Mr. Apprendi knew the *potential* for a higher range. Mr. Ring knew the *potential* for a death sentence. The question is whether a defendant is taking a jury-based risk of having that potential realized or a judge-based risk. But then one is back to the conundrum: a defendant in *every* case takes a judge-based risk within the range.

The import of these cases seems to be that as long as legislatures are not too determinate, the Sixth Amendment does not matter much. The system has no problem with judges deciding whether defendants were armed or not armed, and then using that fact to impose sentences at the high end of wide and even indeterminate ranges, or even to aggravate ranges. But as soon as *legislatures* express the view that being armed is an important fact, by way of making that fact increase the maximum penalty, suddenly the Sixth Amendment comes into play. There is no principled way to draw these lines, except to say that unless they are drawn, judges will not constitutionally be able to impose *any* sentences. And that is precisely where these cases may ultimately lead.

III. THE EMPIRICAL CASE

The modern case against jury sentencing typically relies on certain assumptions about the relative sentencing competence of judges and jurors. These assumptions are often expressed in various versions of the following four propositions: (1) judges are less susceptible to prejudice than jurors; (2) sentences imposed by judges are more uniform and therefore more predictable than sentences imposed by ju-

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PENAL CODE § 6.06 (1985). But it also defined three aggravated levels, or what it called "Extended Terms." *Id.* § 6.07. The Code specifically set forth the grounds for extending an ordinary term, and those grounds included such circumstances as when the defendant is a "persistent offender," a "professional criminal," or is a "dangerous, mentally abnormal person." *Id.* § 7.03. The tentative draft of the revisions to the sentencing portions of the Code retains this system of presumptive and discretionarily aggravated ranges, though it proposes a move away from indeterminate sentencing to a system of determinate sentencing. *See* KEVIN R. REITZ, AM. LAW INST., MODEL PENAL CODE: SENTENCING, PLAN FOR REVISION 1, 74–76, 86–87 (2002) (discussing proposals for revision of several sections of the original Code that involve a move from indeterminate sentencing to a system of determinate sentencing) (unpublished manuscript, on file with the *Duke Law Journal*).

ries; (3) judges are more lenient than juries; and (4) jury sentencing encourages compromise verdicts.[131] These aphorisms about how judges and juries exercise their sentencing power seem to be the product more of judicial myth than empirical examination.

A. Judges Are Less Susceptible to Prejudice

Quite apart from the remarkable judicial hubris embedded in this bold assertion, social science research does not support it. Many mock sentencing experiments have been run to investigate this proposition, with maddeningly mixed results.[132] The only direct study of judge/jury sentencing disparity based on race was one done in 1984 by Professors Brent Smith and Edward Stevens.[133] One part of that study examined the length of sentences imposed in Alabama robbery convictions both before and after judges took over the sentencing function.[134] Professors Smith and Stevens found that, regardless of whether these robbers were being sentenced by judges or juries, there was no statistically significant race-based differences in the frequency of above-average sentences.[135]

Perhaps the most telling study about sentencing prejudice was the one published in 1980 by Professors Alfred Blumstein and Jacqueline Cohen.[136] They examined ordinary people's views of the appropriate length of sentences for crimes based on actual cases, and measured those views across different racial, gender, and educational strata. They found that although members of different strata had very different sentencing views (especially across racial strata), there was remarkable agreement *within* strata.[137] Thus, it appears to be consid-

131. *See, e.g.*, *Consideration of Punishment by Juries*, *supra* note 6, at 401–04 (making the compromise argument); *Jury Sentencing in Texas: Time for a Change?*, *supra* note 8, at 336 (making the prejudice and compromise arguments); Reese, *supra* note 8, at 980–82 (making the uniformity argument); *Statutory Structures for Sentencing Felons to Prison*, *supra* note 6, at 1156–57 (making the compromise argument).

132. *See* Lanni, *supra* note 7, at 1799 n.108 (collecting sources that document mock sentencing experiments).

133. 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 (1984).

134. *Id.* at 3–6.

135. When juries sentenced, they favored white defendants, but only by a statistically insignificant margin. When judges sentenced, they favored black defendants, though again only by a statistically insignificant margin. *Id.* at 6.

136. Alfred Blumstein & Jacqueline Cohen, *Sentencing of Convicted Offenders: An Analysis of the Public's Views*, 14 LAW & SOC'Y REV. 223 (1980).

137. *Id.* at 234–48.

erably more dangerous to leave the sentencing decision to a single person, whose membership in a particular group might skew his or her views considerably, than to leave it to many people, whose memberships in many groups will force them to accommodate their interstrata differences.[138]

B. Judges' Sentences Are More Uniform and Therefore More Predictable

There have been three studies examining this proposition, with inconclusive results. While one study found that jury sentences are more variable than judge sentences,[139] another found no statistical differences in variability,[140] and a third seemed to split the difference, 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."[141] To be fair, the variability inquiry should probably not be done by comparing *all* jury sentences to *all* judge sentences, because jurors come and go while judges stay. That is, even if there is the same variability amongst all judges as there is amongst all juries, there no doubt will be some measure of uniformity, and therefore predictability, in how any particular judge sentences particular kinds of crimes. Good prosecutors and criminal

138. The belief that judges are less susceptible to sentencing prejudices than jurors may stem from the belief, for which there is some equivocal evidence, that there are race-based differences in the frequency with which the death penalty is imposed. *See, e.g.*, DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 140–97 (1990) (setting forth statistics and analysis leading to the conclusion that the race of the defendant influences the decision to impose the death penalty). Since in most states jurors decide capital sentencing, *see supra* note 4, it may be tempting to attribute racial disparities in death sentences to the juries imposing them. But the data does not support that attribution. Instead, it appears that when there are racial differences in death cases, they manifest themselves early in the process—in the charging and other pretrial stages of the case—and not in the sentencing. *See, e.g.*, SAMUEL R. GROSS & ROBERT MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 22 (1989) (explaining that the influence of race was stronger during earlier stages of litigation—such as the decision by the prosecutor to pursue the death penalty—than during later stages); U.S. GEN. ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMITTEES ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 271 (1990) (same).

139. Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3, 31–32 (1994).

140. WILLIAM A. ECKERT & LAURI E. EKSTRAND, THE IMPACT OF SENTENCING REFORM: A COMPARISON OF JUDGE AND JURY SENTENCING SYSTEMS 8–10 (n.d.).

141. Smith & Stevens, *supra* note 133, at 1.

defense lawyers learn their judges' sentencing tendencies and plea bargain accordingly. I am unaware of any studies confirming or quantifying this kind of individual judge uniformity, but any such uniformity would no doubt be lost by a move to jury sentencing.[142]

C. Judges Are More Lenient

Practitioners seem to assume that juries would be harsher sentencers than judges. Surveyed prosecutors favor jury sentencing by wide margins, and surveyed defense lawyers favor judge sentencing by equally wide margins.[143] This belief that jurors are harsher than judges seems to be shared by criminal defendants. In the jury sentencing states that allow a defendant to demand a jury in the guilt phase, but waive it in the sentencing phase,[144] very few of those defendants elect to be sentenced by the jury that just convicted them.[145]

Surprisingly, this most intuitive of all judge-jury intuitions seems to be the least accurate. The Smith and Stevens study of Alabama's change from jury sentencing to judge sentencing showed that Alabama judges were substantially *harsher* than their jury counterparts, by almost every conceivable measure. For example, the mean robbery sentence imposed by Alabama juries during the time period immediately before the switch to judge sentencing was 22.5 years; the mean robbery sentence imposed by judges when they took over was 35.9 years.[146] Juries imposed above-midpoint sentences only 25 percent of the time; judges 50 percent of the time.[147]

A similar study, covering several different kinds of crimes, was done of sentencing practices in Atlanta before and after Georgia

142. On the other hand, I suspect that the most common and detectable individual judge tendencies are those having to with the probation versus prison decision—a decision that should probably remain with the judge in any event—and not with whether a particular criminal should get ten years or twenty years. *See infra* Part V.C.

143. For example, a Virginia survey exploring criminal practitioners' views about a proposal to abandon jury sentencing and adopt judge sentencing found that 63 percent of Virginia's prosecutors who responded opposed the reform and that 65 percent of Virginia's criminal defense lawyers who responded favored the reform. REPORT OF THE SUBCOMMITTEE TO STUDY SENTENCING FOR VIRGINIA STATE CRIME COMMISSION 2 (1977).

144. *See infra* Part V.D.

145. In 1994, only 4.5 percent of Virginia felony criminal defendants who went to trial chose to be sentenced by their jury. BRIAN J. OSTROM & NEAL B. KAUDER, EXAMINING THE WORK OF STATE COURTS, 1994: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 65 (1996).

146. Smith & Stevens, *supra* note 133, at 4.

147. *Id.* at 3.

abandoned jury sentencing in 1974. That study showed no statistically significant differences between the length of jury and judge sentences.[148] Indeed, virtually without exception, all studies, and even less rigorous surveys and mock jury studies, show that average jury sentences are not any longer than average judge sentences.[149]

D. Jury Sentencing Encourages Compromise Verdicts

A common criticism of jury sentencing schemes is that they result in so-called "compromise verdicts"—verdicts in which jurors deadlocked on guilt will break the deadlock by agreeing to a guilty verdict but with a light sentence. As discussed below, this is a criticism that is easily avoided simply by requiring bifurcated trials.[150]

In any event, the evidence supporting this contention is weak. There is no hard data, though there are several mock jury studies that seem to support it.[151] But those mock studies do not investigate the dynamics of *group* decisionmaking; they simply poll individuals, ask them what their verdict would be in close hypothetical cases, and report that when individuals believe they will have a voice in punishment they are much more likely to vote to convict.[152] But in real juries, yesterday's holdouts may be tomorrow's overwhelming majority. The mock studies say nothing about whether, and how, the prospect of having a role in punishment might effect the dynamics of deliberation.

In addition, these mock studies assume that the reason juries deadlock is that one or two jurors are not convinced of a defendant's

148. ECKERT & EKSTRAND, *supra* note 140, at 8–10.

149. Lanni, *supra* note 7, at 1789. It is true, as others have observed, that all single-state studies of judge/jury sentencing differences must be viewed with some caution, not only because judges might have a temporary incentive to prove they will not be as soft on crime as predicted, but also because harsher sentencing may well be a trend over time regardless of who imposes sentences. *See id.* at 1794–95 (describing methodological difficulties in generalizing based on single-state studies). There are also several other distorting complications inherent in any study of judge/jury sentencing differences, including some apparent differences between crimes and, perhaps most interesting, an indication that judges may impose a kind of "trial tariff" by sentencing defendants who elect to go to trial more harshly than defendants who plead guilty. *Id.* at 1795.

150. *See infra* Part V.B.

151. *See, e.g.*, Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 LAW & PSYCH. REV. 1, 8 (1986) (reporting that college mock jurors were more likely to convict if they could control punishment).

152. *See id.* at 6–8 (describing the procedures followed and results gleaned from a college mock juror experiment).

guilt beyond a reasonable doubt, and are holding out for acquittal. But of course the deadlock might also be in the other direction: the holdout jurors may be holding out for conviction, in which case the possibility of participating in sentencing will have no impact on their willingness to vote to acquit because an acquitted defendant will not be sentenced.

Even if the holdouts are holding out for acquittal, the critics of compromise assume they are holding out because they are not satisfied that the case has been proved beyond a reasonable doubt. But an equally plausible scenario is that the holdouts are nullifying—that is, that they agree the case has been proved beyond a reasonable doubt but simply refuse to convict. Having such jurors honor their oaths, in exchange for having a say in sentencing, seems to me to be something the system should encourage, not discourage.

E. So What?

Even if all four of these traditional empirical propositions were true, they do not justify judge sentencing any more than they justify repealing the Sixth or Seventh Amendments. Several of them prove too much, by failing to distinguish the guilt phase from the sentencing phase. For example, if judges really are less susceptible to prejudice than jurors, why in the world does the system trust jurors with the most important and prejudice-sensitive part of the trial—the guilt phase—but then cry crocodile tears about their supposed prejudice during sentencing? Similarly, why does the system care so much about the predictability of sentences, but apparently not one whit about the predictability of trial outcomes?

As for juror harshness and compromise verdicts, it is not clear to me why the critics assume these are bad things, or indeed how they can complain about both when an increase in one (compromise verdicts) presumably reduces the other (juror harshness). Why does the system assume that jurors are too harsh rather than that judges are too lenient?[153] At the very least, an argument can be made that trial judges' intense day-to-day experiences with a part of life about which most jurors have no knowledge actually makes judges worse sentencers rather than better ones: our very experience deadens us to the se-

153. My own suspicion is that many judges are out of touch with the retribution revolution, that they have lingering rehabilitative bones in their bodies, and that their sentences may, as a result, be too lenient when measured against the just deserts standard.

riousness of crimes and the requirements of just desert. Ordinary citizens with little or no exposure to criminal excess may be the best people to gauge that excess.

The compromise verdict criticism is an interesting one. First, of course, the word "compromise" is rife with ambiguity. As discussed above, one juror's principled holdout is another juror's irrational nullification.[154] One jury's "compromise" is another jury's perfectly appropriate give-and-take deliberations. The real question is how much elbow room for jury give-and-take the system should tolerate. The system already tolerates a lot of jury elbow room—for example, when jurors decide between different degrees of culpability for given charges, when they decide several different charges, and when they decide on uncharged lesser offenses. So the question is not whether jurors should have room to compromise in criminal cases; the question is whether they should have as much room to compromise as they have in civil cases.

Most observers laud the civil compromise verdict. The system does not force civil jurors to ignore the profound relationship between liability and damages. Indeed, it recognizes that the best verdicts are the product of the jurors' ability to express that relationship. Thus, in tort cases juries regularly hear liability and damages together, and make judgments not only in binary form about *whether* a defendant was negligent, but also decide *how* negligent, both by allocating comparative negligence between the parties and by expressing a final quantification by way of assessing damages. Is not a similarly "compromised" criminal verdict—in which, for example, a jury could find that the defendant was guilty, but only so guilty that he or she should spend two years in prison instead of twenty—far preferable from every perspective than a hung jury, where neither the state nor the defendant achieves any resolution?

The axiom that compromise verdicts are bad in criminal cases seems to be grounded on a profound misunderstanding of what goes on in the vast bulk of the criminal cases that go to trial. The assumption is that a few jurors who are not satisfied about factual guilt may abandon their reasonable doubts in exchange for assurances about a minimum penalty. But in my experience, most criminal cases that go to trial are not about factual guilt; they are about moral guilt. That is, very few criminal cases really involve any colorable dispute about

154. *See supra* Part III.D.

whether the charged act was committed or even whether the defendant was the one who committed it.[155] Instead, most involve difficult questions about the level of a defendant's criminal culpability—the very same kinds of questions that are ultimately expressed, in a less binary form, at sentencing.

IV. THE POLICY CASE

Even if jury sentencing is not required by the Sixth Amendment, there are powerful policy arguments to recommend it. Jury sentencing not only reflects a more consistent and defensible faith in jurors, it resonates with the reemergence of retribution as the primary justification for punishment. It furthers the time-honored policy of judicial restraint, and removes judges from a discretionary arena in which they have become increasingly unaccountable and dangerous. It solves, in one elegant stroke, the *Apprendi* dilemma, the unjustifiable differences in the approaches between civil and criminal cases, and capital and noncapital cases, and the Guidelines tension between uniformity and individuality. And with the right kinds of limitations and special procedures, it can do all of that without making criminal trials any more complicated or any less reliable.

A. Trusting Jurors, Mistrusting Judges

I trust jurors not only to do the right thing, but to do it for the right reasons. I trust them to be competent, to take their role seriously, and to apply the law as instructed. My trust is not a theoretical hope; it is borne from my experiences on the bench. In the two-hundred-plus jury trials over which I have presided, I can count on the fingers of one hand the cases in which I thought the jury was palpably wrong and/or hopelessly confused.[156]

But I know not all trial judges, and certainly not the academy or the popular press, share my enthusiasm for juries.[157] Indeed, there was a movement that began in the 1980s, both in the commentaries and,

155. An important exception to that rule is sexual assault cases, especially child sexual assault cases.

156. And those cases were almost always drug cases in which it appears the juries simply nullified.

157. One of the best broadsides against the American criminal jury system is WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH (1999). On the civil side, see generally Reid Hasty & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as a Risk Manager*, 40 ARIZ. L. REV. 901 (1998).

to a lesser extent, in some federal courts, to recognize a so-called "complexity exception" to the Seventh Amendment. The idea was that some laws regulating certain complex commercial and technical aspects of modern life have simply become too difficult for ordinary jurors to understand, and that litigants in these kinds of cases have no right to have befuddled jurors be the decisionmakers.[158]

Regardless of one's general views about juror competence, the current orthodox system—in which jurors typically decide liability and damages in civil cases, guilt but not punishment in noncapital criminal cases, and both guilt and punishment in capital cases—is hopelessly irrational. If, taking up the complexity argument, jurors are not competent to decide a complex civil antitrust case, why exactly are they competent to decide an identically complex *criminal* antitrust case, but then not competent at all to decide if the guilty monopolist should spend two months or twenty-two months in the penitentiary? Why are they competent to make fine distinctions at the boundaries between intentional conduct and knowing conduct, but then not competent, by way of imposing a sentence, to express their findings about degrees of culpability within the vast expanses of those categories? Why are they competent to decide the daunting psychiatric issues raised in an insanity defense—trying to estimate where free will ends and psychotic compulsion begins—but then not competent to use those insights to fashion an appropriate punishment if they reject the insanity defense?

The death/nondeath sentencing orthodoxy is even more difficult to understand. Why are jurors not only competent, but in fact virtually indispensable, when it comes to balancing mitigating factors

158. *See, e.g.*, Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 107 (1980) (concluding that history supports the ability of judges to take complex cases away from the jury); Patrick Lynch, *The Case for Striking Jury Demands in Complex Antitrust Litigation*, 1 REV. LITIG. 3, 44–45 (1980) (advocating the same). The movement toward a complexity exception to the Seventh Amendment seems to have lost some momentum lately. Most recent writings have been critical of the idea. *See, e.g.*, Steven I. Friedland, *The Competency and Responsibility of Jurors in Deciding Cases*, 85 NW. U. L. REV. 190, 192 (1990) (concluding that a complexity exception would be overly paternalistic, and that a jury should instead be allowed to play a more active role in complex litigation); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 80–83 (2001) (noting, as part of an overall observation that the role played by juries is diminishing, that some courts have embraced the idea of a complexity exception to the right to jury trials). *But see* Joseph A. Miron, Jr., Note, *The Constitutionality of a Complexity Exception to the Seventh Amendment*, 73 CHI.-KENT L. REV. 865, 896 (1998) (concluding that a complexity exception is constitutional).

against aggravating factors to decide whether a murderer should be executed, but not competent to do that very same thing to decide whether a rapist should be sentenced to so many years that he will die in prison?

It is no answer to say, as many academics do, that the jury does not work even when it is constitutionally compelled, and that its competence should not extend to all areas simply because the Constitution requires it in some. This debate about juror competence has constitutional limits precisely because the Founders decided that certain kinds of civil cases and all criminal cases are too important to leave to judges. It is not that the Founders believed jurors are more competent than judges, it is that they believed jurors are more trustworthy than judges. The English judges who sat at the pleasure of the king, and of whom the Founders were so wary, may have been perfectly competent but they were not trustworthy.[159] The Parliament, which had exclusive appellate jurisdiction, may have been perfectly competent to decide appeals but it was not trustworthy.

Today, one need not worry so much that judges are corruptible or stupid, as that a single person, whether judge or ordinary citizen or philosopher king, simply should not have the power to decide how long another person should spend in a penitentiary. There is nothing I do as a trial court judge that makes me more uncomfortable than when I impose criminal sentences. It is not just a matter of the emotional and policy tensions inherent in the act of sentencing.[160] It is an institutional discomfort—a nagging feeling that this is a moral act and not a legal one, and that one person should no more have the power

159. In *Federalist No. 47*, Madison discusses at some length the failings of the British judiciary because of its entanglements with the king and with Parliament. THE FEDERALIST NO. 47, at 300–04 (James Madison) (Clinton Rossiter ed., 1961).

160. The best description I ever heard of this tension was from a federal court of appeals judge, who has often sat at the trial level both pre- and post-Guidelines, and with whom I was on a panel last year about the Guidelines. He said that one of the reasons he welcomed at least the concept of the Guidelines is that it is difficult for a single human to resist the emotional pleas for mercy voiced by defendants and their families. On the one hand, judges hear those very powerful cries from real people, and on the other hand, we have abstract policies about retribution (unless, of course, the crime was violent and the victim testifies at sentencing). The real cries win over the abstract policies almost every time, and judges justify it to ourselves by saying, "Well, just this one time I am going to make an exception and give you probation (or the minimum sentence) (or grant a substantial downward departure)." Before you know it, every sentencing turns out to be "just this one time," and mercy becomes an unchecked and unprincipled surrender to emotion. For a powerful and exhaustive exposition of this notion, see generally Bowman II, *supra* note 9.

to select an arbitrary sentence within a wide legislatively prescribed range than to declare certain acts to be crimes in the first instance. The demise of rehabilitation, and the reemergence of retribution, has made it clear that the act of sentencing is indeed a moral act.

B. The Reemergence of Retribution

Since the dawn of civilization, the basis of punishment has been retribution—the notion that criminals must suffer just deserts.[161] Kant and Hegel constructed a formal philosophy of retribution, under which they argued that retribution was the only morally justified basis of punishment because it requires criminals to pay a price for regaining their moral standing.[162] Punishing for any other utilitarian goal—deterrence or rehabilitation—dehumanizes criminals by reducing them to objects. As Hegel put it:

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161. Retribution probably has its roots in what some anthropologists call "defilement"—the process by which primitive man externalized human suffering by attributing it to the gods. As the rules of gods became the rules of men, humans imitated defilement. Punishing each other not only became a way to enforce social norms, it was a way to comfort one another that no one would have to endure man-inflicted suffering as long as they obeyed those norms. *See, e.g.*, PAUL RICOEUR, THE SYMBOLISM OF EVIL 26–27 (1967) (arguing that the "experience of fault" allowed humans to leave defilement behind and "conceal[] something that cannot be left behind").

A few commentators contend that the roots of punishment may have been restorative rather than retributive, at least until the Norman Conquest. *E.g.*, John Braithewaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999). It seems to me this view is quite incorrect, and stems in large part from an imprecise, noncriminological use of the word "punishment." Our very nature as humans seems to compel the hope that all wrongdoers can change their ways, even though we suspect that some cannot. As a result, many human institutions, including families, villages, and churches, have often operated with certain kinds of rehabilitative assumptions. But these assumptions are much more akin to notions of contrition and repentance than to what one thinks of today as rehabilitation. They may have had everything to do with personal forgiveness, but they had nothing to do with criminological punishment—that is, what the state may and should do to a particular wrongdoer. Is this wrongdoer one of us, whose wrongs must be punished to restore his moral standing? Or is he diseased, and in need of some kind of treatment? In this sense, it is clear that civilization has always been retributive and not rehabilitative, at least until the 1920s and 1930s, when the confluence of Freud and the Progressives led the American system to a rehabilitative norm under which all people, criminal and noncriminal alike, were seen as the diseased products of their past, and therefore fundamentally not responsible for their actions.

162. *See* IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) (suggesting that the "Law of retribution" is the only system that "can determine exactly the kind and degree of punishment" in public legal justice, because it relies on "the principle of equality, that is, the principle of not treating one side more favorably than the other").

> [P]unishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honor unless the concept and measure of his punishment are derived from his own act. Still less does he receive it if he is treated either as a harmful animal who has to be made harmless, or with a view to deterring and reforming him.[163]

Because the state has the right to exact only as much punishment as the crime deserves, retribution requires proportionality. Proportionate punishment as a limitation on the powers of governments became a very popular idea in Western Europe and in the American colonies.[164] Although the Quakers expected prison sentences to produce repentance, there was nothing rehabilitative about them. People were sentenced to prisons in the colonies and the early republic to be punished for their wrongs, not to be exorcised of their evils.

The retributionist model did not come under any serious attack until Jeremy Bentham and other English utilitarians began to argue that the only legitimate purpose of punishment was to deter.[165] Bentham, and in America Oliver Wendell Holmes, Jr., viewed the prospective criminal as a rational bad man, who carefully weighed the benefits of his crime against the risks of detection and the costs of punishment.[166] The purpose of punishment in the deterrence model was simply to make the costs of crime so high that they outweighed the benefits. For the utilitarians, morality had nothing to do with punishment. Bentham argued that if the state could be assured that a criminal had changed, and would never commit another crime, it would be immoral to impose any punishment at all.[167]

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163. GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 71 (T.M. Knox trans., Oxford Univ. Press 1942) (1821).

164. Cesare Beccaria is generally credited with the first rigorous exposition of proportionality as a theorem of retribution. CESARE BECCARIA, *On Crimes and Punishments*, *in* ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 1, 19–21 (Richard Bellamy ed., Richard Davies et al. trans., Cambridge Univ. Press 1995) (1764).

165. *See* Jeremy Bentham, *The Rationale of Punishment*, *in* 1 THE WORKS OF JEREMY BENTHAM 396 (C.J. Bowring ed., Russell & Russell 1962) (1838–1843) ("General prevention is effected by the denunciation of punishment, and by its application, which, according to the common expression, *serves for an example*.").

166. *See* Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 459, 459 (1897) ("[The] bad man . . . cares only for the material consequences which . . . knowledge [of the law] enables him to predict . . . .").

167. *See* Bentham, *supra* note 165, at 396 ("If we consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another."). In a similar utilitarian vein, but with a new eco-

If, instead of sitting back and hoping that criminals change their ways, the system can somehow actually cause them to change, then the deterrence will not just have a theoretical and attenuated impact on criminals-to-be, it will have a real and permanent impact on the cured criminals themselves. Thus rehabilitation was born. By the end of World War I, this perspective was becoming dominant in American penology, and it remained dominant until after World War II. It is probably no coincidence that the rise and fall of rehabilitation happened at roughly the same time as the rise and fall of the welfare state, and with the rise and fall of psychoanalysis. The state had a moral obligation to cure all the social ills that were believed to lead to crime, and to treat criminals whose as-yet unreformed social circumstances led them to crime.[168]

With a rapidity rarely seen in complex social institutions, the rehabilitative ideal came crumbling down just forty years after its ascension.[169] Its demise came from two sources. First, because rehabilitation is uncoupled to any notions of proportionality (criminals must be "treated" for as long as it takes to "cure" them), critics began to see rehabilitation as a serious threat to individual liberty.[170] But the real

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nomic twist, Judge Posner has argued that, aside from the problem of judgment-proof criminals, all criminal sanctions could be replaced with a system of fines. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1203–05 (1985) (suggesting that many criminal sanctions could efficiently be replaced with a system of fines).

168. *See* R.A. Duff & David Garland, *Introduction: Thinking About Punishment*, *in* A READER ON PUNISHMENT 1, 3 (R.A Duff & David Garland ed., 1994) ("Penal theories drawing on [communitarian theories of the state] may thus support a more interventionist and welfarist form of penal system, and uphold a set of communitarian values and objectives (such as the rehabilitation and reintegration of offenders)."). *See generally* JAMES L. NOLAN, JR., THE THERAPEUTIC STATE: JUSTIFYING GOVERNMENT AT CENTURY'S END (1998) (positing a fundamental, and often dangerous, sociological shift toward a therapeutic ideal).

169. Frank Allen delivered the preeminent obituary of rehabilitation in his 1979 Storrs Lecture at Yale. *See generally* ALLEN, *supra* note 55 ("Although judgments may vary about precisely how far support for rehabilitative theories of penal treatment have eroded . . . the central facts appears inescapable: the rehabilitative ideal has declined in the United States; the decline has been substantial, and it has been precipitous.").

170. *See, e.g.*, AM. FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT 146 (1971) ("The goal of imposing manipulative routines for the purposes of effecting basic changes in 'personalities' offends us. In fact, the whole deterministic view of man that underpins these strategies contradicts the values of free choice, individual autonomy, and self-determination that we embrace."); MORRIS, *supra* note 52, at 17–20 (criticizing the assumption behind the rehabilitative model that "psychological change can be coerced"). Nowhere was the recoil against rehabilitation more evident than in the criticisms of the juvenile court movement, a special kind of precursor to general rehabilitation. *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 67 (2d ed. 1977) (arguing that the "new penology" of the nineteenth century, which emphasized reformation, "reified the dependant status

death knell for rehabilitation was empirical: it just did not work. Crime was mysteriously immune to the entire progressive regimen. Four decades worth of data rather dramatically showed that all the idealistic efforts of this movement had virtually no effect on the propensity of people to commit crimes.[171]

The sudden abandonment of rehabilitation gave way to an amalgam of retribution and incapacitation, dubbed by some as "neoretributionism."[172] These ideas were a modest return to just deserts, with a bit of pragmatism thrown in: while criminals are paying for their crimes and having their moral standing replenished, they are also not out among the public committing more crimes.[173] These ideas eventually led to the almost nationwide abandonment of indeterminate sentencing schemes in state courts, and eventually to the Federal Sentencing Guidelines.

A return to jury sentencing will complete this great philosophical and criminological arc. If the system punishes people not to deter them or to cure them, but simply to have them pay for what they did, then the act of sentencing is indeed a moral act and not a legal one. Judges are no better at making punishments fit crimes than priests or bricklayers. Indeed, when various members of the Court have on occasion written about how death is different, and suggested, though the Court has never held, that the Eighth Amendment requires that the

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of children by disenfranchising them of legal rights"); Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083, 1105 (1991) (advocating the abolition of separate juvenile courts because juveniles are no longer thought to be "morally incapable of committing a crime," and because current juvenile sentences, like adult sentences "are designed to hold the youth accountable for the offense committed; any rehabilitative services or programs . . . are incidental to the punishment meted out").

171. Ainsworth, *supra* note 170, at 1104 ("Despite several decades of experience with rehabilitative penology in the adult and juvenile justice systems, however, criminal recidivism stubbornly refused to wither away."); *see also* MICHAEL H. TONRY, U.S. DEP'T OF JUSTICE, SENTENCING REFORM IMPACTS 6–9 (1987) ("Several prominent reviews of [research on the effects of treatment program] concluded that research could not demonstrate that correctional programs 'worked.'"); Robert Martinson, *What Works: Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974) (same).

172. *E.g.*, Todd R. Clear, *Correctional Policy, Neo-Retributionism and the Determinate Sentence*, 4 JUST. SYS. J. 26, 26 (1978).

173. *See, e.g.*, FRANKEL, *supra* note 9, at 98 (suggesting "definite sentence[s], known and justified on the day of sentencing"); RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 192 (1979) (approving attempts by state legislatures to make sentences "more equal, more consistent, and more fully based on the crime rather than the criminal"); VON HIRSH, *supra* note 9, at 54 ("Punishments . . . are deserved; but, given the overriding concern with the infliction of pain, the notion of deterrence has to be relied upon as well.").

death penalty can only be imposed by ordinary citizens with a broader imprimatur of community moral judgment than possessed by single judges,[174] they are expressing precisely why jurors should sentence in *all* cases. It is not because death is different, it is because all sentencing is fundamentally the same: matching punishments to crimes.

C. Judicial Restraint

Turning the sentencing function over to jurors will deprive judges of a significant portion of their traditional powers. Far from being a cost, that result may just be what the separation-of-powers doctor ordered.

What was so pernicious about unrestrained rehabilitation was that it had no internal proportionality limitations. Once judges pretend to act as defendants' surrogate parents, doctors, and psychiatrists, then their good intentions know no institutional boundaries.[175] If it takes ten years of state-mandated treatment to cure a shoplifter, then ten years it is. It was precisely this limitless therapeutic discretion—intentionally designed to blur the boundaries between the judicial branch's adjudicatory role, the executive branch's charging and corrections roles, and the legislative branch's lawmaking role—that made judges so dangerous during the heydays of the rehabilitative ideal.

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174. For example, see Justice Breyer's concurrence in *Ring*:

> In respect of retribution, jurors possess an important comparative advantage over judges. . . . [T]hey "reflect more accurately the composition and experiences of the community as a whole." Hence they are more likely to "express the conscience of the community on the ultimate question of life or death." . . .
>
> . . . .
>
> . . . I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death.

Ring v. Arizona, 122 S. Ct. 2428, 2447–48 (2002) (Breyer, J., concurring) (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 (1968); Gregg v. Georgia, 428 U.S. 153, 184 (1976)).

175. Professor Frank Allen probably best described the profound dangers to a free society represented by unrestrained judicial do-gooders: "Some paradox of our nature[] leads us, when once we have made our fellow men the object[] of our enlightened interest, to go on to make them the objects of our pity, then . . . our wisdom, ultimately . . . our coercion." ALLEN, *supra* note 55, at 86–87 (alteration in original) (quoting LIONEL TRILLING, THE LIBERAL IMAGINATION 215 (1953)).

D. Solving the Apprendi *Dilemma*

Of course, the very reason *Apprendi* leads to the threshold of jury sentencing is because of the impossible distinctions it forces the system to make between the jury's role in deciding "elements" and the judge's role in deciding "sentencing factors."[176] As long as the system maintains the judge/jury division of labor in criminal cases, it will always be forced to maintain some arbitrary distinctions between elements and sentencing factors, otherwise legislatures could gut the Sixth Amendment by redefining any element as a sentencing factor.[177] But once judges are removed from sentencing, it doesn't matter which facts are "elements" and which facts are "sentencing factors"; all the facts will be decided by the jury.

E. Solving the Civil/Criminal and Capital/NonCapital Paradoxes

Permitting juries to sentence in noncapital cases will also eliminate the artificial distinctions between civil and criminal cases, and between capital and noncapital cases. Jurors will be able to complete their trial task in all cases, just as they do now in civil cases and most capital cases. With the limitations discussed below,[178] jurors will be free in all cases to make appropriate connections between breaking the social contract and paying the price for doing so.

F. Solving the Guidelines Problem

The debate about the Federal Sentencing Guidelines was, and continues to be, largely a debate about the two conflicting foundations of fairness in sentencing: a system needs enough flexibility to take into account material differences between individual criminals, but not so much flexibility that materially similar criminals are treated disparately.[179] At the extremes, there are two structural choices: let

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176. *See supra* Part II.F.

177. *See supra* note 127 (giving an example of such a scheme).

178. *See infra* Part V.

179. At the very heart of justice lies the Aristotelian idea that like cases should be treated alike: "Justice is the political good. It involves equality, or the distribution of equal amounts to equal persons." THE POLITICS OF ARISTOTLE 129 (Ernest Barker trans. & ed., 1946). For a profound critique of the assumption that justice is done simply by treating like cases alike, see John E. Coons, *Consistency*, 75 CAL. L. REV. 59, 113 (1987) ("Perhaps we should wonder whether this impulse to hammer it all flat . . . is really more than an aesthetic quirk that has come to dominate our emotions. There is something obsessive about a jurisprudence that would make all things fit; it lacks sufficient patience with vulgar but real disorder.").

legislatures set very narrow sentence ranges for particular crimes, or even discrete points, thereby maximizing uniformity (or what modern commentators sometimes call "coordination") at the cost of losing individuality; or have individual judges (or juries) impose sentences in wide and/or indeterminate ranges, thereby maximizing individuality at the cost of uniformity. Where one should draw this difficult line between uniformity and individuality depends in large part on one's views about the purpose of punishment.

If criminals are punished to be rehabilitated, then individuality must be paramount. All carjackers should no more get ten years in the penitentiary than all diabetics should get the same dose of insulin. If punishment is about treatment, then individuals are punished, not their crimes. Moreover, if we punish to treat, then indeterminate sentencing is a good way to insure that diseased criminals are not released from the penitentiary before they are cured, or kept there after they are cured.

But if criminals are punished to exact a moral price for immoral behavior, then uniformity must be paramount. The system is matching just deserts with crimes, and the nature of the crime is substantially more important than the individual circumstances of its perpetrator. The individual's circumstances remain important—because retribution requires proportionate punishment—but they are not as important as the crime itself. Determinate sentences are also paramount under a retributive paradigm. Because criminals are being punished instead of treated, parole boards do not need to announce when the morally diseased have been cured.

The engine for the Guidelines was very much the return to retribution, marking a significant movement away from unbounded sentencing flexibility and toward more uniformity between similarly situated criminals; that is, away from indeterminate sentences and toward determinate ones. The Guidelines may have seriously overshot the mark by making sentencing ranges too narrow and by bureaucratizing departures. But the idea of narrowing sentence ranges from the almost limitless indeterminate ranges that were in place in the federal system before the Guidelines was a laudable one, and indeed even a necessary one, after the rejection of the rehabilitative ideal and the return to retribution.

The real rub with the Guidelines was institutional, not criminological. Federal judges simply did not approve of having their longstanding and almost limitless sentencing discretion taken away by bu-

reaucrats.[180] But having it taken away by jurors should be another thing entirely. Judges and jurors have a partnership considerably more venerable than judges and sentencing commissioners. It is also a partnership grounded in the Constitution, not in the vagaries of political reform. Most importantly, because almost all criminal cases are plea bargained, jury sentencing is a considerably less drastic invasion of the judicial sentencing power than are sentencing commissions. In most jury sentencing systems, judges will continue to sentence defendants in the vast bulk of cases that are plea bargained; sentencing commissions tie judges' hands whether or not defendants plead guilty or are convicted after trial.[181]

Having legislatures set sentencing ranges, and then letting jurors decide particular sentences within those ranges, is a sensible accommodation of the tension between uniformity and individuality. The question of how bad certain crimes are in general, and the ballpark levels of retribution those crimes must command, is certainly a legislative question properly answered by having elected legislatures set ranges of punishment. The much finer question of how much proportionate retribution, within that range, is required of a particular criminal in a particular situation can most accurately be answered by the twelve people who heard all the facts.

V. LIMITATIONS

Reformers do not write on a blank slate when it comes to jury sentencing. There is a wealth of unbroken experience that has accumulated since colonial times about what works and what does not work when jurors are asked to impose sentences. Many of the best design features have been adopted specifically to respond to increasing criticisms of jury sentencing; many others have become necessary simply because the trial mechanism has become substantially more complex. In either case, most of these evolved design features act as important limitations on unbounded jury sentencing discretion, and no call for a move toward more jury sentencing would be complete without a discussion of them.[182]

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180. *See generally* STITH & CABRANES, *supra* note 9 (criticizing the Guidelines).

181. *See supra* note 12.

182. My good friend, Professor Bill Pizzi, comes at the problem of the American system's breathtaking ambivalence about the role of the jury from the opposite direction. As a comparativist, he suggests that Americans should consider the trial practices in European and other

A. Imposing Legislative Ranges

Even the most dedicated supporters of jury sentencing should not be comfortable with jurors having unlimited discretion in the fashion of federal judges before the Guidelines. Just as no single person should decide whether a criminal should spend one day or one hundred years in prison, neither should twelve citizens (or a handful of parole officials). Indeterminate sentencing, whether by judge or jury, dangerously usurps the legislature's obligation not only to define crimes, but to distinguish in some rough fashion their relative seriousness.[183]

As discussed above, legislative ranges accomplish the important public policy of quantifying the just deserts for particular crimes; jury decisions within those ranges accomplish the complimentary policy of making sure justice is done in individual cases.[184] Moreover, imposing such limits addresses two of the principle criticisms of jury sentencing: jury sentences are too variable and juries are too harsh.[185]

Indeed, all five of the existing jury sentencing states are determinate sentencing states, and sentencing juries in those states thus operate only within legislatively defined ranges, though some of the ranges in some of the states are surprisingly wide.[186]

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countries in which the decision on guilt is shared between the trial judge and the jurors. PIZZI, *supra* note 157, at 227. Though Professor Pizzi does not address the sentencing phase, and although I am highly skeptical of the idea of mixed panels during the guilt phase (quite apart from the command of the Sixth Amendment), there may be merit in considering mixed panels for sentencing. In a fundamental way, Professor Pizzi and I are both aiming at the same result: some form of bounded jury input. Jury sentencing, with a limited role for the judge, seems preferable, both constitutionally and pragmatically, to judge sentencing with a limited role for the jury.

183. Madison expressed this general point, though of course not in a sentencing context, in his first paper on the separation of powers: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47 (Madison), *supra* note 159, at 301.

184. *See supra* Part IV.F.

185. *See supra* Part III.B, C.

186. Arkansas recognizes five general classes of noncapital felonies, carrying ranges of ten years to forty years, six to thirty, five to twenty, three to ten, and zero to six. ARK. CODE ANN. § 5-4-401 (Michie 1997). Missouri recognizes four classes, carrying ranges of ten to thirty, five to fifteen, zero to seven, and zero to five. MO. ANN. STAT. § 558.011 (West 1999). Oklahoma does not group felonies into classifications, but does impose particular ranges for specific crimes. *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 647 (West Supp. 2003) (maximum of five years for aggravated assault); *Id.* § 1705 (West Supp. 2003) (maximum of five years for grand larceny); *Id.* § 701.9 (West 2002) (death, or life without parole, for first degree murder); *Id.* § 715 (West 2002) (maximum of four years for first degree manslaughter). Texas recognizes four classes, carrying

B. Bifurcating Guilt from Punishment

Bifurcating the guilt phase from the sentencing phase is an easy way to defuse the compromise verdict criticism, as well as some of the practical evidentiary problems that can arise when guilt and punishment are tried simultaneously. Although formal bifurcation may not always be necessary in all kinds of criminal cases,[187] the fact is that there is typically a myriad of information submitted at sentencing hearings that would at best slow down the guilt phase and at worse hopelessly prejudice it.

For example, when a defendant has prior felonies and elects not to testify, bifurcation will almost always be necessary to make sure that the jury is not prejudiced by the felonies in the guilt phase, but can consider them in the sentencing phase. Indeed, the very fact that a defendant has a constitutional right not to testify, but in most states has a right of allocution at sentencing, may compel bifurcation.

Because most Americans have experienced jury sentencing only in capital cases, we have come to think of jury sentencing hearings as painfully Byzantine proceedings that can last even longer than the guilt phase. But noncapital jury sentencing hearings need not be mini-trials, any more than they are in judge sentencing systems. I suspect that in the vast majority of tried cases, the jury's sentencing "phase" can proceed immediately after the jury's verdict, and that counsel, the defendant and the victim will proceed very much in the same manner as they proceed now in judge sentencing hearings—in my jurisdiction, simply by making arguments, having the defendant and victim make statements from the podium and rarely calling any other witnesses. Although I am not so naïve to think that counsel will not spend a little more time at sentencing playing up to juries than they now spend

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ranges of five to ninety-nine, two to twenty, two to ten, and six months to two years. TEX. PENAL CODE ANN. §§ 12.32–12.35 (Vernon 1994). Virginia recognizes six classes, carrying ranges of life, twenty to life, five to ten, two to ten, one to ten, and one to five. VA. CODE ANN. § 18.2-10 (Michie Supp. 2002).

187. There is no federal constitutional impediment to nonbifurcated, or so-called "unitary," proceedings, in which the jury simultaneously decides guilt and, if appropriate, punishment. McGautha v. California, 402 U.S. 183, 221 (1971) (upholding California's then version of a unitary system for capital cases). Of course, even in the traditional trial—where juries decide guilt or innocence and judges sentence—there is already a kind of informal bifurcation embedded in the simple structural fact that the penalty phase must always follow the guilt phase, since the judge's sentencing role is not triggered until the jury returns a verdict of guilt. Thus, even where no additional evidence is presented at sentencing, the judge typically hears the arguments of counsel, and allows the defendant the right of allocution, at a separate sentencing hearing.

playing up to judges, any small increase in the length of sentencing hearings will more than be offset by eliminating the traditional probation-department delays between verdict and sentencing.[188]

Three of the five jury sentencing states mandate a bifurcated sentencing hearing immediately after the jury returns a verdict of guilt.[189] Only one—Missouri—expressly requires the jury to impose its sentence in a unitary proceeding at the same time it returns its verdict.[190] Oklahoma mandates a bifurcated sentencing hearing if one of the sentencing aggravators is a prior conviction, otherwise is silent on bifurcation.[191]

C. Keeping the Probation Decision with Judges

To the extent that probationary sentences have a rehabilitative component, it would certainly not be unreasonable to have judges retain the decision about whether a probation-eligible defendant should be given probation. Perhaps the experience judges acquire over the years—seeing both the fruits and failures of their willingness to take a chance on a defendant—makes them better at the probation decision. Moreover, that decision is often not a simple yes or no. A myriad of special conditions can be attached to a particular probationary sentence (e.g., go to jail for a short time, get a GED, go to this or that drug treatment program, submit to random urinalyses, wear an ankle bracelet), and a judge, through sheer experience, is undoubtedly in a better position than most jurors to craft appropriate (and available) probation conditions. The same is true of the various cousins to pro-

188. In most judge-sentencing states, and certainly in the federal courts both before and after the Guidelines, probation departments typically issue pre-sentence investigation reports with a sentence recommendation. These reports take several weeks to prepare (in Colorado, from six to eight weeks in a nonsex case, ten weeks in a sex case), and are seldom begun until after a verdict of guilt. As a result, the sentencing hearing must necessarily take place several weeks or even months after the verdict or guilty plea. Substantial delays between verdict and sentencing would be unworkable in a jury-sentencing system. In one of the three jury-sentencing states that leave the probation decision to the trial judge—Missouri—the pre-sentence reports are done before trial. MO. ANN. STAT. § 557.026 (West 1999). In the others—Oklahoma and Virginia—the statutes seem to contemplate only posttrial reports. OKLA. STAT. ANN. tit. 22, § 982 (West Supp. 2003); VA. CODE ANN. § 19.2-299 (Michie Supp. 2002).

189. ARK. CODE ANN. § 5-4-103 (Michie 1997); TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(a) (Vernon 2002); VA. CODE ANN. § 19.2-295.1 (Michie Supp. 2002).

190. MO. ANN. STAT. § 557.036 (West 1999).

191. VERNON'S OKLAHOMA FORMS 2D: UNIFORM JURY INSTRUCTIONS, CRIMINAL 490 (2001).

bation—deferred judgments, community corrections, and other innumerable state varieties of sentences short of prison.

The five current jury sentencing states handle the matter of probation in several different ways. At one extreme, probationary decisions in Texas are left to juries, and their decision on probation, like their decision on prison sentences, is binding on the judge.[192] At the other extreme, in Missouri, Oklahoma, and Virginia, the probationary decision is for the trial judge only, who effectuates it after the prison sentence imposed by the jury.[193] Arkansas has a mixed approach, under which the trial judge may, but is not obligated, to instruct the jury on alternatives to prison, but the jury's decision in such cases is advisory only.[194]

D. Partial Waiver

Once defendants demand a jury for the guilt phase, may they waive it for the sentencing phase? The five existing jury sentencing states handle this problem of partial waiver in several interesting ways.

In Arkansas, a defendant may waive jury sentencing before the guilt phase only with the consent of the prosecution, and may do so after being found guilty only with the consent of both the prosecution and the court.[195] In Missouri, where there is no bifurcation, jury sentencing in a jury trial is presumed, but the defendant may waive jury sentencing by filing a written notice, before voir dire begins, demanding that the judge impose any punishment.[196] In Texas, a defendant may waive jury sentencing before the guilt phase begins, but needs the consent of the prosecution after being found guilty.[197] In Oklahoma and Virginia, the defendant needs the consent of both the court and prosecution to waive jury sentencing, regardless of when the waiver is requested.[198]

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192. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 3(a) (Vernon 1965**).** The jury imposing probation does not impose a *length* of probation; that is for the judge's discretion. *Id.* § 6.

193. MO. ANN. STAT. § 559.036 (West 1999); OKLA. STAT. ANN. tit. 22, § 926.1 (West Supp. 2003); VA. CODE ANN. § 19.2-303 (Michie 2000).

194. ARK. CODE. ANN. § 16-97-101(4) (Michie Supp. 2001).

195. ARK. CODE ANN. §§ 5-4-103(b)(4), 16-97-101(5) (Michie 1997 & Supp. 2001).

196. MO. ANN. STAT. § 557.036 (West 1999).

197. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 2(b) (Vernon 2002).

198. VA. CODE ANN. § 19.2-257 (Michie 2000); Case v. State, 555 P.2d 619, 625 (Okla. Crim. App. 1976) (interpreting OKLA. STAT. ANN. tit. 22, § 926 (West 1986) to mean "that any waiver

I am skeptical of permitting partial waivers. In the first place, given the apparently irrational but deeply held belief by defense lawyers and defendants that jurors are harsher sentencers than judges,[199] I am afraid that partial waivers would effectively eliminate jury sentencing entirely. I am not even sure partial waivers should be allowed with the consent of the prosecution and the court, any more than defendants should be able to elect, with or without the consent of the prosecution and the court, to have the jury decide one element of an offense but the judge to decide all the others. The very purpose of moving to jury sentencing is to recognize as a policy matter the inextricable connections between guilt and punishment.[200]

E. Deadlock and Nonunanimity

As a preliminary matter, I suspect deadlocks in the sentencing phase are quite rare. Although I am unaware of any statistics on this point, my own experience in civil cases suggests that jurors who have managed to agree on the yes or no question of whether a defendant has been proved responsible are very unlikely to be unable to reach a unanimous verdict on punishment.

Nevertheless, four of the five current jury-sentencing states allow the judge to discharge the jury and take over the sentencing role once a jury becomes deadlocked on sentencing.[201] Texas is the only jury-sentencing state that defines the criminal verdict as being composed

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by the defendant of the right to have the jury assess punishment upon determination of guilt must be joined by the prosecuting attorney and the judge of the trial court.").

199. *See supra* Part III.C.

200. There is a kind of converse partial waiver question that might also be asked: may defendants waive a jury for the guilt phase (by either pleading guilty or agreeing to a bench trial), but then demand a jury for sentencing? Only two of the current jury-sentencing states—Texas and Arkansas—expressly allow for jury sentencing once a defendant waives a jury for the guilt phase. In Texas, a defendant may insist on jury sentencing even after a guilty plea or a bench trial, provided the sentence is not fixed by law. TEX. CODE CRIM. PROC. ANN. art. 26.14 (Vernon 2002). In Arkansas, a Defendant may similarly demand jury sentencing after waiving a jury on guilt, but may do so only with the consent of the prosecution and the court. ARK. CODE ANN. § 16-97-101(6) (Michie Supp. 2001).

201. ARK. CODE ANN. § 5-4-103(b)(3) (Michie 1997); *Id.* § 16-90-107(a) (Michie 1987); MO. ANN. STAT. § 557.036 (West 1994); OKLA. STAT. ANN. tit. 22, § 927.1 (West Supp. 2003). In Virginia, the judge can take over the task of sentencing from a deadlocked jury only if the defendant and the prosecution consent; otherwise a mistrial is declared. VA. CODE ANN. § 19.2-295.1 (Michie Supp. 2002).

of the verdict on guilt *and* the sentence and which therefore compels a mistrial if a jury is deadlocked on punishment.[202]

Another solution to the hung-on-punishment problem is to reduce the number of votes required to agree on a sentence. Thus, in jurisdictions that now require unanimity on guilt, allow nonunanimity on punishment. In jurisdictions that already allow nonunanimous verdicts on guilt, reduce the number of votes needed for the punishment phase. None of the four current jury-sentencing states that bifurcate guilt from sentencing, or allow such bifurcation, have lowered the unanimity requirement for the sentencing phase.

Although my own view is that unanimity is important to the deliberative process that underlies jury reliability, nonunanimity in the punishment phase may be an appropriate reflection of the fact that there are no particularly "right" answers when the question is: "how long should Bart be imprisoned?" On the other hand, an argument can be made that unanimity is less important in the guilt phase precisely because the guilt phase is almost always a binary process. When everyone must agree on "guilty" or "not guilty," there is not much room for give and take, and perhaps it is a sensible policy to disregard, at some appropriate point in time, the one or two holdouts. But in the sentencing phase, just like in the damages phase of a civil case, the very presence of the unanimity requirement will force the jurors to compromise the easily compromisable nonbinary question of how long a defendant should be sent to prison within a given legislative range.

F. Review

Once the jury imposes its sentence, another safeguard against excess is to permit the judge to review that sentence in some fashion. In Arkansas, Missouri, Oklahoma, and Virginia, the jury's sentence is in effect a declaration of a maximum sentence. The trial judge is free to depart downward from that maximum—in Oklahoma and Virginia by suspending all or part of the jury's sentence[203]—but has no power to

202. TEX. CODE CRIM. PROC. ANN. art. 37.07, § 3(c) (Vernon 2002).

203. In fact, in Virginia, these postjury sentencing hearings are called "suspension hearings." *See, e.g.*, Vines v. Muncy, 553 F.2d 342, 345 (4th Cir. 1977) ("At the suspension hearing . . . [t]he trial court . . . refused to suspend the sentence as fixed by the jury . . . .").

impose a harsher sentence.[204] In Texas, the judge has no power to override the jury's sentence.[205]

In a perfect world, a judge in a jury-sentencing state should probably have no more power to displace a jury's sentence than a jury in a judge-sentencing state should have power to displace a judge's sentence. But in recognition of the traditional skepticism about a jury's sentencing competence, it might be sensible to subject those sentencing decisions to some form of limited judicial review. The open-ended systems in Arkansas, Missouri, Oklahoma, and Virginia seem to me to go too far. If all that juries are doing is imposing maximum sentences, and not being forced to face up to the task of imposing a determinate sentence for a particular crime, then they are acting more like mini-legislatures than factfinders and punishers. A more truncated kind of review—perhaps by imposing an abuse of discretion standard and/or a limit on the degree to which a judge may depart from the jury sentence—would more properly reflect the relative suspicion Americans should have of judges and juries.

CONCLUSION

The criminal justice system is constitutionally required, and culturally committed, to trust the judgment of jurors when it comes to criminal guilt or innocence. Despite the often simple nature of their verdicts, the trust reposed in jurors encompasses a remarkable range of complexity. They are asked not only to decide whether Bad Bart pulled the trigger but also what was going on inside his head at the moment of the crime. That they are not also asked to finish the job of trial, and participate in the task of quantifying Bart's guilt, is more an accident of history than of deliberate policy.

Reunifying the jury's guilt and punishment roles in criminal trials, just as their liability and damages roles have always been unified in civil trials, is not simply a matter of an abstract compulsion to force some symmetry between the Sixth and Seventh Amendments. It goes to the heart of the fundamental challenge of sentencing: balancing the

204. ARK. CODE ANN. § 16-90-107(e) (Michie 1987); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. tit. 22, § 991a (West Supp. 2003); VA. CODE ANN. § 19.2-303 (Michie 2000).

205. *See* 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))).

dangers of a determinate sentencing machine more interested in retributional uniformity than individual justice, against the dangers of a boundless indeterminacy so individualized that similarly situated criminals, and their similarly situated victims, suffer wildly unjust differences.

As courts and legislatures struggle to allocate power between judge and jury, and to define in some principled way the differences between elements and sentencing factors, they would be well served to reexamine the sensibility of the axiom that only judges are competent to impose criminal sentences. That axiom has little empirical support, and, by way of *Apprendi* and its progeny, it is infecting the Sixth Amendment with a dangerous and unpredictable formalism.

Jurors are in a better position than judges not only to take the measure of a crime, but also to take the measure of its proportionate retribution. The system's deep constitutional and cultural commitments to the jury have always recognized the former proposition. It is time to consider whether they should also recognize the latter.