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Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder

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Discussions of criminal punishment tend to focus on sentencing as the unique moment when punishment is affixed. Yet *two* punishment decisions are made in the course of establishing a criminal defendant's liability. The first occurs at conviction, where the available punishments are narrowed to the range defined by the conviction offense's statutory grade. The second occurs at sentencing, when the sentencing body makes a more refined decision and selects a punishment within that range.[1]

At present, the first punishment decision involves no explicit judgment by the relevant decisionmaker—the jury, in a jury trial—as to what constitutes a proper punishment, even in broad terms. Instead, the jury makes a set of factual findings and votes for a conviction on one or more offenses, without knowing the offense grade or the punishment range attaching to that grade.[2]

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[1] The precision of the sentencing decision varies by jurisdiction. The official sentence imposed following conviction may be a determinate sentence (say, "five years"), or it may be an indeterminate sentence (say, "five to ten years"). As the name implies, a determinate sentence is fixed at the time of sentencing, with less room for later adjustment; the offender will be required to serve all—or at least a mandated percentage—of the imposed term. An indeterminate sentence, on the other hand, allows for a range of possible punishments, and where an offender's sentence ultimately falls along that range will depend in part on later determinations by "back-end" decisionmakers, such as a parole board. See, for example, Michael M. O'Hear, *Statutory Interpretation and Direct Democracy: Lessons From the Drug Treatment Initiatives*, 40 Harv J on Legis 281, 289 n 63 (2003) ("Most states employ a system of indeterminate sentencing, which means that a parole board actually has the final say as to how long an incarcerated defendant will remain in prison; the judge's durational decision establishes an upper and lower bound to the parole board's discretion."). See also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv L Rev 2463, 2468 n 12 (2004) (noting multiple usages of "determinate" and "indeterminate" in current sentencing parlance).

[2] For a discussion of, and citations supporting, the general rule that the jury is not to be instructed as to the punishment consequences of returning a conviction, see Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of*

The "first cut" punishment level determined by the offense's statutory grade is then imposed administratively, by operation of law.

This Article argues that the body making the first punishment decision at the conviction stage should not be blind to the consequences of that decision, which is what currently occurs in jury trials (though not, significantly, in bench trials[3]). The proposal in this Article is based largely on institutional competence and seeks to realign the roles of the judge and jury to maximize their competencies as well as the jury's role as fault-finder. The jury should play both a greater and more explicit role in assigning punishment—not (or at least, not only) by taking on a greater role with respect to the second sentencing decision, which is the focus of most current attention, but by wielding more, and more informed, power with respect to the punishment consequences of the initial decision to convict. In short, I propose that criminal juries should receive instructions that provide information not only as to the elements of the offenses with which a defendant is charged but also as to the offense grades and overall sentencing ranges that correspond to each of those offenses. Then, once the informed jury has chosen the offense grade and thus a broad punishment range, the judge can employ her expertise to assign a punishment within that range.

This proposal is distinct from two other discrete, though related, recent trends and developments in criminal law and scholarship. First, the recent literature has discussed,[4] and sometimes advocated,[5] jury sentencing. Though sympathetic to this litera-

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Mandatory Sentencing, 152 U Pa L Rev 33, 79–80 n 206 (2003); Milton Heumann and Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 Am Crim L Rev 343, 358–61 (1983).

[3] See Part II-B.

[4] See, for example, Nancy J. King and Rosevelt Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 Vand L Rev 885, 898–940 (2004) (reporting results of a descriptive study of how jury sentencing operates in three states); Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 NC L Rev 621, 653–75, 705–11 (2004) (questioning jury-sentencing schemes based on psychological studies of jury decisionmaking, and critiquing the *Apprendi* line of cases as likely to generate practices similar to jury sentencing).

[5] See, for example, Morris B. Hoffman, *The Case for Jury Sentencing*, 52 Duke L J 951, 956 (2003) (arguing that with some limitations, "[t]here 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"); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 Va L Rev 311, 350 (2003) (advocating jury sentencing and asserting that "[b]ecause of their deliberative capacity and democratic makeup, juries are better situated than other political institutions to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender");

ture's desire to invigorate jury involvement in punishment decisions, I am somewhat skeptical about the mechanism that the jury-sentencing advocates propose for achieving that goal. For reasons discussed later,[6] I recommend that judges retain a significant role in sentencing decisions.

The second development is the recent line of United States Supreme Court decisions regarding the right to a jury trial, including *Apprendi v New Jersey*,[7] *Blakely v Washington*,[8] and *United States v Booker*.[9] The focus of these recent cases is on the jury's role as mandated by the Constitution. These cases assure a defendant both the right to have a jury, rather than another entity, decide the facts that determine the maximum available punishment, as well as the correlate evidentiary right to have those facts decided beyond a reasonable doubt.

Many seem to believe that the Supreme Court has gone too far in defining the jury's constitutionally-mandated fact-finding role.[10] This Article, however, argues that the Court's right-to-jury-trial opinions have not gone far enough—at least in terms of advancing sound principle and policy, as opposed to matters of constitutional doctrine. Specifically, the Court's decisions focus almost exclusively on one jury function to the detriment of an-

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Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L J 1775, 1777 (1999) (arguing that jury sentencing may be "a more direct and more effective mechanism for expressing the recent populist and retributive trends in criminal punishment").

[6] See Part III-B.

[7] 530 US 466 (2000).

[8] 124 S Ct 2531 (2004).

[9] 125 S Ct 738 (2005).

[10] See, for example, Stephanos Bibas, Apprendi *in the States: The Virtues of Federalism as a Structural Limit on Errors*, 94 J Crim L & Criminol 1, 12 (2003) ("*Apprendi* is wrong. As I have argued elsewhere, *Apprendi*'s abstract principle undervalues the benefits of insulated, expert judicial sentencing. It disrupts procedures that worked well to reduce bias and ensure equality in favor of untested jury sentencing. And by fragmenting crimes, it gives prosecutors more power to manipulate indictments and plea bargain, while hobbling judges' power to check prosecutors at the sentencing stage."); Frank O. Bowman, III, *Function over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 Fed Sent Rptr 1, 1 (2004) ("*Blakely* is a bad decision from the point of view of real lawyers, judges, legislators, and defendants who will have to inhabit the oddly configured post–*Blakely* universe."); Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 Am Crim L Rev 217, 219 (2004) ("*Blakely* has created a ghastly mess, bringing the federal criminal justice system to a virtual halt and putting a number of state systems in disarray."). But compare Jon Wool, *Aggravated Sentencing:* Blakely v. Washington, *Legal Considerations for State Sentencing Systems*, 17 Fed Sent Rptr 134, 142 (2004) ("Although many commentators have stated that *Blakely* extended the *Apprendi* rule too far, perhaps the strongest legal argument against *Blakely* is that it appears not to go far enough.").

other.[11] In addition to its procedural role of weighing the evidence, the jury has a substantive role of assigning moral blame (and rightly so, in my view). Part of the jury's proper function—though not necessarily its constitutionally required function[12]—is to figure out the *meaning* of the facts in terms of the relative amount of punishment that they warrant. In other words, the jury both is and should be not merely a finder of facts, but a finder of fault.

The jury as fault-finder is one of two premises on which this Article's proposal rests. The other is that there is no obvious or compelling reason to draw a strict and categorical distinction between the jury's voice as to the question of liability *vel non* and its silence as to the question of how much liability is appropriate. There may be sound reasons to give the jury different types or levels of responsibility for each of these two questions, but if so, the reasons should be articulated. A complete differentiation of the roles of the jury with respect to these two issues seems arbitrary unless explicitly justified.

Perhaps neither premise of this Article sounds radical or even especially controversial. Yet, taken together, they substantially challenge current law, which grants the jury a fault-finding capacity for assessing guilt while steadfastly denying the jury any such capacity—even in the crudest, most basic terms—for assessing punishment.

The jury should have enough information for its first-cut determination about punishment to reflect an actual decision, not an unknown consequence of some other deliberation. Our current way of asking the jury to make various normative judgments in the course of establishing liability *vel non*—when the jury has no idea, even at the broadest level, about how those judgments translate into actual punishment—does not make sense. Accord-

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[11] For a similar (though not precisely congruent) criticism, see Barkow, 152 U Pa L Rev at 44–46 (cited in note 2) (arguing that the *Apprendi* line of cases gives insufficient attention to the jury's institutional role as a check on governmental power, and advocating an enhanced role for the jury in applying sentencing rules).

[12] I make no claim that this article's proposal is of constitutional dimension—and I tend to think the Supreme Court agrees with me on that score. See *Shannon v United States*, 512 US 573, 587 (1994) (holding that the jury need not hear about the consequences of a verdict of not guilty by reason of insanity). Others, however, have made somewhat similar arguments on constitutional grounds. Consider Heumann and Cassak, 20 Am Crim L Rev at 371–82 (cited in note 2) (arguing, on due process and equal protection grounds, that juries should be instructed about mandatory minimum sentences); Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 Colum L Rev 1232, 1260–71 (1995) (recommending that the jury be instructed about mandatory minimum sentences, and suggesting, without quite explicitly claiming, a Sixth Amendment basis for such a rule).

ingly, as noted above, this Article proposes that the jury, in its capacity as assigner of blame, should be instructed as to the offense grades and sentencing ranges that attach to the offenses with which a defendant is charged.[13]

Part I of this Article first explains and defends the jury's fault-finding role generally, then advocates the Article's central proposal: the expansion of that role to include making the jury explicitly aware of the punishment-determining aspect of the conviction vote. Part II describes and considers the current role and proper role of the judge with respect to decisions about an offender's punishment, comparing the judge's function with that of the jury. Part III briefly fleshes out, and explores the potential consequences of, the Article's basic proposal in light of the earlier discussion and with regard to other legal and practical considerations.

I. THE JURY'S FAULT-FINDING ROLE

Asserting that the jury's function does, and should, include normative as well as purely factual and evidentiary judgments is hardly new or controversial. As this Part discusses, the basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant's moral blameworthiness. Further, various specific criminal-law rules have been designed to depend on jury resolution of significant moral issues bearing on a defendant's liability. Denying the jury any role in assessing normative issues as to the amount of punishment, and allowing it to make only a binary decision about whether to punish, prevents the jury from

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[13] Sherman Clark has made a similar proposal, though with very different justifications. See Sherman J. Clark, *The Courage of Our Convictions*, 97 Mich L Rev 2381, 2381–84, 2442–45 (1999). Clark emphasizes the "expressive content" and "social meaning" of jury decisions. Without denigrating these concerns, I am not relying on them here. My interest generally is in the role of juries relative to other institutional players, rather than considered in isolation and in the abstract, as is centrally Clark's approach.

More specifically, I discuss here the jury's institutional competence, especially relative to that of a sentencing judge, and also how the allocation of punishment decisions between judge and jury affects not only the relationship between those two players, but between both of them and the legislature. See, for example, Parts I-C-1, II-C, III-B. I am concerned with what role we should assign the jury as a matter of sensible policy, rather than what that role "says" about them, or what it "says" about us as a society. Descriptively, I note that juries currently make normative judgments, so there is nothing transparently unusual or improper about asking them to make an explicit normative judgment about punishment. See Part I-A. Normatively, I maintain that doing so would be a good idea, not merely or even mainly for "expressive" reasons, but as a matter of their competence and as a check on other institutional forces. See Parts I-B to I-D, III-B.

fulfilling its proper mission, and may even impede its ability to accomplish the tasks currently assigned to it.

Section A of this Part provides support for the descriptive claim that the jury's role, both historically and today, involves an evaluative aspect as well as responsibility for determining the existence of objective facts. Section B defends the normative claim that this practice of entrusting the jury with some fault-finding, as well as factfinding, authority is justifiable and, indeed, desirable.

At present, however, the jury's fault-finding role does not include any explicit responsibility for the punishment-related aspects of the conviction decision. In fact, *no* party now bears explicit responsibility for the punishment consequences of a conviction vote in a specific case. Section C advocates filling the present normative vacuum by allowing juries to make their verdict decisions while possessing information about the potential punishments that are at stake. Section D responds to possible criticism of this proposal as condoning, and perhaps advocating or depending on, jury nullification.

A. Historical and Empirical Support

Throughout American history, the significance of the jury has been defended on grounds related to the jury's role as a moral arbiter, as opposed to a mere weigher of competing objective claims of fact. The jury's overt fault-finding authority has changed, and in some ways diminished, over time, but, even today, criminal juries remain invested with considerable normative discretion. In various ways, their job demands not only determinations about what an alleged offender did, but moral assessments of whether the accused is sufficiently blameworthy to merit criminal sanction.

1. Generally: Jury as conscience and counterweight.

The role of the jury, particularly the criminal jury, always has been thought to transcend mere "utilitarian fact-finding."[14] Various procedural rules make clear that the jury's function goes beyond resolving evidentiary issues of fact. In using their discretionary authority to exercise lenity, for example, criminal juries may render factually inconsistent verdicts.[15] The defendant also

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[14] Sauer, 95 Colum L Rev at 1249 (cited in note 12).

[15] See, for example, *Dunn v United States*, 284 US 390, 393 (1932) ("Consistency in

has the right to a general verdict; that is, the jury's role may not be cabined into merely returning special findings of fact that form the basis for the court's entry of conviction.[16] It is well settled that the role of the criminal jury "is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence."[17]

This aspect of the jury's decision-making power was central to the Founders' conception of the jury and their view of the jury, and particularly the criminal jury,[18] as fundamentally important.[19] Case-by-case jury assessment of the wrongfulness of an alleged offender's behavior would assure a popular voice in the determination of punishment.[20] As one convention delegate put it at the time:

> Let [a man] be considered as a criminal by the general government, yet only his own fellow-citizens can convict

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the verdict is not necessary."); *United States v Powell*, 469 US 57, 64–65 (1984) (reaffirming the "*Dunn* rule" allowing inconsistent jury verdicts).

One reason juries engage in this practice is that they seek, notwithstanding their lack of clear information on the matter, to generate an amount of punishment for an offender that seems fair and proportionate. See, for example, Barkow, 152 U Pa L Rev at 81–82 (cited in note 2) ("[T]he jury deliberately acquits on some charges and convicts on others, even when such results are logically inconsistent, in order to reach a just outcome. . . . The jury knows that its compromise position will result in a reduced sentence; it mitigates punishment precisely because it believes the defendant should not be blamed for the entirety of the conduct with which she is charged."). Of course, given juries' ignorance of the actual punishment consequences of their decisions, this effort to achieve justice involves a great deal of conjecture and is subject to considerable inaccuracy.

[16] See *United States v Gaudin*, 515 US 506, 513–14 (1995) (explaining that the jury's general verdict allows it to decide mixed questions of law and fact); *Sparf v United States*, 156 US 51, 80–81 (1895) (discussing the jury's right to render a general verdict); Albert W. Alschuler and Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U Chi L Rev 867, 912–13 (1994) ("[N]ineteenth-century disputants agreed that . . . judges should not require juries to return 'special verdicts' in criminal cases [as that] would have forced juries into too narrow a factfinding role[.]").

[17] *Gaudin*, 515 US at 514. See also id at 513 (recognizing "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt and innocence on every issue, which includes application of the law to the facts").

[18] See Barkow, 152 U Pa L Rev at 54–55 (cited in note 2) ("Even with an elected government, there was agreement that the people should have another check on government action in the criminal context, an area in which the government's power is at its apex.").

[19] See id (observing that the criminal jury's significance "was one of the rare subjects on which both the Federalists and Anti-Federalists agreed," and offering support for that observation).

[20] See id at 58 ("Even if the people's representatives agreed that certain behavior should be criminalized, the Framing generation wanted the people themselves to have a final say in each case. In criminal trials—trials that, at their core, are trials of the human condition and morality—the jury would allow the morality of the community and its notions of fundamental law to inform the interpretation of the facts and, in some cases, to overcome the rigidity of a general criminal law.") (internal citation omitted).

> him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him; and innocent they certainly will pronounce him, if the supposed law he resisted was an act of usurpation.[21]

Like voting, and no less than voting, jury service was a critical way for the jury to express its views on law and matters of public interest and policy.[22] Indeed, some saw the jury right as even more critical than the franchise, as it would prevent government from exercising tyrannical power over specific people in individual cases.[23] In short, belief in, and protection of, the jury's fault-finding role dates to the earliest days of the American republic.

In fact, the American criminal jury once had even more—or at least, more explicit—power to decide moral or legal issues than it now does. Early in the nation's history, it was common for juries to decide legal as well as factual issues.[24] The jury also had a significant de facto, if not de jure, influence over punishment, at least in the nation's early history.[25] Because specific crimes often led to particular defined punishments, rather than the broad discretionary ranges that later became common, the jury could, and often did, make decisions about conviction and acquittal based on its assessment of the appropriate penalty.[26]

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[21] Barkow, 152 U Pa L Rev at 58 n 119 (cited in note 2), citing Jonathan Elliot, ed, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 94 (JB Lippincott 2d ed 1891) (statement of Theophilus Parsons at the Massachusetts Convention of 1788).

[22] See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L Rev 203 (1995).

[23] See, for example, Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in Neil H. Cogan, ed, *The Complete Bill of Rights* 596 (Oxford 1997) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the legislative."); *Essays by a Farmer (IV)*, Md Gazette (Mar 21, 1788), reprinted in 5 Herbert J. Storing, ed, *The Complete Anti-Federalist* 36, 38 (Chicago 1981) (referring to the jury as "*the democratic branch of the judiciary power*—more necessary than representatives in the legislature") (emphasis in original).

[24] Numerous other commentators have described the history of the criminal jury deciding issues of law, so I will not reiterate the details here. See, for example, Alschuler and Deiss, 61 U Chi L Rev at 902–21 (cited in note 16); David C. Brody, Sparf *and* Dougherty *Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 Am Crim L Rev 89, 98–101 (1995); Matthew P. Harrington, *The Law-Finding Function of the American Jury*, 1999 Wis L Rev 377, 381–435; Lillquist, 82 NC L Rev at 640–50 (cited in note 4).

[25] See Barkow, 152 U Pa L Rev at 101 (cited in note 2) (discussing the jury's unreviewable power to acquit as a check on excessive punishments in mandatory-punishment scheme).

[26] See *Beck v Alabama*, 447 US 625, 640 (1980) (noting that the right to acquit of greater offense and convict of lesser included offense enabled juries to "create[] their own

Over time, partly because of the rise of a trained professional class of lawyers and judges,[27] the jury's explicit power to decide issues categorized as "legal" eroded.[28] Yet even though it is no longer typical to give the jury formal power to resolve legal issues, various legal and practical influences assure that the jury retains considerable say over legal issues.[29] In both civil and criminal cases, the jury retains an interpretive function that involves, at some level, a determination of what the law is or means.[30] Accordingly, to this day, a central aspect of the jury's role is to decide issues that go beyond objective facts to include moral assessments of an offender's blameworthiness.[31]

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sentencing discretion by distorting the fact-finding process"); Lillquist, 82 NC L Rev at 636–39 (cited in note 4) (discussing juries' use of lesser-offense convictions and "benefit of clergy" as methods of reducing punishment via conviction decisions in eighteenth century England and America). Compare Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury 1200–1800*, at 28–64, 261 (Chicago 1985) (discussing English juries' willingness to convict of lesser offenses because they considered penalties for greater offenses too harsh); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U Chi L Rev 1, 54–55 (1983) (pointing to cases where an English jury of the eighteenth century "not only decided guilt, but it chose its sanction through its manipulation of the partial verdict").

[27] See, for example, Alschuler and Deiss, 61 U Chi L Rev at 917 (cited in note 16) (suggesting the rise of trained professionals and published legal authorities as the possible cause for "displacement of jurors by judges in resolving legal issues"); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U Chi Legal F 87, 103–06 (describing the historical development of, and tension between, "lay and professional justice").

Another significant factor in the changing historical role of the criminal jury related to changing understandings of the purposes of criminal law itself. See Part I-B-2.

[28] See *Sparf v United States*, 156 US 51 (1895) (holding that juries do not have a "right" to decide legal questions, though noting that they have the "power" to do so); Jeffrey Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* 67–88 (Basic 1994) (discussing the reduction over time of juries' authority to decide questions of law).

[29] See, for example, Alschuler and Deiss, 61 U Chi L Rev at 914 (cited in note 16) ("[T]he primary significance of the disappearance of the jury's de jure power to resolve issues of law may be symbolic. Undisputed procedures . . . ensured both nineteenth- and twentieth-century American juries the practical power to 'acquit against instructions' . . . [and] frequently ensured the power to 'convict against instructions' as well."). See also Barkow, 152 U Pa L Rev at 67–68 (cited in note 2) (asserting that *Sparf*'s rejection of jury "right" to decide legal questions, while recognizing its "power" to do so, reduced jury's law-finding authority less than others have contended). Compare id at 48–49 ("Because the Double Jeopardy Clause shields *absolutely* a jury's general verdict of acquittal from review, the jury has necessarily been given the power to decide the law as well as the facts in criminal cases.") (emphasis in original).

[30] See Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 Nw U L Rev 877, 908–16 (1999) (discussing the jury's historical, and ongoing, interpretive function); Yeazell, 1990 U Chi Legal F at 113–17 (cited in note 27) (discussing the jury's role in substantive development of tort law).

[31] See Barkow, 152 U Pa L Rev at 68 (cited in note 2) ("[A]lthough th[e] erosion [of the jury's normative power] is significant, it did not strip the jury of its core power to check the state and reach an equitable result, even if it means nullifying the law in a particular case. The criminal jury has retained its power to issue an unreviewable general verdict of acquittal, thus protecting the jury's law-application function and reaffirm-

2. Specific fault-finding aspects of the conviction decision.

Various aspects of the jury's general authority grant it the power, and the obligation, to decide normative fault-related issues. Of course, in every criminal case that a jury hears, the basic concept of proof "beyond a reasonable doubt" involves a vague evidentiary standard whose substantive content the jury supplies on an ad hoc (and largely unreviewable) basis.[32] Further, the jury's protected role in applying law to the facts[33] assures it a norm-determining function, as applying the law to particular cases "is a complex psychological process, one that often involves judgment. The more general the rule, the larger the domain for judgment. Thus, law application frequently entails some attempt to elaborate the governing norm."[34] Accordingly, the criminal jury necessarily "possesses the power to elaborate the governing norms underlying criminal laws from the perspective of the community and its sense of moral blameworthiness."[35]

Moreover, this broad authority to make moral assessments is directly instantiated in a number of particular doctrinal formulations. For example, it is the norm, rather than the exception, for the jury to fill in broad and ambiguous culpability terms with its own understanding of an individual defendant's blameworthiness.[36] Standard definitions of recklessness and negligence, two of the four fundamental culpability levels in most modern criminal codes, refer to a "substantial and unjustifiable risk" that constitutes a "gross deviation" from what a "law-abiding" or "reasonable" person would recognize and heed.[37] All of these terms, which call for normative assessments in order to place specific behavior along a spectrum of possible risks and

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ing that the criminal jury performs more than a factfinding role under the Constitution.").

[32] See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 UC Davis L Rev 85, 146–76 (2002) (discussing, and offering normative justification for, variation in content of the reasonable-doubt standard); Marder, 93 Nw U L Rev at 910–11 (cited in note 30) (discussing the vagueness of the reasonable-doubt standard); consider Lawrence M. Solan, *Refocusing the Burden of Proof in Criminal Cases: Some Doubt about Reasonable Doubt*, 78 Tex L Rev 105, 112–18, 119–31 (1999) (discussing approaches to instructing the jury about the reasonable-doubt standard, and their practical effects).

[33] See note 17 and accompanying text.

[34] Henry P. Monaghan, *Constitutional Fact Review*, 85 Colum L Rev 229, 236 (1985).

[35] Barkow, 152 U Pa L Rev at 59 (cited in note 2).

[36] For a general discussion of the jury's special role in applying the law, see Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 Mich L Rev 1199, 1210–16 (1998).

[37] Model Penal Code § 2.02(2)(c) (as adopted in 1962) (ALI 1985) ("MPC") (defining recklessness); id § 2.02(2)(d) (defining negligence).

levels of disregard or inattentiveness, are essentially undefined in the law, leaving the jury to insert its own evaluations. Similarly, typical formulations of the manslaughter mitigation call on the jury to determine what counts as an "extreme mental or emotional disturbance for which there is reasonable explanation or excuse."[38] Again, the content of the notions of extremity and reasonableness must be filled in by the jury. Further, all these standards—for recklessness, negligence, and manslaughter—invite the jury to individualize its expectations of suitable behavior based on what the jury deems relevant about "the actor's situation."[39]

It might seem natural, if not inevitable, that the jury must make individual normative evaluations of blameworthiness in making a finding regarding culpability. But the jury's normative role embraces not only issues related to the defendant's mental state; often the jury also must impose moral judgments on objective behavior. Perhaps most significantly, the jury is entrusted with making the fundamental decision regarding when conduct crosses the line from non-criminal (as "mere preparation") to criminal (as an attempt). All standard formulations of the conduct requirement for attempt—whether demanding a "substantial step" toward the offense,[40] or conduct that "tends to effect" the crime,[41] or conduct in "dangerous proximity" to the offense[42]—offer only vague and general descriptions that basically ask the jury to make a difficult moral judgment in an individual case: was this conduct serious enough to warrant punishment?[43] The basic standard for distinguishing criminal conduct from justified (and therefore non-criminal) conduct similarly calls on the jury to evaluate whether "the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged."[44]

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[38] Id § 210.3(1)(b).

[39] Id. See also id § 2.02(2)(c) (defining recklessness); id § 2.02(2)(d) (defining negligence).

[40] Id § 5.01(1)(c).

[41] NY Penal Law § 110.00 (McKinney 2004).

[42] See *People v Davis*, 16 F3d 212, 218 (7th Cir 1994), quoting *People v Terrell*, 459 NE2d 1337, 1341 (Ill App 1984).

[43] Indeed, the standard attempt formulations are vague enough that juries tend to decide cases in precisely the same fashion irrespective of the governing legal standard that they are instructed to apply, despite the clearly different positions that the standards are meant to adopt. See note 92 and accompanying text.

[44] MPC § 3.02(1)(a).

These are just a handful of examples, and anyone with more than a casual familiarity with criminal law could identify others. The point is merely that the jury has, and is meant to have,[45] a significant normative role in applying—indeed, in effectively defining—broad and ambiguous legal standards that otherwise lack substantive content. This normative function is every bit as significant as the jury's objective fact-finding role, both as a matter of principle and, perhaps, as a matter of practice. As one judge has noted:

> [I]n 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 whether the charged act was committed or even whether the defendant was the one who committed it. Instead, most involve difficult questions about the level of a defendant's criminal culpability[.][46]

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[45] For example, the Model Penal Code's widely followed formulation of the manslaughter mitigation explicitly was designed to allow for juries to flesh out its requirements in individual cases as they arose. See MPC § 210.3 Comment at 63 (1980) ("The Model Code endorses a formulation that affords sufficient flexibility to differentiate in particular cases between those special aspects of the actor's situation that should be deemed material for purpose of grading and those that should be ignored. There thus will be room for interpretation of the word 'situation,' and that is precisely the flexibility desired. There will be opportunity for argument about the reasonableness of explanation or excuse, and that too is a ground on which argument is required. In the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen. Section 210.3 faces this issue squarely and leaves the ultimate judgment to the ordinary citizen in the function of a juror assigned to resolve the specific case.").

Similar explanations appear for the Code's flexible definitions of culpability terms and the conduct requirement for attempt. See MPC § 2.02 Comment at 237 (1985) ("Some standard is needed for determining *how* substantial and *how* unjustifiable the risk must be in order to warrant a finding of culpability. There is no way to state this value judgment that does not beg the question in the last analysis; the point is that the jury must evaluate the actor's conduct and determine whether it should be condemned. The Code proposes, therefore, that this difficulty be accepted frankly, and that the jury be asked to measure the substantiality and unjustifiability of the risk[.]"); id § 5.01 Comment at 329 (1985) ("Whether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem."); id § 5.01 Comment at 332, 352 (noting limitations on the judge's power to refuse to instruct the jury on issue of "substantial step," or to set aside the jury's conviction).

The United States Supreme Court also has explicitly recognized the jury's critical normative function in establishing that the jury must be allowed to decide such issues as "materiality" for purposes of perjury, or more generally, to decide "mixed" questions of law and fact. See *Gaudin*, 515 US at 513–14.

[46] Hoffman, 52 Duke L J at 991–92 (cited in note 5).

The jury's fault-finding role, then, is not merely some minor afterthought or unavoidable corollary to its fact-finding role; it is a central aspect of the jury, in its fundamental justification and its day-to-day operation.

B. Normative Support

1. The function of the jury.

The previous section asserted that, as a descriptive matter, part of the criminal jury's authority always has been, and continues to be, a role in making normative evaluations. This section moves beyond the somewhat negatively expressed observation that the jury is not merely a factfinder to offer an affirmative claim that serving this role is one of the jury's most powerful and fundamental purposes. Not only as historical fact, but as ongoing normative justification, the jury long has been held and upheld to be the moral "conscience of the community."[47] Jury sentencing, where used, is also supported on this ground.[48]

The jury's normative, fault-finding function has been supported both on its own terms, based on the capacity of a lay jury to express community norms, and also by reference to process-related or instrumental concerns about balancing and legitimating institutional power. A significant part of the jury's ongoing role and responsibility has been to protect against the otherwise potentially overwhelming might exercised by state agents, including police, prosecutors, judges, and, significantly, the legislature.[49] The jury can check possible overreaching by the criminal

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[47] See Clark, 97 Mich L Rev at 2420–22 (cited in note 13) (discussing the historical understanding of the jury as the community's conscience and providing supporting authority).

[48] See King and Noble, 57 Vand L Rev at 895 (cited in note 4) (quoting an Arkansas prosecutor as saying, "[Jury sentencing] is a wonderful mechanism of democracy. Having a community-based barometer, I think it's appropriate."); id at 895 n 32 (offering quotes from Kentucky and Virginia prosecutors, respectively: "'The community gets to reflect in their sentences a sense of what the public thinks.' . . . 'Because the important thing is to hear from the community, to hear what they have to say about a crime . . . when they do sentence, it is a better reflection of community judgment. People in the criminal justice system for a long time frequently get inured to crime, they think, "Aw, it's just another car broken into, give him a suspended sentence." But to the guy whose car was broken into, it's a serious matter, to him and his neighbor, there may be a plague of these in their neighborhood. To allow the jury to sentence gives the community a greater say.'").

[49] See *Duncan v Louisiana*, 391 US 145, 155 (1968) (concluding that the jury-trial right was "granted to criminal defendants in order to prevent oppression by the Government"); *Singer v United States*, 380 US 24, 31 (1965) (concluding that the jury-trial right was "clearly intended to protect the accused from oppression by the Government"). See also *Taylor v Louisiana*, 419 US 522, 530 (1975) ("the purpose of a jury is to guard against

law itself as well as by legal agents.[50] Requiring the conviction vote of a lay jury ensures that "no one is likely to suffer of whose conduct [the jury does] not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions."[51] Ensuring a check against governmental abuse is especially important in the criminal context, where the stakes are highest.[52]

Stated more affirmatively, jury authority promotes democracy by giving the lay public a strong role in the legal system. Importantly, jury service enables citizens to speak with a voice different from the one they use in voting for political officeholders. Juries make specific decisions about specific cases, which differ markedly in content and in context from the general policy inclinations voters can express (to the extent voters express any clear preferences at all).[53] The jury's role as moral conscience,

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the exercise of arbitrary power"); *Colgrove v Battin*, 413 US 149, 157 (1973) ("the purpose of the jury trial in criminal cases [is] to prevent government oppression"); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1183–90 (1991) (discussing the framers' intent for juries to curb overreaching by the judiciary and legislature); Barkow, 152 U Pa L Rev at 49 (cited in note 2) ("The jury is, by design, like the other checks and balances in the government: 'further protection against arbitrary action.'") (quoting *Duncan*, 391 US at 156); Jon M. Van Dyke, *The Jury as a Political Institution*, 16 Cath Law 224, 231–36 (1970) (arguing that the jury, an inefficient factfinder, is justified only by its political function of preventing governmental oppression). Consider Sauer, 95 Colum L Rev at 1247–60 (cited in note 12) (discussing the role of the jury as a bulwark against state oppression).

As to a concern with legislative overreaching specifically, see Federalist 48 (Madison), in Clinton Rossiter, ed, *The Federalist Papers* 309 (Mentor 1961) (warning of "danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations"). Tying this concern to the jury-trial right in particular, see Joseph Story, 3 *Commentaries on the Constitution of the United States* § 1774 at 653 (Hilliard, Gray 1833) ("The great object of a trial by jury in criminal cases is, to guard against a spirit of oppression and tyranny on the part of rulers, and against a spirit of violence and vindictiveness on the part of the people. Indeed, it is often more important to guard against the latter, than the former.").

[50] See Barkow, 152 U Pa L Rev at 38 (cited in note 2) ("Juries by design, with their unreviewable power to acquit, can act as a check on overinclusive or overrigid criminal laws. To be sure, this is an imperfect check, *especially given the limited information the jury now receives at trial.*") (emphasis added).

[51] Id at 36, quoting *McCann v Adams*, 126 F2d 774, 775–76 (2d Cir 1942), revd on other grounds, 317 US 269 (1942). See also Barkow, 152 U Pa L Rev at 59 (cited in note 2) ("The purpose of the jury was to inject the common-sense views of the community into a criminal proceeding to ensure that an individual would not lose her liberty if it would be contrary to the community's sense of fundamental law and equity.").

[52] See id at 61.

[53] See id at 61–62 ("People view the law quite differently depending on whether they are acting as jurors facing an individual defendant or as voters viewing the law in the abstract. As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case. Jury trials force the people—in the form of community representatives—to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged.

rather than mere objective factfinder, is also said to serve a useful practical role in promoting broader societal acceptance of the results of the justice system.[54]

To summarize, a strong sense of the criminal jury as an assessor of moral blame, rather than merely a finder of objective facts, long has been defended on both principled and practical grounds.[55] Yet the current legal scheme extends the jury's fault-finding role only so far as the determination of issues relating to the definition of an offense, and hesitates to inform juries about the functional role they play in determining the punishment that follows from a conviction for the offense.

This general restriction on the criminal jury's fault-finding role is particularly anomalous given the roles juries are commonly asked to play in other contexts. As some commentators have observed, it is especially curious that the present scheme so strongly denies the criminal jury a voice in determining punishment when civil juries—whose normative role is generally more circumscribed and subject to more thorough review[56]—are often entrusted with the determination of compensatory, and even punitive, damages in civil cases.[57] Although a full exploration of the relative roles of the civil and criminal juries, either as a constitu-

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The result is a more measured, individualistic evaluation of whether liberty deprivation is appropriate. It is the essence of the judicial role—law application in an individual case—performed by the people.").

[54] See Marder, 93 Nw U L Rev at 918 (cited in note 30) ("[Jurors'] status as one-time decisionmakers also makes it more likely that the verdict they reach will be accepted by the rest of the citizenry."); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 Harv L Rev 1357, 1368 (1985) ("Many of the procedures of our legal system are best understood as ways to promote public acceptance of verdicts."); Harry Kalven, Jr. and Hans Zeisel, *The American Jury* 7 (Little, Brown 1966) (stating that "because of popular participation, the jury makes tolerable the stringency of certain decisions" and that "the jury is a guarantor of integrity"). Consider Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J Crim L & Criminol 118, 151 (1987) (explaining that criminal jury trial decisions "are culturally validated" and represent "the community's moral assessment of that situation").

[55] See Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 Yale L J 1355, 1375–76 (1999) ("One of the primary functions of a jury is to express the moral sentiment of the community in applying the law. In this regard, juries have better access to relevant information (such as current community views on punishment) than do sentencing judges. Juries are also thought to be well-suited for decisions that are difficult to articulate through general principles.").

[56] See Andrew D. Leipold, *Rethinking Jury Nullification*, 82 Va L Rev 253, 264–65 (1996) (contrasting rules protecting the criminal jury's authority with oversight and reversal mechanisms available for review of civil jury decisions).

[57] See Hoffman, 52 Duke L J at 953 n 2 (cited in note 5) ("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.").

tional[58] or a prudential[59] matter, is beyond the scope of the present Article, this odd dichotomy is at least worth noting.[60]

Moreover, "[t]o further deepen the paradox,"[61] criminal juries do sometimes have an explicit role in punishment determinations: namely, in cases involving the death penalty. Although non-capital juries are not even informed about the possible punishment consequences of their decisions, juries in capital cases have long been asked to determine,[62] and are now constitutionally required to determine,[63] facts that will expose a defendant to capital punishment. This combination of rules—that civil juries generally decide damages, and capital juries rule on the death penalty, while other criminal trial juries are not only prevented from deciding punishment, but denied information about the punishment implications of the decisions they already make—is, to put it mildly, curious.[64]

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[58] See generally Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker: *What the Seventh Amendment Can Teach the Sixth*, 39 Ga L Rev 895 (2005). See id at 903–04 ("A discrepancy between the scope of the jury rights under the Sixth and Seventh Amendments would not seem unusual if it resulted in a more expansive right for criminal defendants. After all, criminal defendants enjoy added protections from the right to proof beyond a reasonable doubt and the possibility of jury nullification. But in the allocation of decisionmaking responsibility, the Supreme Court's Sixth and Seventh Amendment jurisprudence has . . . produced a system in which a civil litigant may demand a jury decision on questions that, if presented in a criminal case, would fall within the exclusive province of the judge."). Compare Hoffman, 52 Duke L J at 974 (cited in note 5) (noting that Supreme Court case law since the 1980s has drawn "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," but criticizing this trend and claiming that later cases have also called it into doubt).

[59] See, for example, Kirgis, 39 Ga L Rev at 904 (cited in note 58) ("There is simply no good reason to ensure that civil litigants get a jury decision on all questions of fact relevant to the imposition of a civil award while denying similar protection to criminal defendants facing imprisonment or even death.").

[60] For more thorough discussion, see id at 938–42 (comparing the Supreme Court's Sixth Amendment case law regarding sentencing with its Seventh Amendment case law regarding civil damages); id at 942–46 (defending jury decision-making authority on policy grounds).

[61] Hoffman, 52 Duke L J at 954 (cited in note 5).

[62] Even before the Supreme Court's decision in *Ring v Arizona*, 536 US 584 (2002), which applied the *Apprendi* principle to require jury findings for aggravating factors authorizing capital punishment, most of the states allowing the death penalty gave juries the power to decide when to impose it. See Hoffman, 52 Duke L J at 954 n 4 (cited in note 5) (summarizing states' pre-*Ring* treatment of jury role in death penalty).

[63] *Ring*, 536 US at 609. See Hoffman, 52 Duke L J at 980 (cited in note 5) (discussing *Ring* holding).

[64] See Hoffman, 52 Duke L J at 954 ("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.")

2. The function of criminal punishment.

Our understanding of the jury's role in the determination of criminal punishment also may change along with changing understandings of the purpose of criminal punishment itself. One possible reason for the diminution in the jury's explicit fault-finding function during the twentieth century is that criminal law's connection to moral fault as a general matter was increasingly being questioned, or rejected outright. For most of the twentieth century, through about the 1960s, utilitarian models of criminal justice, rooted in rehabilitation of offenders and deterrence of crime through manipulation of punishment severity levels, were ascendant.[65] These models relied on the professional (and putatively scientific) expertise of institutional players such as judges and, especially, parole boards to determine which offenders have been rehabilitated. The system accordingly came to put less stock in the opinion of juries—and, indeed, all "front-end" decisionmakers who knew only about an offender's criminal behavior and not about how he or she responded to rehabilitative efforts—when it came time to decide how much punishment an individual offender would receive.[66]

Today the utilitarian agenda largely has fallen out of favor, both descriptively (in terms of how the system of criminal punishment is constructed and justified) and theoretically as a basis for criminal punishment,[67] in part because of a sense that rehabilitative efforts simply failed to achieve their goal.[68] Instead, retributivist (desert-based) justifications have come to the forefront, both in the world of policy and in the academy.[69] As re-

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[65] See, for example, id at 997 ("By the end of World War I, [the rehabilitationist] perspective was becoming dominant in American penology, and it remained dominant until after World War II.").

[66] See Iontcheva, 89 Va L Rev at 326 (cited in note 5).

[67] See Hoffman, 52 Duke L J at 997 and n 169 (cited in note 5) ("With a rapidity rarely seen in complex social institutions, the rehabilitative ideal came crumbling down just forty years after its ascension.") (citing, as the "preeminent obituary of rehabilitation," Francis A. Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (Yale 1981)).

[68] See Hoffman, 52 Duke L J at 997–98 (cited in note 5) ("[T]he real 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."). For the classic contemporary account of the failures of the rehabilitative ideal, see Robert Martinson, *What Works: Questions and Answers About Prison Reform*, 35 Pub Int 22 (1974).

[69] See, for example, Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 Nw U L Rev 843, 845–47 nn 2–12 (2002) (offering numerous citations regarding the rise of retributivism as a justification for punishment, in scholarship

tributivist concerns become more prominent in defining and justifying criminal law, it makes sense to reconsider the role of the jury, which many think has a comparative advantage over other systemic players in making moral judgments reflecting the community's level of moral disapproval of a given offense or offender.[70] The centrality of jury decisionmaking in capital cases, for example, has been defended on the ground that the decision to impose the death penalty rests on considerations of an offender's moral desert.[71]

C. Punishment Judgments at Conviction: Filling the Normative Vacuum

The jury's traditional role in assigning punishment is limited to establishing the grade of the offense. Even there, however, the jury does not know the consequences of its conviction vote regarding the conviction offense's grade or sentence range. In other words, as to the punishment ramifications of its decision, the jury's role is purely to find the underlying facts and not to take an active part in assessing the relative gravity or moral blameworthiness of the offense.

This current legal scheme creates a normative vacuum—though only in jury trials, not in bench trials, as I discuss in Part II-B—at the initial punishment-determinative stage of assigning

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and in the law, since the 1970s). See also Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 U Chi L Rev 1, 1 (2003) (discussing the "demise of rehabilitation and emergence of a 'new penology' in the century's final quarter"); id at 15–22 (advocating retributivism as the orientation for the punishment system); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, in 20 Crime & Just: Rev Rsrch 1, 9–45 (1996) (describing the resurgence of retributivism starting in 1970s, and noting arguments in its favor and against consequentialism).

As to the role of retributivism in assigning an amount of punishment, as opposed to justifying the imposition of punishment generally, see, for example, Andrew Ashworth, *Sentencing and Criminal Justice* 72–74 (Butterworth 3d ed 2000) (describing the "desert theory" as "a modern form of retributive philosophy" and asserting that "the main thrust and chief contribution of desert theory is to the quantum of punishment"); Andrew von Hirsch, *Censure and Sanctions* 6–19 (Oxford 1993) (describing "[t]he principle of proportionality—that sanctions be proportionate in their severity to the gravity of the offences"); Andrew von Hirsch, *Doing Justice: The Choice of Punishments* 67–76 (Hill & Wang 1976) (describing how the "[s]everity of punishment should be commensurate with the seriousness of the wrong").

[70] See, for example, Hoffman, 52 Duke L J at 998–99 (cited in note 5); Lanni, 108 Yale L J at 1779 (cited in note 5).

[71] See *Ring v Arizona*, 536 US 584, 614 (2002) (Breyer concurring) (supporting jury sentencing in capital cases based on the "belief that retribution provides the main justification for capital punishment" and "the jury's comparative advantage in determining, in a particular case, whether capital punishment will serve that end").

a broad grade to the offender's conduct. The jury has a de facto role in deciding an offender's punishment, in that its conviction vote enables imposition of only the range of punishments specified for the relevant offense(s). The jury exercises that role, however, literally without knowing what it is doing.

This rule seems rooted more in history than in any principled basis. As noted earlier in Part I-B, the system already calls on the jury to make significant normative—and, in a meaningful way, legal—judgments when deciding whether to convict, so overt recognition of its punishment-related authority is hardly out of step with the jury's normal province. Denying information about punishment consequences is based mainly in a traditional notion that imposing punishment is the judge's and not the jury's bailiwick.[72] Yet discussions of this distinction offer little by way of any general theoretical basis for giving the judge a monopoly on punishment decisions.

In any event, the conviction decision *is* a punishment decision, with effects that the sentencing judge cannot revisit or reverse. The court's sentencing discretion is necessarily confined to the statutorily authorized range of punishments.[73] If refusing to give the jury information about punishment consequences protects the power of any institution, therefore, it is not the judiciary but the legislature, whose general offense grading decision applies mechanically, without specific review or approval as to its application to any case.

1. Implementing (and checking) legislative determinations.

Some might support the current scheme, which keeps the jury ignorant of punishment consequences, as a positive one, in that it ensures that the jury will not overturn the legislative determination of an offense's seriousness. But such a view runs

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[72] See, for example, *Shannon*, 512 US at 579 ("The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task.").

[73] See, for example, *Apprendi*, 530 US at 481 ("[O]ur periodic recognition of judges' broad discretion in sentencing . . . has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature."); *Williams v New York*, 337 US 241, 247 (1949) (noting that, in contrast to the guilt stage of trial, the judge's task in sentencing is to determine, "within fixed statutory or constitutional limits[,] . . . the type and extent of punishment after the issue of guilt" has been resolved).

contrary to one of the central functions of the jury: its role in curbing governmental overreaching.[74] Far from promoting the jury's capacity to act as a check on governmental abuse of power, the current rules undermine that function and render the jury an unwitting pawn of the legislature. When deciding whether to convict of an offense, the jury can decide only whether the legislature overreached in criminalizing the relevant conduct *at all*. But the jury has no power to assess whether the government acted too harshly in punishing the conduct *so severely*. Surely it would be a rare case for the legislature to criminalize wholly innocent activity undeserving of any sanction. It is unfortunately all too common, though, for the legislature to mandate a punishment level that, if known, might strike a reasonable jury as too severe.[75] Empowering the jury to assess the propriety of the chosen grade, rather than merely the propriety of having a given offense *vel non*, is the only way for the jury to fulfill the governmental-oversight aspect of its mission.[76]

Further, denying the jury the capacity to make a particularized assessment of whether a prescribed offense grade should apply to a given case means that *nobody* ever makes such an assessment.[77] The legislature's ex ante and categorical (however broad) judgment about the relative seriousness of an offense is never subject to question or adjustment when applied to specific circumstances.[78] Instead, the offense grade, and any additional restrictions such as a mandatory minimum sentence, are automatically applied whenever the jury finds that the offense's elements are satisfied and returns a conviction. There is, consequently, no opportunity for any party to review whether the assigned grade makes sense, either generally or in the case at

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[74] See notes 49–52 and accompanying text.

[75] For examples of situations where juries refused to convict because legislatively-imposed punishments were considered too high, see notes 109, 122–23.

[76] See, for example, *United States v Datcher*, 830 F Supp 411, 416 (M D Tenn 1993), citing Federalist 83 (Hamilton), in Jacob E. Cooke, ed, *The Federalist Papers* 562–64 (Wesleyan 1961) ("Institution of the jury system was meant to protect against unjust punishment perpetrated by government, not merely unjust conviction.").

[77] Compare David Garland, *The Culture of Control* 172 (Chicago 2001) (noting that under guidelines-based and mandatory-minimum schemes, "legislatures and government ministers have acquired more direct and unimpeded means of shaping practical outcomes").

[78] Compare Sauer, 95 Colum L Rev at 1263–64 (cited in note 12) ("When a mandatory penalty is at stake, the legislature essentially has determined the penalty in advance, thereby limiting the judge's role in determining the sentence. . . . Under these conditions, if the defendant is to receive meaningful individual consideration with respect to punishment, it must come from the jury.").

hand.[79] Moreover, the only other screening device that might apply here—a general or as-applied challenge to the offense grade under the Eighth Amendment—is nonexistent as a practical matter.[80]

Perhaps none of that would matter if legislatures could be relied on to categorize offenses thoughtfully and consistently, so that the chosen offense grade truly captured some sense of the relative seriousness of an offense. But even the best, most careful legislature would have a difficult time making categorical ex ante decisions about offense grading that perfectly capture the relative seriousness of an offense in all its incarnations. "Even when legislators mandate a clear direction, they cannot calibrate statutes to cover every distinct factual situation,"[81] nor would we want them to try, for "problems that call for individualized, case-by-case assessment are often better decided through small-scale deliberation than through the mechanical application of a general policy."[82] Legislation of general application is inevitably overinclusive to some degree.[83]

Further, the creation of rules and the subsequent application of those rules are two different processes, each of which should involve some conscious decisionmaker, rather than having the legislature generate rules that are applied automatically, as is currently done. Overall policy decisions are not the same as decisions about implementation, and a democratic process for mak-

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[79] See Garland, *The Culture of Control* at 179 (cited in note 77) ("These methods of fixing sentences well in advance of the instant case extend the distance between the effective sentencer (in reality, the legislature, or the sentencing commission) and the person upon whom the sentence is imposed. The individualization of sentencing gives way to a kind of 'punishment-at-a-distance' where penalty levels are set, often irreversibly, by political actors operating in political contexts far removed from the circumstances of the case. The greater this distance, the less likely it is that the peculiar facts of the case and the individual characteristics of the offender will shape the outcome.").

[80] Modern United States Supreme Court case law essentially eviscerates any potential to challenge any authorized punishment as disproportionate. See, for example, *Lockyer v Andrade*, 538 US 63, 66, 77 (2003) (rejecting challenge to sentence, under California's "three-strikes" law, of two consecutive terms of twenty-five years to life for theft of about $150 worth of videotapes); *Ewing v California*, 538 US 11, 30–31 (2003) (affirming a sentence, under California's "three-strikes" law, of twenty-five years to life for theft of three golf clubs with a total value of about $1,200); *Harmelin v Michigan*, 501 US 957, 996 (1991) (affirming a mandatory life sentence without parole for a first-time offender convicted of possession of 672 grams of cocaine).

[81] Iontcheva, 89 Va L Rev at 350 (cited in note 5).

[82] Id at 339–40.

[83] See Barkow, 152 U Pa L Rev at 61 (cited in note 2) ("Legislatures cannot predict ex ante all the situations that will be covered by a general law; therefore, the law inevitably will be overbroad and cover some situations that legislators (and those voting for them) would not want covered. This is especially true given the dynamics of crime and punishment in the political process.").

ing policy decisions does not assure case-specific applications that the majority would endorse.[84] Popular will, where it exists at all, is not fixed, but subject to change with context or additional information.[85] Even a perfect legislative process, then, is no guarantor of sound outcomes in individual cases.

Further, as Paul Robinson and I have discussed elsewhere, existing legislative processes are far from perfect; instead, political forces exert a powerful, uni-directional pressure on legislatures to expand criminal definitions and increase criminal penalties.[86] Institutional dynamics are such that, from the legislature's point of view, "too little criminalization tends to be riskier than too much."[87] Offense definitions sweep too broadly, and penalties reach too high, because legislators expect prosecutors to weed out the excesses via non-prosecution or plea-bargaining downward—or expect that the prosecutors, rather than the legislators, will take the blame for any failure to do so.[88]

The current contours of the jury right offer the potential for the jury to protect against overbroad offense definitions, yet utterly fail to provide any similar protection from overly high offense penalties, as those penalties are fully insulated from any jury scrutiny. Indeed, because the punishment consequences of the jury's conviction vote are both unknown *and* binding in their constraint on the judge's later sentencing choices, the current scheme insulates penalties from any scrutiny at all, at least if those penalties are formulated as offense grading decisions or

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[84] Consider Iontcheva, 89 Va L Rev at 351 (cited in note 5) ("The 'majority will' expressed through the aggregation of votes and through public opinion is often very different from the decision that citizens would make when given the opportunity to consider an individual case and to deliberate about it."); Lanni, 108 Yale L J at 1781 (cited in note 5) ("When asked about sentencing in the abstract, citizens report a desire for harsher penalties, but when presented with detailed descriptions of cases, these same citizens often suggest more lenient penalties than those meted out by judges and, in many cases, than the mandatory minimum sanctions currently in force in their jurisdictions.").

[85] See Darryl K. Brown, *Structure and Relationship in the Jurisprudence of Juries: Comparing the Capital Sentencing and Punitive Damages Doctrines*, 47 Hastings L J 1255, 1280 (1996) (noting that popular "preferences are often fluid and relative, contingent upon possible and likely alternatives, or upon information and discussion"), quoted in Iontcheva, 89 Va L Rev at 351 (cited in note 5).

[86] See Paul H. Robinson and Michael T. Cahill, *The Accelerating Degradation of American Criminal Codes*, 56 Hastings L J 633 (2005); Paul H. Robinson and Michael T. Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 Ohio St J Crim L 169, 173–75 (2003) (describing the political pressures on each of the "players in the criminal justice process").

[87] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 505, 549 (2001).

[88] See id at 549–50 (detailing the agency costs associated with legislatures creating criminal laws that they depend upon others to enforce).

mandatory sentences, rather than as sentencing factors subject to aggravation or mitigation.

2. Aiding fulfillment of current duties.

The jury's ability to fulfill its current fault-finding role is handicapped when the jury makes conviction decisions while ignorant of the punishment consequences of those decisions, since information about punishment ranges helps jurors assign meaning to otherwise broad and ambiguous legal notions, such as culpability terms. A jury deciding, for example, whether to convict of murder or manslaughter—deciding, perhaps, whether a defendant's emotional disturbance should be regarded as sufficiently "extreme," and its basis sufficiently "reasonable," to merit the mitigation[89]—might have a very different sense of how to resolve that legal issue if it knew how great a punishment disparity were riding on it. The larger the disparity, the less inclined the jury might be to offer a mitigation from murder to manslaughter in less unusual cases, as it would likely be reluctant to give a large punishment "discount" unless the offender could show truly extraordinary circumstances warranting such a significant departure from the punishment otherwise thought appropriate. A relatively slight reduction in punishment, however, might lead the jury to see the mitigation as less demanding. One might say that this is entirely appropriate as a matter of implementing the rule, as the magnitude of the punishment differential might reasonably serve as a proxy for the magnitude of the moral or practical distinction thought to exist between the offenses, thereby affecting the magnitude of the showing necessary to persuade the jury that a mitigation is suitable. A jury similarly might read the conduct requirement for attempt to be more demanding as the corresponding punishment were to rise, or grow closer to the punishment for the completed offense.[90]

Informing the jury of the punishment consequences of its decision to convict in the first place seems a sensible way for the jury to make the requisite normative and legal assessments. Providing information about punishment ranges serves as an additional tool of statutory interpretation for the jury, in that the

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[89] See, for example, MPC § 210.3(1)(b); NY Penal Law § 125.25(1)(a).

[90] The causation rule also might be read more strictly as the disparity were to increase between liability for attempt and the completed offense. That is, with a more severe punishment contingent on the issue of whether the defendant was the legal "cause" of a result, the jury might demand a closer causal connection to support such a finding.

associated ranges might provide a signal to the jury about what otherwise ambiguous terms really mean.[91] The jury's capacity for normative and legal assessment is hindered, if not altogether uprooted, without an understanding of how the legal rule or distinction in question bears on an offender's ultimate liability.

Some might say that the above characterization of how juries make decisions rests on the unrealistic assumption that juries take seriously their charge to apply the law, as it is given them, to the facts of a case. These cynics might say that juries aren't really trying to interpret, or even construct, the meaning of "extreme emotional disturbance" or other such terms; juries simply make an ad hoc decision as to what offense seems about right, based on their gut feelings about the case and the defendant. Perhaps this is true. There certainly is evidence to support the claim that juries do not truly apply, or understand, legal instructions, and that they tend to employ their own pre-existing moral and legal intuitions regardless of whether those intuitions comport with the law.[92]

But if that is true, then what does it mean? Essentially it means that juries are, or may be, reaching verdict decisions that contravene legislative definitions of crimes and defenses; in other words, they may be engaging in what amounts to nullification of the law on the books, but doing so unwittingly rather than by making a conscious decision to override the legislative will. If jurors do ignore the law in favor of their own sensibilities, they are presumably making verdict decisions based on their best guess as to the punishments that might attach to a particular choice, and an assessment of which of those speculative options comes closest to their own preferred outcome.

In that case, how would giving the jury information about punishment ranges make matters any worse? It appears that offering such information merely would enable the jury to more easily, and accurately, do what it already does—that is, match the resulting punishment range to its own sense of what seems fair, regardless of what the law says. If so, at least such a system

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[91] I am indebted to Ed Cheng for this characterization of the point.

[92] See, for example, Dan M. Kahan, *Lay Perceptions of Justice vs Criminal Law Doctrine: A False Dichotomy?*, 28 Hofstra L Rev 793, 796 (2000) (describing studies indicating that jurors' views "are unaffected by the definitions contained in the instructions that courts give them" as to such issues as the definition of criminal offenses and defenses); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 Utah L Rev 1, 10–11 and nn 46–49 (citing studies by "linguists, psychologists and other academics [that] have shown that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decision-making").

would facilitate result-oriented verdicts that result in what the jury wants, as opposed to the current scheme of result-oriented verdicts that might be wildly inaccurate as to achieving the sought-after result.

On the other hand, some studies suggest that jurors take seriously the task of interpreting their instructions carefully and in good faith.[93] If so, then this Article's proposal is just as appropriate. To the extent there are concerns as to juries' misusing information about punishment ranges, it should be possible to assuage such concerns by providing additional instructions to the jury regarding the proper use of the punishment-related information that it receives. For example, if there are fears that the jury will disregard the stated elements of the crime in order to achieve a punishment range that it deems just—even if that range attaches to an offense that the jury does not believe the defendant committed—then the court can remind the jury that, irrespective of its own views as to an appropriate sentence, it must not return a conviction for any offense unless it is satisfied beyond a reasonable doubt that the prosecution has proved all elements of that offense.

Information about possible punishment ranges also might help the jury make sense of the reasonable-doubt standard itself (or prevent the law from exploiting the vagueness of that standard to make conviction easier). Erik Lillquist has argued that information about the seriousness of an offense might, in some cases, affect jurors' attitudes regarding how much proof is necessary to satisfy the undefined standard of proof beyond a reasonable doubt.[94] In the typical case, where the actual punishment does not depart greatly from what the jury otherwise might have expected, this effect will be modest or perhaps even nonexistent.[95] Yet "when information about sentencing dramatically and disproportionately changes jurors' feeling about one particular type of outcome"—for example, where an offense carries a high mandatory minimum sentence, increasing the perceived costs of a wrongful conviction—providing the jury with that information might lead them to demand clearer proof so that the risk of harm

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[93] See Shari Seidman Diamond and Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 Judicature 224, 225 (1996) (noting that jurors "spend substantial time and effort attempting to apply instructions").

[94] See R. Erik Lillquist, *Expected Utility Theory and Variability in Proof Beyond a Reasonable Doubt* (unpublished manuscript on file with author).

[95] See id at 12 ("In the typical criminal case involving moderately serious crimes, I believe that information about the penalty has little effect on the standard of proof.").

from an inaccurate conviction vote is reduced.[96] Thus for many offenses, such as drug offenses, where mandatory minimums are becoming increasingly routine,[97] "ignorance may be artificially lowering the standard of proof for the government."[98] Without expressing a view as to the normative desirability of juries' varying the demands of the reasonable-doubt standard from case to case—a position Lillquist defends elsewhere[99]—if the claim that jurors do so is descriptively true, it is troubling to think that legislatures and prosecutors could manipulate this tendency by creating and charging offenses that both artificially reduce the proof necessary for conviction and remove any post-conviction sentencing discretion to set an offender's punishment below the floor set by a mandatory minimum.

D. The Nullification Concern

One potential criticism of giving juries information about possible punishments is that it might invite jury nullification. Without wandering too far into the thicket of the general debate about whether nullification is justifiable or desirable, which has spawned a significant literature of its own,[100] I offer four responses to this concern as it arises in the context of this Article's proposal.

First, it is worth mentioning that the proposal does not endorse, or depend on, nullification to any greater extent than does the general right to a jury trial, as currently defined. Of course, "nullification" is itself a normatively loaded term that presupposes the propriety of a constrained role for the jury.[101] If one

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[96] Id at 12–13.

[97] See id at 13, citing Michael Tonry, *Sentencing Matters* 79 (Oxford 1995).

[98] Lillquist, *Expected Utility Theory* at 13 (cited in note 94).

[99] See Lillquist, 36 UC Davis L Rev at 146–76 (cited in note 32) (arguing that "a flexible reasonable doubt standard is preferable to a standard that would require a single, fixed level of certainty").

[100] See, for example, Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Carolina Academic 1998); Paula L. Hannaford-Agor and Valerie P. Hans, *Nullification at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 Chi Kent L Rev 1249, 1250 n 3 (2003) (collecting citations to books, book chapters, and articles on nullification); Leipold, 82 Va L Rev at 296–311 (cited in note 56) (reviewing arguments on both sides and ultimately arguing against nullification).

[101] See Nancy S. Marder, *Juries, Drug Laws & Sentencing*, 6 J Gender Race & Just 337, 370 (2002) ("The language used to describe the jury's . . . role contributes to whether the role is seen as legitimate or overreaching. If the jury is described as simply a fact-finder and [its normative role of checking other institutions' overreaching] is described as 'nullification,' in which the jury is flouting or disregarding the law, then it is not surprising that this is seen as a departure from the jury's proper role . . .").

objects to the specter of nullification in the context of the present proposal, one presumably also objects to various aspects of the criminal jury's current authority in making conviction decisions, and would favor reforms such as allowing or mandating special verdicts, enabling judicial review of acquittals, and so on.[102] The present proposal merely argues that the criminal jury's current power to decide issues (including normative and, as a practical matter, legal issues) related to the *definition* of the crime should exist in equal measure with respect to issues related to the *weight* of the crime, at least in a very broad sense. There seems to be no compelling reason in the abstract why juries should have considerable discretion as to the first set of issues but zero discretion as to the second.[103] In fact, failure to include the second set of issues within the ambit of jury authority allows for, and even invites, the kind of legislative and executive abuses the jury is meant to curb.[104]

Moreover, as Darryl Brown has argued, the jury's authority to decide such issues need not be seen as a promotion or reflection of lawlessness, but is fully compatible with and can help strengthen the rule of law.[105] The present proposal might better be seen as offering a tool that acknowledges, and hopefully improves, the current process of dynamic statutory interpretation juries (as well as judges) already employ in their effort to harmonize legal generalities with their specific moral intuitions in particular cases.[106]

Second, to the extent this Article's proposal grants nullification power to the jury, it actually merely equalizes the jury's current power vis-à-vis other players in the criminal justice system. For example, in a bench trial, judges are armed with the punishment information that juries currently lack.[107] Failure to pro-

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[102] See notes 29–31 (discussing aspects of criminal jury's current unreviewable authority to make normative decisions).

[103] Compare Barkow, 152 U Pa L Rev at 106–07 (cited in note 2) ("Because the threat of overinclusive laws is the same in the case of *all* general laws of blameworthiness that mandate criminal punishment—whether sentencing laws or liability laws—the response should also be the same: a check by the people, operating in the judiciary, to provide an equitable check against executive and legislative overreaching. It is insufficient to give the jury authority over only a subset of those laws.") (emphasis in original).

[104] See Part I-C-1.

[105] See generally Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 Minn L Rev 1149 (1997).

[106] Compare id at 1167–68 (discussing how both judges and juries must negotiate between formal legal materials and external norms and conventions to develop coherent "rule of law").

[107] See Part II-B.

vide this equalization creates an odd dichotomy between jury trials and bench trials, possibly establishing a perverse incentive for defendants to avoid a jury trial. Of course, some current jurors may have knowledge from outside sources regarding sentencing rules, and already may engage in nullification on that basis.[108] But the spottiness of such awareness, and the inconsistent results generated by juries' disparate knowledge, merely reinforce the need to provide such information uniformly.[109]

More broadly, it is routine for other institutional players, such as judges and even (perhaps especially) prosecutors, to use their knowledge of statutory punishments as a basis for making authoritative decisions—about whom to prosecute, what to charge, and how to sentence—that have the effect (and often the intent) of shielding defendants from those punishments. Somehow, the system tolerates such decisions without questioning them or, indeed, even really noticing them. Why, then, is there so much fear and trembling about the prospect of juries doing the same thing? As Nancy Marder puts it:

> Interestingly, when officials, such as police or prosecutors, choose not to pursue a case, that decision is described as within their "discretion." When state court judges decide to give a lesser sentence, that decision is also described as within their "discretion." However, when juries choose to acquit because of dissatisfaction with the law or its application, they are described as "nullifying," and this act is viewed as leading inexorably to "anarchy" and "chaos." It is difficult to account for the different ways in which these acts of discretion are viewed.[110]

Juries are at least equally entitled to exercise this kind of discretion, given the significance of their institutional role.

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[108] See, for example, notes 122–23.

[109] See *Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, Panel Discussion—Jury Nullification*, 145 FRD 149, 191 (June 10–12, 1992) (quoting a juror who served on a hung jury where four jurors who knew "exactly what the sentencing guidelines called for" refused to convict, believing that the sentence was too harsh); Heumann and Cassak, 20 Am Crim L Rev at 352–54 (cited in note 2) (describing extremely low conviction rates—below 10%—for Michigan's widely publicized mandatory sentencing law for possession of a firearm); Iontcheva, 89 Va L Rev at 332 (cited in note 5) (noting low conviction rates, or jurors' refusal to convict, under harsh and well-publicized mandatory-sentencing rules for drug offenses in New York, firearms offenses in Massachusetts, and "three strikes" in California).

[110] Marder, 6 J Gender Race & Just at 370–71 (cited in note 101).

The other two responses to the nullification concern relate to two necessary premises underlying it. The first premise is an empirical one: that juries armed with information about punishment levels in fact would nullify more than they currently do. The second premise is a normative supposition: that such an increase in nullification would be a bad thing, either because nullification is inherently bad, or because the presently proposed reform would lead to nullification in a particularly troublesome subset of specific cases.

Both of those premises are questionable.[111] As to the first, it is hardly clear whether juries in possession of punishment knowledge would be (1) consistently more lenient than now,[112] (2) consistently harsher than now,[113] (3) sometimes more lenient and sometimes harsher, or (4) generally about the same as they are now.[114]

In fact, some critics of this Article's proposal might express the opposite of the nullification concern, fearing instead that juries will use their knowledge of punishment ranges not to reject convictions, but rather to impose convictions for offenses whose

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[111] Compare Jack B. Weinstein, *Considering Jury "Nullification": When May and Should a Jury Reject the Law to Do Justice*, 30 Am Crim L Rev 239, 245 (1993) ("Given the procedural safeguards and requirements of group decisionmaking, we can remain confident that, first, instances of nullification will continue to be rare, and second, if twelve individuals decide to 'nullify,' they will have a good reason for so doing.").

[112] See Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U Chi L Rev 433, 438–42 (1998) (claiming that juries sometimes nullify offenses subject to "three-strikes" and other harsh sentencing rules); Marder, 93 Nw U L Rev at 895–97 (cited in note 30) (offering evidence that juries nullify three-strikes rules); Loretta J. Stalans and Shari Seidman Diamond, *Formation and Change in Law Evaluations of Criminal Sentencing*, 14 L & Human Behav 199, 206 (1990) (finding that lay citizens might prefer sentences below minimum statutory sentence for some offenses). Compare Shari Seidman Diamond and Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 Behav Sci & L 73, 74–81 (1989) (claiming that jurors empowered to make sentencing decisions are as lenient or more lenient than judges); Brent L. Smith and Edward H. Stevens, *Sentence Disparity and the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States*, 9 Crim Just Rev 1, 4 (1984) (finding that Alabama judges were harsher than sentencing juries).

[113] Compare Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash U J Urban & Contemp L 3, 9–10 (1994) (summarizing a study's findings that "jury sentences are both more harsh and more dispersed than judge sentences . . . [and] that the differences between the length of average sentences imposed by the two authorities, which seem to run in the direction of greater severity by juries, increase with the seriousness of the offense"); id at 31–37 (providing findings of study); King and Noble, 57 Vand L Rev at 946–49 (cited in note 4) (finding that sentencing juries are harsher than judges).

[114] Compare Michelle D. St. Amand and Edward Zamble, *Impact of Information About Sentencing Decisions on Public Attitudes Toward the Criminal Justice System*, 25 L & Human Behav 515, 526 (2001) (finding juries' sentencing tendencies to be similar to judges').

corresponding penalties are overly harsh. (In some ways, the underlying concern is the same—that juries will ignore the law—but the fear is that juries might express their lawlessness by expanding or enhancing crimes rather than, or as well as, by nullifying them.) Juries may be thought to lack experience and thus to view relatively minor offenses as serious crimes, whereas more seasoned judges might see minor offenses for what they are.

That specific concern—the possibility of "upward nullification"—strikes me as related less to the jury's function than to the judge's. The jury should be instructed only as to charges with sufficient factual support that a decision to convict must be considered reasonable.[115] In other words, true upward nullification—a decision to reject the law despite clear evidence to the contrary—never should be possible (or, at any rate, never would be provable) if the judge adequately has enforced the prosecution's burden of production for all charges sent to the jury. True, the jury may choose, based on punishment-related considerations, to convict of the most serious offense among those plausibly supported by the evidence. The possibility, however, exists in any jury trial; the only way to minimize that risk is to narrow the set of options that the jury receives in the first place.

As to the general issue of jury harshness or leniency, the evidence from jury-sentencing states is interesting, though not conclusive. A study by Nancy King and Rosevelt Noble tends to support the view that where juries are empowered to impose sentences—a system distinct from that proposed in this Article—juries tend, on the whole, to impose harsher sentences than judges.[116] It is not clear, though, whether this behavior by juries is entirely due to their lack of experience. While some maintain that inexperience leads to harsher jury sentences,[117] others maintain the opposite: that juries who hear multiple cases become

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[115] See *Jackson v Virginia*, 443 US 307, 324 (1979) (holding that a conviction must be reversed if no rational trier of fact could find guilt beyond a reasonable doubt).

[116] See King and Noble, 57 Vand L Rev at 907–08 (cited in note 4) (finding that Kentucky juries impose much higher sentences); id at 923–24 (finding jury sentences longer than bench sentences for most offenses in Virginia, with the most notable exception being rape, for which sentences were roughly equivalent); id at 939 (finding, in Arkansas, significantly higher jury sentences than bench sentences for drug offenses, but no significant differential for other offenses).

[117] See, for example, id at 900 (quoting a Kentucky defense attorney as saying, "Everybody's afraid that jury sentences are higher than what a judge would do—jurors haven't seen one of these guys before, don't know his is a fairly typical crime."); King and Noble, 57 Vand L Rev at 914 (cited in note 4) ("Interviewees also reported that jurors do not have the experience in sentencing that judges have and, as a result, may overreact to what a judge would consider a routine, less serious offense.").

harsher over time.[118] King and Noble point out that "[t]hese competing hypotheses pose interesting empirical questions for further study."[119] They also cite some statistical evidence by way of a master's thesis that examined jury sentences in Kentucky and concluded: "More experienced juries punished criminal defendants more severely, on average[,] than did less experienced juries."[120] Other studies suggest that juries can be quite harsh, in terms of both deciding whether to convict and deciding how much punishment to give, when responsible for meting out punishments themselves, but tend to be more lenient when their authority is limited to providing a recommendation to some other body.[121] Though further investigation is warranted, the finding suggests that this Article's proposal would be less problematic than a system of jury sentencing in terms of its potential to generate overly harsh punishment.

There certainly is reason to believe that juries would, at least sometimes, make different decisions if they had more information.[122] In some cases, they might switch from a conviction vote to an acquittal vote.[123] In others, though, the switch might

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[118] See, for example, id at 914 n 95 (quoting a Virginia judge: "I'd have jurors in the past that would sit for sixty days or more, and their sentences would get tougher and tougher as they had more trials. . . . They see more cases and they think there's a crime wave. Especially that last day of the term. That's when they think, this is our last opportunity to put a stop to this nonsense. I always say if you've got a good personal injury case, try it on the last day of the term, the jurors tend to be their most punitive."). But see id at 932 (quoting an Arkansas judge as saying, "Juries, especially inexperienced jurors, are more lenient.").

[119] Id at 932.

[120] King and Noble, 57 Vand L Rev at 932 n 151 (cited in note 4).

[121] Consider Martin F. Kaplan and Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 L & Psych Rev 1, 8 (1986) (noting that observed outcomes varied only when the appearance of guilt was low; in such cases, "conviction votes were lowest when an *authority* controlled a severe punishment" and "were most numerous, and were as likely as when evidence was highly incriminating, when [the mock jurors themselves] controlled *either* mild or severe punishment") (emphasis in original); id at 13 (noting that mock jurors who controlled punishment "assigned more stringent punishments than did [those] who recommended punishments to an authority").

[122] See King and Noble, 57 Vand L Rev at 912–13 (cited in note 4) ("It is doubtful that Virginia juries invariably agree with the stiff minimum sentences they are required to return. For example, after convicting a man of giving a 17-year-old a puff of marijuana, and learning that the minimum sentence for that crime was ten years in prison, one jury reportedly refused to return a sentence that high. The judge declared a mistrial and selected a new jury for sentencing."); id at 947 ("[D]efenders in Kentucky and Arkansas also reported that jury sentencing can work to the defendant's advantage if the jurors learn during the guilt phase of the prospect of a stiff minimum sentence and decide to acquit as a result. In other words, the juror's knowledge of the sentence may give defendants a chance at jury nullification in some cases.").

[123] See, for example, Marder, 6 J Gender Race & Just at 347 (cited in note 101) ("The defendant, who had been charged with possessing a rock of cocaine, told the jurors when they returned a guilty verdict: 'I want you all to know you put me away for 25 to life!'

be toward punishment and away from acquittal. Knowing the relatively low typical sentence ranges for, say, negligent homicide or involuntary manslaughter might encourage juries to return convictions in cases where they might now assume that the penalty is too harsh.[124] Studies to date indicate, though not uniformly,[125] that juror decisionmaking is affected by knowledge of the prospective punishment.[126] Perhaps not surprisingly, jurors appear most concerned about severe prospective penalties when the evidence supporting the prosecution's case is relatively weak.[127] On the whole, though, the data can hardly be said to offer any clear general conclusion.[128]

These considerations lead into the response to the second, normative, premise, which may be stated as a question: is any of that necessarily bad? After all, jury nullification, if it were to occur, almost certainly would not take place across the board, but only as to certain offenses and, perhaps, certain situations. Surely the offenses and situations conducive to nullification would be those where the legislature most likely got it wrong in determining the offense grade—wrong in terms of tracking the

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When the judge polled the jury to confirm its verdict, two jurors, including the foreperson, changed their votes. The trial ended in a hung jury."), quoting Harriet Chang, *Some Jurors Revolt Over 3 Strikes / Penalty Prospects Sway Their Verdicts*, SF Chron A1 (Sep 24, 1996).

[124] See Kalven and Zeisel, *The American Jury* at 308 (cited in note 54) ("A series of negligent automobile homicide cases presents a situation in which the jury is disposed to guess at the penalty. In these cases the jury is uncertain what the penalty will be but fears that, since death is involved, it will be serious. The judge's view is that the momentum to acquit is generated primarily by an impression of the penalty, and that if the jury had known what the actual penalty would be, it would be less disturbed.").

[125] See Jonathan L. Freedman, et al, *Severity of Penalty, Seriousness of the Charge, and Mock Jurors' Verdicts*, 18 L & Human Behav 189, 200 (1994) (concluding that verdicts do not vary as a function of crime or penalty severity).

[126] See Elisabeth Stoffelmayr and Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 Psych Pub Pol & L 769, 780 (2000) (reviewing literature regarding effects of jury knowledge of punishment and concluding that as a whole, it supports the "notion that juror decision making is influenced by crime and penalty severity").

[127] See Kaplan and Krupa, 10 Law & Psych Rev at 14–16 (cited in note 121) ("Contrary to expectation, severity of penalty did not have a substantial positive effect on offender evaluations. Severe penalties did not reduce subjects' certainty of guilt, and led to fewer convictions when evidence was mildly incriminating [i.e., weak] and an authority [i.e., rather than the jurors themselves] controlled a real punishment [i.e., one not thought to be simulated]. . . . These findings suggest that knowledge of a severe penalty may reduce convictions in weaker cases."). Compare Lillquist, *Expected Utility Theory* at 10–13 (cited in note 67) (arguing that knowledge of severe penalty may lead jurors to adjust degree of proof needed to satisfy reasonable-doubt standard).

[128] Compare Marder, 6 J Gender Race & Just at 354 (cited in note 101) ("Anecdotal evidence is all that is available to show that juries [in New York] have balked at returning convictions in some drug cases, knowing that the sentences meted out [under the 'Rockefeller drug laws'] will be harsh.").

shared moral judgment of the community. If the jury is unconvinced in a given case that a prescribed level of punishment is appropriate, then its decision probably reflects one of two sentiments: (1) the legislative grading of the offense, though generally valid, swept too broadly and cannot justly be applied to the circumstances of the specific case; or (2) the chosen grading is altogether inappropriate and too high. The jury should be entitled to voice either sentiment—to deny the jury these options is merely to exploit its ignorance for the sake of obtaining a conviction that the jury would not approve.

Importantly, the current system facilitates imposition of sentences, based on the jury's conviction vote, to which the jurors themselves might respond with outrage, not to mention guilt or regret, over their unwitting complicity in the outcome.[129] This prospect should not be downplayed or neglected. One important virtue of a jury system is its power to promote the legitimacy of our legal institutions, both *through* the jury and *to* the jury. Jury service promotes feelings of civic engagement and reinforces one's support of the legal system. But where the result of a jury process differs radically from what the jurors themselves wanted or expected, we can expect them only to lose confidence in those institutions.[130]

It also might be possible to erect a system that enables jurors to send a signal about their punishment preferences without having to engage in nullification.[131] A revised and more refined

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[129] Jenia Iontcheva relates an example:

> [One] Florida case involved a jury who found that a thirteen-year-old boy who was "practicing wrestling moves" on another child—who subsequently died—had intended to harm the child. This resulted in a verdict of first-degree murder. Unbeknownst to the jury this meant an automatic sentence of life without parole. Jury members were described as "horrified" to learn the effect of their verdict[.]

Iontcheva, 89 Va L Rev at 314 n 15 (cited in note 5), citing Dana Canedy, *As Florida Boy Serves Life Term, Even Prosecutors Wonder Why*, NY Times A1 (Jan 5, 2003) (citation omitted).

[130] See Marder, 6 J Gender Race & Just at 345 (cited in note 101) ("One juror who had served on a jury that had convicted a woman for taking a five-dollar cut in a cocaine deal 'felt deceived by the court' after learning that the defendant would go to prison for life under [California's] three-strikes law."), quoting Rene Lynch and Anna Cekola, *"3 Strikes" Law Causes Juror Unease in O.C.*, LA Times (Feb 20, 1995).

[131] Compare Marder, 6 J Gender Race & Just at 340 (cited in note 101) ("Admittedly, the jury verdict is a blunt instrument for communicating disagreement [with a law or sentencing rule]. In a criminal case, the jury can only communicate with a verdict of guilty, not-guilty, or a hung jury; moreover, a criminal jury does not decide a sentence except in some capital cases. When juries wish to express their disagreement with a potential sentence about which they have not been told but often surmise, their only means is an acquittal or hung jury.").

verdict system[132] might enable the jury to return a qualified conviction of, say, "guilty but deserving clemency"—that is, to find that the elements of the offense have been proved while declining to authorize the stated penalty, or at least recommending a penalty at the bottom of the available range. A jury also might be given the option of returning a verdict along the lines of "not punishable, but equally condemnable"—finding that the elements of the offense have not been proved beyond a reasonable doubt, though the proven facts suggest the defendant is just as blameworthy (in terms of the suitable punishment range) as if they had been. Here again, the jury would send a useful signal about the appropriate punishment—especially in cases where it combines such a "reluctant acquittal" with a conviction of a lesser-included offense, suggesting that a punishment on the high end of that offense's range is warranted.

In these ways, the jury could express the view that the facts of a particular case do not track the level of blame or punishment reflected in the available liability range. Without requiring the extreme step of nullification, these signaling mechanisms might offer a more direct and actionable rebuke to the legislature than current nullifications, which occur sub rosa, are hard to identify, and do not provide a clear message.

Another possible concern with the proposal of this Article, distinct from the nullification concern, relates to the risk of compromise verdicts.[133] The worry is that some jurors who otherwise would hold out for acquittal, thus creating a hung jury, might be persuaded to meet other jurors somewhere in the middle, leading to punishment for someone who otherwise would receive none. The unstated empirical premise for this concern is that compromise verdicts somehow would be less accurate or more harmful than the results we see in the current system, and I am aware of no clear evidence supporting that claim. It well may be that juries compromise on lesser-included offenses at present, and do so with no clear idea of whether they are meeting in the middle or nearer the high or low end of the spectrum of punishments available.

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[132] For further discussion of the potential for a more sophisticated verdict system to enable juries to send clearer signals regarding their findings or regarding offenders' blameworthiness, see Paul H. Robinson and Michael T. Cahill, *Law Without Justice: Why Criminal Law Doesn't Give People What They Deserve* Ch 9 (Oxford forthcoming).

[133] See Sauer, 95 Colum L Rev at 1242–43 (cited in note 12) (discussing the fear of compromise verdicts as a central concern driving the refusal to inform the jury of the sentencing consequences of conviction). See also id at 1262–63 (rejecting this argument in the context of informing juries about mandatory sentences).

Further, the nature and extent of any such compromise would depend on the ranges that attach to the different possible offenses. If one offense has a punishment range of six to thirty years of imprisonment, and a lesser offense has an available range of four to fifteen years,[134] then there is a lot of overlap. If different grades have sufficient room on both the low and the high end, the jury will not be certain that its compromise would dictate any specific amount of punishment. The jury will know only what it should know: that it is determining the broad relative seriousness of the defendant's offense, using knowledge about the legislative assessment of varying categories of offense seriousness. This scenario seems considerably different from the risk of compromise verdicts in a system where the jury fixes the sentence, as occurs routinely for felonies in six states (apparently without any rampant complaints about improper compromise verdicts).[135]

The somewhat speculative possibility of increased rates of compromise verdicts is hardly more troubling than the current system of outright ignorance and determination of punishment in the two-step fashion outlined above: (1) an automatic linking of the jury's decision with a punishment range, followed by (2) broad sentencing authority vested in one judge. If jurors can reach consensus as to an appropriate range of punishment, even through compromise, that seems at least superior to the current prospect of "compromises" whose substance is unknown and which therefore might be unsatisfying to all parties.

Indeed, one might wonder whether or why "compromise" is somehow inherently undesirable:

> 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). . . . The compromise verdict criticism is an interesting one. First, of course, the word "compromise" is rife with ambiguity. . . . [O]ne juror's

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[134] See 730 ILCS Ann 5/5-8-1(a)(3) (West 2000) (authorizing a term of six to thirty years for a Class X felony); id at 5/5-8-1(a)(4) (authorizing a term of four to fifteen years for a Class 1 felony, one level below Class X).

[135] The six states are Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. See Lillquist, 82 NC L Rev at 646–47 n 111 (cited in note 4) (collecting authority). Case law in Kentucky, however, has interpreted that state's system to involve only nonbinding jury recommendations as to sentence. See *Murphy v Commonwealth*, 50 SW3d 173, 178 (Ky 2001) (finding that the jury's decision as to sentence is not a mandate).

> principled holdout is another juror's irrational nullification. One jury's "compromise" is another jury's perfectly appropriate give-and-take deliberations. . . . [Why isn't a] "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?[136]

The compromise "concern," then, cuts both ways.

II. THE JUDGE'S ROLE IN PUNISHMENT

Although the jury has a role to play—the central role, this Article argues—in assigning blame, the conviction decision represents only a subset of the moral choices involved in imposing punishment. Numerous other moral judgments are currently made at sentencing, by the judge.

A. Normative "Factfinding" at Sentencing

The judge, like the jury, has a mixed role under current rules: he or she effectively decides facts, assigns blame, and makes legal determinations. As with the offense elements given to the jury, the sentencing factors decided by the court often demand moral judgments as well as factual findings.[137] *Blakely* provides an example: in Washington, one aggravating sentencing factor is a finding that a domestic violence offense involved "deliberate cruelty."[138] The Federal Guidelines allow a similar upward departure where "the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim."[139] Some guidelines ask the judge to determine if the crime's victim was particularly "vulnerable."[140] Further, the Federal Guidelines allow downward departures for "significantly reduced mental capac-

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[136] Hoffman, 52 Duke L J at 990–91 (cited in note 5).

[137] See Jenia Iontcheva Turner, *Implementing* Blakely, 17 Fed Sent Rptr 106 (2004) ("Factors pertinent to sentencing are often complex and involve legal, factual and value judgments all at once.").

[138] See Wash Rev Code Ann § 9.94A.535(2)(h)(iii) (West 2004). See also Kan Stat Ann § 21-4716 (2003) (enhancement for "excessive brutality").

[139] United States Sentencing Commission, *Guidelines Manual* § 5K2.8 (2004) ("USSG").

[140] See USSG § 3A1.1(b). See also id § 8C2.8(a)(5); Kan Stat Ann § 21-4716 (2003); Wash Rev Code Ann § 9.94A.535 (West 2004).

ity"[141] or where the offense was "aberrant behavior"[142] by an otherwise law-abiding person—both rules that essentially invite the court to rule on the defendant's moral compass or character.

The judge's overlapping duties may sometimes interfere with each other. Institutional concerns, for example, may intrude on the capacity to make case-specific judgments, as judges bear some risk of institutional bias. In routine cases, the judge, who has ties to other repeat players in the criminal justice system and who has a large docket, may simply defer to the factual findings of the prosecutor or probation officer.[143] Federal judges, for example, commonly accept the factual findings appearing in a probation officer's pre-sentence report, unless the defendant explicitly challenges a finding.[144] In other words, the judge may not act truly as an independent factfinder, but instead rely on the conclusions of other parties.

Some specific guidelines determinations also typically are given to, rather than found by, the judge. To take one example, although in theory the Federal Guidelines reduction for "acceptance of responsibility"[145] should track some individualized assessment that the defendant has shown some remorse or contrition as to the crime, that departure for various reasons currently amounts to nothing other than a judicial rubber stamp on plea bargains, automatically reducing the punishment whenever an offender pleads guilty.[146] Downward departures for providing "substantial assistance" to the government are similar.[147]

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[141] USSG § 5K2.13.

[142] USSG § 5K2.20.

[143] See Barkow, 152 U Pa L Rev at 72 (cited in note 2) ("[B]ecause the judge is a repeat player, she might be more inclined to favor the government's view of the facts as the government is also a repeat player in the criminal justice process.").

[144] See FRCrP 32(i)(3)(A) (allowing the court to "accept any undisputed portion of the presentence report as a finding of fact"); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw U L Rev 1635, 1673–76 (2003) (describing the probation officer as "the 'keeper' of the sentencing system and the guardian of the guidelines" and explaining rules governing the preparation and adoption of the sentencing guidelines report). See also *United States v Smiley*, 997 F2d 475, 483 (8th Cir 1993) (Bright dissenting) (noting that "the sentencing judge often summarily approves the sentencing recommendations of the probation officer"); *United States v Harrington*, 947 F2d 956, 966 (DC Cir 1991) (Edwards concurring) (observing that "many trial judges appear to accept the Report as written"). Compare FRE 1101(d)(3), Advisory Committee Notes (stating that in sentencing, "great reliance is placed on the presentence investigation and report").

[145] See USSG § 3E1.1.

[146] See, for example, *United States v Escobar-Mejia*, 915 F2d 1152, 1153 (7th Cir 1990) (describing "acceptance of responsibility" departure as "a thinly disguised reduction for pleading guilty"); Michael M. O'Hear, *Remorse, Cooperation, and "Acceptance of Responsibility": The Structure, Implementation, and Reform of Section 3E1.1 of the Federal*

B. Punishment Judgments at Sentencing: "Judge Nullification"

When the judge knows of the existence of a draconian sentencing rule or mandatory minimum, he or she may find a way to avoid implementing that harsh sentence by finding facts—or imposing an offsetting downward departure, where possible—in a way that avoids undesirable results. Andrew Leipold has compiled data strongly suggesting that exactly this phenomenon has developed at the federal level.[148] The rise of guidelines sentencing and mandatory minimum sentences under federal law has coincided with an increasing disparity between the relatively high acquittal rates of judges (who know about the existence of the high guidelines sentences or minimums) and the lower acquittal rates of juries (who do not).[149] In other words, it is entirely possible—Leipold does not explicitly make this assertion, though he hints at it—that guidelines and mandatory minimums have created a system that enables, and perhaps fosters, "judge nullification" in the form of acquittals that go against the law for the sake of preventing harsh punishment.

The bench-trial judge, then, may take seriously the role of assigning blame, but do so in a way that conflicts with governing law and introduces the potential for inconsistency. In this and other ways, guidelines and mandatory minimums do not remove inconsistency or discretion, but shift it so that the judge appears to be exercising discretion in her capacity as factfinder, rather

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Sentencing Guidelines, 91 Nw U L Rev 1507, 1534 (1997) (noting that in many federal districts, judges automatically award acceptance-of-responsibility discounts to all defendants who plead guilty).

[147] USSG § 5K1.1. See generally Cynthia K.Y. Lee, *From Gatekeeper to Concierge: Reigning [sic] in the Federal Prosecutor's Expanding Power Over Substantial Assistance Departures*, 50 Rutgers L Rev 199 (1997) (discussing relationship between judges and prosecutors with respect to substantial-assistance departures); see id at 234–35 ("[T]he prosecutor not only controls whether or not a departure can be granted, but also . . . the extent of the departure. . . . [P]rosecutors play a defining role in determining whether a defendant receives a downward departure based on substantial assistance. It goes without saying that the authority to veto a substantial assistance departure is a significant power in light of the fact that such departures constitute the bulk of all departures and an increasing percentage of all Guidelines sentences.").

[148] Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 Wash U L Q 151 (2005).

[149] Id at 152 ("Between 1989 and 2002, the average conviction rate for federal criminal defendants was 84% in jury trials, but a mere 55% in bench trials. Just as importantly, this 'conviction gap' increased dramatically over this period—while the jury conviction rate increased slightly in recent years, the judicial conviction rate has fallen dramatically."); id at 164–67 (providing tables detailing this trend); id at 200–18 (discussing the hypothesis that the rise of sentencing guidelines, and judges' knowledge of rules under guidelines, has driven this trend).

than in her unstated but nonetheless real capacity as assigner of punishment by means of conviction.

Juries, of course, have no knowledge of first-stage punishment consequences. Accordingly, the potential for judge nullification, with no corresponding possibility in a jury case, creates a discrepancy between the prospects of a bench-trial defendant and those of a jury-trial defendant. In addition to creating an arbitrary distinction leading to inconsistent treatment, this discrepancy establishes a perverse incentive for defendants—at least, for those few defendants who know about the imbalance of information and its ramifications—to waive a jury trial in favor of a bench trial.

The dichotomy between judges' and juries' discretion in this area is all the more unusual because the criminal jury, rather than the judge, is the institution generally empowered to exercise the kind of unreviewable normative power that the potential for "judge nullification" suggests. Juries are not expected to offer reasons for their decisions to convict or acquit, and conviction votes are reviewed only for the most fundamental kinds of error, whereas acquittal votes are entirely shielded from review. Judges, on the other hand, are expected to offer some formal explanation for their decisions, and those decisions are typically subject to review and later revision or rejection by other judges or by legislative action.[150]

C. Judge v Jury

The judge is not better positioned than the jury to make moral judgments.[151] The judge's relative competence vis-à-vis the jury has two aspects: expertise and professionalism. The judge knows the law and also may know more about how the justice system works. Indeed, the initial rise of trained lawyers and judges was a major factor in the erosion of juries' authority to decide legal issues as well as factual issues.[152] The judge also is a

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[150] See Barkow, 152 U Pa L Rev at 60–61 (cited in note 2).

[151] Compare Paul H. Robinson and Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 Colum L Rev 1124, 1146 (2005) ("If shared community intuitions of justice are a central determinant of liability, the jury will have a substantial advantage because it can more reliably articulate those intuitions than an individual judge. . . . [G]roups [also] tend to be better at decisions involving judgment or evaluation because groups are better at taking multiple factors into account."); id at 1148 ("Jurors really do have an advantage in making the normative judgments that the public so closely associates with doing justice.").

[152] See Alschuler and Deiss, 61 U Chi L Rev at 917 (cited in note 16) (noting one possible explanation for "displacement of jurors by judges in resolving legal issues" is that

repeat player and can get a better sense than the jury of how cases relate to each other.[153] Judges potentially are better able both to get a sense of overall sentencing trends, and to maintain consistency over time across their own sentencing decisions.[154]

Both of these competencies are relevant, but they should not outweigh the jury's independent say in assigning moral blame in at least some basic fashion.[155] The jury should have an initial role and responsibility with respect to decisions about appropriate levels of punishment. The judge then should retain the power to make the second punishment decision—sentencing—as that decision then may capture more precisely a sense of the proportionate punishment that one offender merits relative to another. This also may enable the judge to employ his or her expertise as to what amount or method of punishment might better serve the system's utilitarian goals in individual cases—determinations that may require some technical knowledge and familiarity with what works.[156]

"[j]urors initially resolved legal issues at a time when lawbooks and legal professionals were in short supply," and were moved aside as legal professionalism progressed); Iontcheva, 89 Va L Rev at 324 (cited in note 5) ("As the nineteenth century progressed, courts began restricting the authority first of the civil jury, and then of the criminal jury. . . . The gulf between the roles of juries and judges grew as the rise of law schools created a new class of specially trained legal experts.").

[153] See Wright, 108 Yale L J at 1378 (cited in note 55) ("The best reasons to favor sentencing judges over sentencing juries, however, do not involve the power of the judge to individualize a sentence. Instead, judges gain an advantage over juries because they are better able to coordinate a sentence in one case with sentences in other cases. . . . Because judges sentence regularly, they might find ways to become more consistent with other judges and to impose better sentences tomorrow than they did yesterday.").

[154] See id ("We might expect coordination among different sentencers at any given time, giving us some assurance that similar offenders and offenses will receive similar sentences. We might also expect sentencers to coordinate their work over time: Sentencers could learn from experience, notice developing problems or trends, and improve their sentences over time.").

As to the second benefit—consistency within a single judge's own pattern of sentences—see also Hoffman, 52 Duke L J at 987 (cited in note 5) ("[E]ven 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.").

[155] Compare Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 Georgetown L J 387, 432–34 (2002) (arguing that the distinction between "offense elements" and "sentencing factors" should be based on whether the issue involves a question of moral fault, in which case it should be an offense element for the jury to decide).

[156] As discussed earlier, reliance on (or faith in) the technical expertise of the judge—and other players, such as parole boards—with respect to implementing utilitarian objectives, such as rehabilitation and incapacitation, helped drive the shift in punishment-related authority away from juries and toward those other players in the middle of the last century. See Part I-B-2. Although those objectives now share the stage with retributive purposes, and likely will continue to do so, they remain relevant to sentencing as tools for selecting a specific punishment from within a prescribed range or for determining the method (rather than amount) of punishment.

In fact, a system where both judge and jury effectively (and explicitly, unlike the current system) share authority over an offender's ultimate punishment might best maximize the strengths of each while undercutting their weaknesses.[157] For example, as repeat players, judges have expertise that juries lack and may be better able than juries to craft specific sanctions within a prescribed range,[158] including alternative sanctions to incarceration.[159] At the same time, some maintain that judges'

Some more recent work also suggests that, though the utilitarian project foundered in the 1960s and 1970s because of methodological shortcomings, new advances might increase the potential for experts to make useful judgments about whether at least some categories of criminals are amenable to rehabilitation or represent a future danger. For example, as to assessing dangerousness for purposes of incapacitation, see John Monahan et al, *Rethinking Risk Assessment: The MacArthur Study of Violence and Disorder* (Oxford 2001); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 Nw U L Rev 1, 9 ("Due to a number of methodological difficulties in measuring prediction validity, we may never know precisely how accurate the various modes of prediction are. But we can say that prediction science—in particular, methods that utilize actuarial tables or structured interviews—has improved to the point where clear and convincing evidence of dangerousness, if not proof beyond a reasonable doubt, is available for certain categories of individuals."); id at 9 n 32 (listing empirical studies).

As trained professionals and repeat players, judges would be better suited than juries to assimilate and implement these findings. See Robinson and Spellman, 105 Colum L Rev at 1146 (cited in note 151) ("[I]f the dominant purpose [of the punishment system] is the incapacitation of dangerous offenders—for which the central criteri[on] is not the offender's blameworthiness but a clinical assessment of his dangerousness—or if the dominant purpose is the general deterrence of potential offenders—for which the central criteria [are] again factors other than blameworthiness—then judges may be better able [than juries] to elicit and understand those expert opinions upon which the judgment will be based.").

[157] Compare Robinson and Spellman, 105 Colum L Rev at 1146–50 (cited in note 151) (discussing relative strengths of juries and judges, as well as other possible players such as sentencing commissions, with respect to different sentencing decisions involved in individual cases; tentatively concluding juries should make normative judgments, whereas judges should implement utilitarian goals and determine the specific amount and method of punishment).

[158] As more experienced parties, judges may be less likely than juries to fall victim to cognitive biases such as "anchoring" or "scaling" problems that lead to erratic or arbitrary choices when a decisionmaker has no clear basis for selecting any particular point along a spectrum of options. See, for example, J.J. Prescott and Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, Mich Law and Econ Res Paper No 05-004, 21–25 (discussing likely anchoring and scaling problems for sentencing jurors).

This Article's proposal is less likely to create such problems for juries than, say, jury sentencing would, because the jury is not being asked to select a particular penalty, but simply being informed about the penalties related to the options already on the jury's menu of choices. Juries may suffer from cognitive biases in choosing from that menu as well, but any such biases exist even without the present proposal. See, for example, id at 25 ("Mock juries presented with the option of convicting on a lesser-included offense quite frequently take that option, generating a 'compromise effect.'"); Lillquist, 82 NC L Rev at 654–71 (cited in note 4) (discussing possible "compromise" and "decoy" effects from presenting additional options to the jury). Implementation of the proposal should not aggravate those current biases dramatically—though further empirical study would be welcome on this score.

[159] See Hoffman, 52 Duke L J at 1005–06 (cited in note 5) ("[A] judge, through sheer

familiarity with criminal cases "overconditions" them so that they become insensitive to the subtleties of individual cases.[160] As one trial judge has written:

> 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 seriousness 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.[161]

Jury participation in the first stage of the process of imposing punishment might temper this potential problem.

Juries, on the other hand, may lack the sophistication or expertise to make refined judgments about the precise amount—or, as is also significant, the method[162]—of punishment, but should

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

[160] See *Taylor*, 419 US at 530 (claiming that juries protect against the "perhaps overconditioned or biased response of a judge"); *Duncan*, 391 US at 156 (stating that jury trials provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge"); *Sparf*, 156 US at 174 (Gray dissenting) ("[I]t is a matter of common observation, that judges and lawyers, even the most upright, able, and learned, are sometimes too much influenced by technical rules; and that those judges who are wholly or chiefly occupied in the administration of criminal justice are apt, not only to grow severe in their sentences, but to decide questions of law too unfavorably to the accused."); Marder, 93 Nw U L Rev at 918 (cited in note 30) ("[T]he jury is a check on professionals, who may have grown too removed from the experiences and common sense reasoning of ordinary citizens. Relatedly, jurors are nonrepeat players. They hear only one case, which means they bring to their interpretation of the law a freshness that a judge who has heard many cases may no longer have."); Weninger, 45 Wash U J Urban & Contemp L at 19–20 (cited in note 113) (reporting that judges sometimes acknowledge becoming jaded from seeing many criminal cases). See also Iontcheva, 89 Va L Rev at 353 (cited in note 5) (noting concern with "overconditioning").

[161] Hoffman, 52 Duke L J at 990–91 (cited in note 5).

[162] Consider id at 1005–06 (acknowledging, while advocating jury sentencing authority, that judges should probably retain authority over decision to impose probation rather than a prison sentence); Robinson and Spellman, 105 Colum L Rev at 1149–50, 1157 (cited in note 151) (suggesting judges should make decisions regarding method of punishment).

Importantly, although retributive concerns speak to the proper amount of punishment, they have nothing to say about the proper *method* (or methods) of imposing that punishment. Accordingly, there is no reason not to have judges, with their superior knowledge of what is likely to work, craft specific sanctions designed to achieve utilitarian goals, once the jury has provided general guidance as to the appropriate amount of punishment. See Robinson and Cahill, *Law Without Justice* at Ch 9 (cited in note 132) (discussing the potential for the system to use the punishment method to achieve utilitar-

at least have some broad authority to pass on the appropriateness of placing an offender into a general punishment category. Among other things, the jury represents a broad cross-section of society, whereas the judiciary may not.[163] Jurors also have no personal or professional stake in trial outcomes, as other institutional players might.[164] Partly for these reasons, and perhaps for others as well,[165] giving the jury an explicit and shared role with the judge might enhance the system's legitimacy among the general public, as "[s]tudies of the public perception of the fairness of judges and juries . . . reveal that citizens overwhelmingly rate jurors as fairer decisionmakers in criminal trials."[166] The jury

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ian goals, while setting the punishment amount according to desert-based considerations).

[163] See Barkow, 152 U Pa L Rev at 72 (cited in note 2) (observing that it is "more likely that juries will represent the community's perception of the facts than 'trial judges [who] collectively do not represent—by race, sex, or economic or social class—the communities from which they come'") (quoting Stephen Gillers, *Deciding Who Dies*, 129 U Pa L Rev 1, 63 (1980)); Marder, 6 J Gender Race & Just at 363–64 (cited in note 101). See also Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich L Rev 63, 100 and n 139 (1993) (stating that judges are "primarily white, male, middle-class").

To be sure, the jury's connection to the community carries its own risks of bias and abuse, see Barkow, 152 U Pa L Rev at 74–77 (cited in note 2), but the size and possible diversity of the jury, relative to a single judge, might help reduce the likelihood of bias. See Valerie P. Hans and Neil Vidmar, *Judging the Jury* 50 (1986) ("The jury's heterogeneous makeup may also lessen the power of prejudice."); Marder, 6 J Gender Race & Just at 365 (cited in note 101) ("Ideally, the differences among jurors enable them to challenge each other's assumptions and to correct each other's mistakes."). Further, *any* governmental agent has the potential to abuse its discretion or exercise bias, and "[t]he jury's enshrinement in the Constitution and the powers it has retained in criminal cases for 200 years reflect[] the judgment that any risk of disparity from jury involvement in the criminal justice process is outweighed by the benefits the jury brings." Barkow, 152 U Pa L Rev at 77 (cited in note 2).

[164] See Marder, 93 Nw U L Rev at 918 (cited in note 30) ("[Jurors] are likely to be viewed as fair arbiters not only because they have no personal stake in the outcome, but also because they shed their official role of juror as soon as they render a verdict."); Marder, 6 J Gender Race & Just at 363 (cited in note 101) ("Nor are jurors likely to consider how a particular outcome might enhance their reputation or increase their power, as a professional might.").

[165] For example, the very fact that juries need not explain their decisions, and that those decisions will not serve as precedent in future cases, enables the juries to exercise great flexibility in deciding individual cases without creating a clear record over time that suggests inconsistency or lawlessness. See William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* at 29 (Harvard 1975) (asserting that jury system offers "flexibility while simultaneously giving the illusion of stability—two values that are important in doing justice in individual cases *and in convincing litigants that justice has been done them*") (emphasis added).

[166] Iontcheva, 89 Va L Rev at 353 (cited in note 5). See also Barkow, 152 U Pa L Rev at 83–84 (cited in note 2) ("Whether because of its valuable function or its historical pedigree, the jury to this day commands the respect and admiration of the American people."); Robinson and Spellman, 105 Colum L Rev at 1145–46, 1148 (discussing significance of public perception of juries as superior to judges). For a discussion of the significance of "legitimacy" to the criminal-justice system, see Robinson and Cahill, *Law Without Justice*

also arguably better upholds the proper institutional (and constitutional) balance of power.[167]

Nancy Marder has summarized the considerations in favor of ensuring a decision-making role for both the judge and the jury:

> All of the institutional features that the jury brings to the process—that jurors are ordinary citizens drawn from a cross section of the population, that they engage in a process of group deliberation, and that they are nonprofessionals who hear only one case—are critical features that the trial judge cannot offer. The trial judge has many other institutional advantages that he or she brings to the interpretive task, such as professional training, a perspective developed from hearing many cases over time, the vehicle of the judicial opinion in which to express his or her reasoning, and resources such as prior cases to consult for guidance, but these are not substitutes for the institutional features of a jury.[168]

There is no obvious reason why these general observations, indicating that a shared role for judge and jury is best, are any less true with respect to the particular question of determining punishment.

This Article's proposal is generally in accord with the numerous contemporary proposals suggesting that the best system of criminal punishment employs a "limiting retributivism" approach, where retributivist concerns define a general range of available punishments for an offender, within which a specific punishment is chosen based on utilitarian criteria.[169] For exam-

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at Ch 7 (cited in note 132).

[167] Consider Hoffman, 52 Duke L J at 994 (cited in note 5) ("[T]he 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.").

[168] Marder, 93 Nw U L Rev at 920 (cited in note 30).

[169] See, for example, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision* (2002), reprinted in 6 Buff Crim L Rev 525, 556 (2002) ("ALI Sentencing Plan") (explaining that "[r]etribution can . . . operate as an important limitation upon utilitarian goals"). Norval Morris often is cited as an early exponent of such an approach. Consider Norval Morris, *The Future of Imprisonment* 78 (Chicago 1974) ("Retribution . . . not only limits the worst suffering we can inflict on the criminal, but also sometimes dictates the minimum sanction a community will tolerate."); Norval Morris, *Madness and the Criminal Law* 196 (Chicago 1982) (arguing to "treat desert as a limiting rather than a defining principle of punishment"); Norval Morris and Michel Tonry, *Between Prison and Probation: Intermediate Punishments in a Rational Sentencing System* 84–93 (Oxford 1990) (discussing generally retributive punishment philosophies). For other early discussions of

ple, the ALI's Sentencing Project, currently rewriting the sentencing rules of the Model Penal Code, has embraced such an approach.[170] Typically, however, these recent proposals suggest that both the retributivist and utilitarian features of such a system would operate at the sentencing stage, with sentencing guidelines setting a broad, retributivist sentencing range reflecting an offender's general level of blameworthiness, from which the judge then would select a particular level (and, perhaps, kind) of punishment, perhaps with regard to utilitarian goals.[171]

I propose a different system, where offense grading rules rather than sentencing rules would perform the initial retributivist demarcation of a punishment range, and where the jury would implement that first punishment decision while explicitly recognizing that it was doing so. Once the jury has chosen the offense, whose corresponding grade defines a broad punishment range, the judge can use her expertise to assign a punishment within that range, perhaps paying particular attention to utilitarian goals and facts related to them, such as prior record, dangerousness, or the most effective (or least restrictive) method of punishment. The judge's technical expertise—derived from experience as well as legal knowledge—may help rein in any jury excesses or insufficiencies with respect to proportionality. The judge also may employ a more specialized understanding as to the empirics of effective sentencing, in terms of both the amount and method of punishment.

This proposal is also largely in keeping with, though it does not precisely replicate, proposals to make the offense-element versus sentencing-factor distinction (which is critical under the *Apprendi* line of cases) reflect the distinction between "offense-related" and "offender-related" facts.[172] Offense-related facts are

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the concept of retribution as a limiting principle on punishment, see H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 235–37 (Oxford 1968) (describing the combination of retribution and utilitarian theory); Herbert L. Packer, *The Limits of the Criminal Sanction* 140 (Stanford 1968) (discussing how retribution can dictate the amount of punishment for particular offenses, "with perhaps some mitigation allowed for less than normal wickedness on the part of particular offenders").

[170] See ALI Sentencing Plan, 6 Buff Crim L Rev at 555–57 (cited in note 169); id at 621–22 (suggesting revision of MPC § 1.02 along limiting-retributivism lines).

[171] See id at 557 (proposing development of limiting-retributivism scheme via revision of sentencing rules).

[172] See Douglas Berman, *Reconceptualizing Sentencing*, 2005 U Chi Legal F 1. Compare Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S Cal L Rev 289, 355–56 (1992) (arguing that "many of the decisions being made at sentencing proceedings under the guidelines do not belong in those proceedings at all").

generally relevant to establishing the moral gravity of the offense in a retributivist sense. At the same time, retributivists—at least, act-based retributivists—focus only on the deed and the actor's moral accountability for it, and not on broader offender-related traits that relate to a more general sense of the actor's moral character. A utilitarian, on the other hand, would rely on offender-related facts to guide determinations regarding the prospects of achieving special deterrence or rehabilitation of this particular offender, or the need for incapacitation based on an individualized finding of dangerousness.

III. REFORMING THE SYSTEM

This Part sketches some of the practical nuts-and-bolts issues that would arise in trying to implement the Article's proposal and explores the proposal's ramifications for the various players in the criminal-justice system and for other legal issues. Although certain details might need to be hammered out over time, a commitment to affirm the jury's fault-finding role with respect to punishment could realign the roles of judge, jury, prosecutors, and the legislature to better accord with their relative competencies.

A. Implementation

1. Methods.

One initial question as to the practicality of this Article's proposal relates to how, or by whom, it would be implemented. As noted earlier, I do not consider this proposal to be a constitutional mandate.[173] It could be effectuated by statute—but given all I have said to criticize how legislatures operate and to point out that this proposal is designed to strengthen juries at the expense of legislatures,[174] one might wonder why any legislature would be interested in enacting such a scheme.

It is also possible, however, for the judiciary to implement this proposal, either through promulgation of general rules of court or by a decision in individual cases to admit evidence of punishment ranges or include information about those ranges in jury instructions. For example, Judge Gerard Lynch recently considered giving a criminal jury an instruction regarding the

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[173] See note 12 and accompanying text.

[174] See Part I-C-1.

ten-year mandatory minimum sentence corresponding to a defendant's charged drug offense.[175] Though the Second Circuit ordered Judge Lynch not to do so,[176] it is by no means clear that trial judges are (or must be) generally barred from offering such information in jury instructions.

2. Details.

Even if this Article's thesis strikes the reader as sensible, there certainly remain numerous tricky details to hammer out. For example, should juries receive additional information about how to decide an appropriate punishment range—or how the law will operate, such as through guidelines, to narrow the statutory range—beyond simply being told the broadest possible range of punishments for an offense? Perhaps the defense, or the prosecution, would want to inform the jury as to what factors, including guidelines factors, will lead to the sentence falling in one part of the range rather than another. Sometimes the defense might want to inform the jury that available guidelines would require (perhaps based on an offender's criminal history, though the defense would not want to explain that basis) a higher punishment than the technical statutory minimum. The defense thereby might assuage possible jury concerns that the defendant could receive an inappropriately low sentence at the bottom of the authorized range.

In some cases, on the other hand, the prosecution might want to reassure the jurors in the other direction by stating that the statutory maximum punishment exaggerates the penalty that the defendant is likely to receive under governing sentencing rules. In such a situation, however, the prosecution's statement should properly be held to waive the right to argue at sentencing for any punishment higher than the prosecution said would be authorized.

Further, perhaps the defense would want to introduce evidence of other crimes falling in the same grade as a charged offense. Imposing liability for a particular grade of felony in a drug or firearm case, for example, might seem less proper if a jury knows that other more serious-seeming offenses, such as rape or

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[175] See *United States v Pabon-Cruz*, 255 F Supp 2d 200, 214 (S D NY 2003) (noting that such an instruction would alert jurors to the "moral consequences of their decisions").

[176] See id (stating that the Court of Appeals issued a writ of mandamus to forbid the instruction, "concluding that to do so would encourage forbidden jury nullification").

attempted murder, are crimes of the same grade (or lower).[177] Armed with such information, the jury might decide that an offender's particular crime is better treated as a lesser-included offense whose grade better captures its relative seriousness. Whether providing such information is proper—and if so, how much information to give—remain open questions, perhaps best left to resolution over time, as judges and other participants gain experience and insights about how best to inform the jury as to punishment consequences.

3. An analogous case: The insanity defense.

A good illustration of the oddities of the current system, and the role that this Article's proposal envisions for the jury, is the jury's unawareness of the consequences of finding the defendant not guilty by reason of insanity ("NGRI").[178] The typical consequence of a verdict of NGRI is not that the defendant is free to go, but that he is remanded for psychological evaluation and possible civil commitment.[179] The system accordingly manages any danger that an insane person presents independently of whether that person is convicted. In theory, then, the jury's actual function in choosing between a guilty verdict and NGRI is purely to assess the defendant's moral blameworthiness, rather than to address any utilitarian concern about incapacitating on the basis of dangerousness. Indeed, the underlying basis for having an insanity defense at all arguably relates purely to limitation of unwarranted moral blame rather than any utilitarian goal.[180]

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[177] Compare, for example, 720 ILCS Ann 570/401(a)(1)(A) (manufacturing, delivering, or possessing with intent to deliver 15–100 grams of heroin; Class X felony), with id 5/16-16.1(a)(2), (c)(2) (possession of 6–10 stolen firearms within 2-year period; Class X felony), and with id 5/8-4(c)(1) (attempted murder in the first degree; Class X felony), and with id 5/12-14(a)(1)–(3), (d)(1) (forcible sexual intercourse involving a dangerous weapon, injury to victim, or threat to victim's life; Class X felony).

[178] See Wayne R. LaFave, *Criminal Law* § 8.3(d) at 432 (4th ed 2003) ("One might think, simply as a matter of logic, that if the insanity issue is in the case the jury would be told of its significance, that is, of the fact that commitment must or may follow a finding of not guilty by reason of insanity. . . . The better view is [that] . . . it does not make sense that a jury should be presented with three verdict choices (guilty, not guilty, and not guilty by reason of insanity) but know the consequences of only the first two.") (footnotes omitted).

[179] See, for example, id at § 8.4 at 434 ("In a minority of states and also in the federal courts, statutes require automatic, mandatory commitment of a defendant who has been found not guilty by reason of insanity. . . . In all other jurisdictions, commitment is possible but not mandatory."); id at n 5 ("[I]n practice, however, commitment usually follows.").

[180] See Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive Versus Normative Crime Control*, 86 Va L Rev 1839, 1842–45 (2000) (discussing the difficulty of constructing an instrumentalist justification for insan-

In practice, however, current rules regarding jury instructions undermine, rather than facilitate, any effort to divorce concerns about the defendant's potential dangerousness from the jury's evaluation of his guilt. Many jurisdictions adopt a rule against informing the jury that, should it vote for an NGRI verdict, the acquitted will not be free but will be remanded for psychological evaluation and treatment.[181] The United States Supreme Court has explicitly condoned this rule.[182] The bases for the rule are similar to those for the current refusal to instruct juries about any other punishment-related issues: it's not the jury's business; it might lead to compromise verdicts; it will only confuse the jury.[183]

Yet those reasons are exactly backward. The idea behind the do-not-inform rule is that instructing the jury about consequences will lead the jury to focus too much on consequences, ignoring the legal issue of guilt or innocence. But, of course, refusing to instruct jurors about consequences does not mean that they stop caring about them[184]—it means only that jurors are more likely to act on their concerns in an ignorant and counterproductive manner, such as by voting for conviction out of fear that conviction is the only way to ensure that a dangerously ill offender will obtain needed help. If a jury were reassured that treatment for mental illness would not depend on a conviction, then it truly would be able to rule on guilt and guilt alone.

The same reasoning holds true for knowledge of punishment consequences. Refusing to tell the jury about the consequences does not make the issue go away, either legally (the jury's decision does have ramifications for the available punishment) or practically (the jury's thought process still likely will include

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ity or other excuse defenses).

[181] See LaFave § 8.3(d) at 432 and nn 62–63 (cited in note 178); Thomas M. Fleming, *Instructions in State Criminal Case in Which Defendant Pleads Insanity as to Hospital Confinement in Event of Acquittal*, 81 ALR4th 659, 666–71 (1990).

[182] *Shannon v United States*, 512 US 573, 587–88 (1994).

[183] See id at 579 ("[P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.").

[184] See, for example, Henry Weihofen, *Procedure for Determining Defendant's Mental Condition Under the American Law Institute's Model Penal Code*, 29 Temp L Q 235, 247 (1956) ("Preliminary statistics [from a University of Chicago Law School study] show that [the result of the NGRI verdict] is indeed one of the most important factors in the jury deliberations. 'If we acquit him on the ground of insanity,' the jury wants to know, 'will he be set at liberty to repeat his act?' Not a single jury studied in the jury project refrained from considering what would happen to the defendant as a precondition for arriving at a decision concerning his guilt or innocence, sanity or insanity.").

considerations of possible punishment[185]). If juries are concerned about outcomes, they will make decisions on that basis; if they are not told about possible outcomes, the only result will be that their outcome-oriented decisions are uninformed and arbitrary. The jury's decision *does* affect the outcome as a legal matter—so why should the jury not be aware of this, especially since every other participant in the system does know the effect of the conviction vote on punishment options?

B. Consequences for Other Institutional Players

The anticipated roles of judge and jury under this Article's proposal have been discussed, in Part II-C. Yet the proposal also will affect various other participants in the criminal-justice system. Here I discuss its potential impact on the authority and proper function of two such players: prosecutors and legislatures.

1. Prosecutors.

I have spoken little so far about prosecutors, who play a central role in the current system. Here I will address two possible objections—one principled, the other practical—regarding the impact of this Article's proposal on prosecutorial power or practice.

The principled objection is that the proposal improperly undermines the prosecutorial role in the system. I have asserted that no decisionmaker currently applies broad legislative punishment decisions in specific cases, yet some might argue that part of the prosecutor's role is to do exactly that.[186] Prosecutors

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[185] I have found surprisingly little direct empirical analysis regarding the extent to which criminal juries generally do consider potential punishments (actual or perceived) in their deliberations regarding whether to convict, notwithstanding the typical instruction that they are not to do so. Harry Kalven, Jr. and Hans Zeisel's landmark study suggests that punishment considerations are significant when punishment is known, or thought to be known. See Kalven and Zeisel, *The American Jury* at 307 (cited in note 54) (stating that although juries are not informed of possible penalties, and are told not to consider penalties, "[n]evertheless, the threatened penalty may come to dominate the deliberation, because the jury guesses at the magnitude of the legal penalty, or because it has special reason to know what the penalty actually is"). And as noted above, other studies have explored whether giving jurors more information about punishment changes their decisions, see notes 112–14, and there is some anecdotal evidence that this is so, see, for example, note 108, 122–23.

There seems to be little systematic data, however, regarding the frequency with which current juries make decisions based on potential punishments, despite their lack of information and despite being charged not to. If there have been any detailed studies of this issue (and there certainly should be, whatever one thinks of this Article's thesis), I have not come across them.

[186] I am indebted to Erik Lillquist for pointing out this possible objection.

make charging decisions based in part on their sense of the appropriate punishment range for a given offender. My proposal, some might argue, thus derogates prosecutors' current role in making normative judgments.

I question that claim, both descriptively and normatively. First, I doubt whether prosecutors' charging decisions are generally, or uniformly, driven by the prosecutors' own sense of a proper punishment. It is very likely that prosecutors do not simply try to maximize defendants' sentences, but the issue of what prosecutors *are* maximizing is more complex[187] and is probably guided at least as much by practical considerations and constraints as by moral judgments or objectives.[188]

In any event, prosecutors certainly seem more susceptible to conflicted interests and priorities than juries when it comes to imposing punishment on offenders. And that is in the best case; it is also possible that prosecutorial choices about what charges to bring and what bargains to strike will reflect bias (even if the prosecutors themselves are not consciously biased), generating disparate results.[189] Prosecutorial decisions (like jury decisions) are also discretionary and effectively unreviewable, so there is no greater likelihood of outside scrutiny that might identify and curb abuse. Absent clear evidence that prosecutors are actually good agents in making these decisions, there is no obvious reason to entrust them to prosecutors instead of juries.

Perhaps prosecutors have more expertise than juries, but the same is true of judges, who also would seem less conflicted than prosecutors. To the extent that one seeks a more sophisticated decisionmaker than the jury as to broad punishment categories, one might do better to advocate a judicial rather than a prosecutorial role, perhaps by reinvigorating Eighth Amendment

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[187] See William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 Harv L Rev 2548, 2554 n 6 (2004) ("There is as yet no developed social science literature on what prosecutors maximize, probably because the solution is too complex to model effectively."), citing, as among the best of the efforts in this area, Edward L. Glaeser, et al, *What do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 Am L & Econ Rev 259, 266–88 (2000); Daniel C. Richman, Old Chief v. United States: *Stipulating Away Prosecutorial Accountability?*, 83 Va L Rev 939, 956–69 (1997).

[188] See Stuntz, 117 Harv L Rev at 2554 (cited in note 187) ("Voter's preferences, courthouse customs, the prosecutor's reputation as a tough or lenient bargainer, her own views about what is a proper sentence for the crime in question—all these things play a role in defining the sentences that prosecutors are likely to seek in plea bargains.").

[189] See, for example, *McCleskey v Kemp*, 481 US 279, 286–87 (1987) (discussing the "Baldus study"'s assessment of the risks of both juror bias and prosecutorial bias); Barkow, 152 U Pa L Rev at 75–77 and nn 191–92 (cited in note 2) ("Studies on race and capital sentencing have found even greater disparities in the exercise of prosecutorial discretion than in jury discretion.").

scrutiny. Giving judges such a role might well be a good idea, but as I have discussed, there is good reason for juries, and not *only* judges, to exercise authority in this area.[190]

Further, even if prosecutors currently are making charging decisions based on their own sense of suitable judgment, I'm not sure that that is their proper role. Why should a prosecutor, as an agent of the government charged with enforcing the law, *not* seek the highest punishment that the facts support?[191] Of course, if the prosecutor goes even beyond *that*, one might be troubled; but the possibility of prosecutorial overreaching seems again to suggest a call for enhanced judicial authority, this time in the form of enforcing the state's burden of production and dismissing unsupported charges.

The practical objection to this Article is that the proposal, if implemented, would change prosecutors' real-world behavior for the worse. Fearing lenient juries, prosecutors might start to add charges more serious than those they currently pursue, in an effort to ensure appropriate punishment. As the foregoing discussion indicates, however, I am not convinced that prosecutors currently pursue less than the most serious possible offense standing a chance of generating a conviction, nor am I entirely convinced that they should.

2. Legislature.

This Article's proposal also has consequences with respect to the proper function of the legislature in defining and structuring criminal-law rules. One possible result of implementing the proposal might be that offenses would be more narrowly defined than at present, with more distinct grades. (Narrower ranges of punishment might reduce the likelihood that a jury, hearing the full available range, would think the floor too low or the ceiling too high, or both.) The jury then could find all relevant offense facts as elements, while still allowing room for the judge to exercise discretion when sentencing within the range provided for the offense.

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[190] See Part II-C.

[191] Of course, this claim merely restates the "nullification" concern, but directs that concern at prosecutors rather than juries. If a jury's group decision to "nullify" is troubling, why should a single person's decision to reject a legislative mandate be any less troubling merely because it goes by the name of "prosecutorial discretion"? If anything, the prosecutor, as advocate, should be more assertive in pursuing all available charges and it should fall to other players, such as judges and juries, to restrain them from overreaching.

Consider, for example, the current allocation of punishment distinctions as between offense grades and sentencing rules in the federal system. The federal criminal code does not provide for offense grades at all: it defines offenses merely with a maximum and (sometimes) a minimum sentence, often with a wide range of possibilities between the two.[192] The definitions of the offenses themselves are correspondingly broad.[193] The Federal Sentencing Guidelines, on the other hand, recognize forty-three separate "offense levels" for purposes of determining a sentencing range.[194] Surely this scheme could be adjusted so that more refinement of punishment is involved at the offense-definition level, so that less of the work must be done at the sentencing stage. The job of allocating between elements and sentencing factors ultimately falls to the legislature.

C. Relation to *Apprendi* Issues

Apprendi and *Blakely* held that the jury must find certain facts, but offered no guarantee that the jury would have any role in assigning blame. The rule set out in *Apprendi* squarely addresses the jury's role as weigher of evidence pursuant to fact-finding rather than the jury's normative function: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be

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[192] See, for example, 18 USC § 81 (2000 & Supp 2001) ("Whoever, within the special maritime and territorial jurisdiction of the United States, willfully and maliciously sets fire to or burns any building, structure or vessel, any machinery or building materials or supplies, military or naval stores, munitions of war, or any structural aids or appliances for navigation or shipping, or attempts or conspires to do such an act, shall be imprisoned for not more than 25 years[.]"); 18 USC § 2241(a) (2000) ("Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.").

[193] See, for example, offenses cited in note 192; 18 USC § 111 (2002 & Supp 2002) (defining assault offense for whoever "forcibly assaults, resists, opposes, impedes, intimidates, or interferes with" a federal officer or employee; providing for punishment of up to 8 years, or up to 20 years if offender "uses a deadly or dangerous weapon"); 18 USC § 113(a)(2),(3) (2000) (punishing "assault with intent to commit any felony" and "assault with a dangerous weapon"—offenses not defined in any further detail—by up to 10 years' imprisonment); 18 USC § 371 (2000) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.").

[194] See USSG § 5A.

submitted to a jury, and proved beyond a reasonable doubt."[195] *Blakely* also, instead of fully discussing the basic principles underlying the right to jury trial, focuses on two particular evidentiary and procedural aspects of that right: first, the right to have the prosecution's factual allegations proved beyond a reasonable doubt to a unanimously affirming jury; and second, a requirement that the prosecutor's charge must include all facts relevant to the defendant's possible punishment (a rule rooted in a concern about cabining prosecutorial authority, as opposed to affirming jury authority).[196] In short—as an observation, not a criticism, as this Article makes no claim about how to read the Constitution—the *Apprendi-Blakely* rule seeks to draw formal lines establishing minimum requirements, not to tackle more substantive or aspirational issues involving jury competence or authority. *Booker* makes this clear by effectively re-establishing the authority of judges rather than juries to make sentencing decisions, so long as any liability ranges provided by sentencing guidelines are merely advisory and not mandatory.[197]

The *Apprendi-Blakely* rule seems, and ostensibly is, pro-defendant,[198] but may not have that effect in the real world. Defendants who pursue jury sentencing "trials"—if such ever occur, given *Booker*'s eleventh-hour resuscitation of judicial sentencing under guidelines—may obtain worse outcomes than before if the jury does not possess the same information as a sentencing judge with respect to how sentencing factors ultimately affect sentences. Jury factfinding without jury knowledge of sentencing consequences would deny the jury the "sentence nullification" power that judges now hold, which might make the *Apprendi-Blakely* reform harmful for defendants.

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[195] *Apprendi*, 530 US at 490.

[196] See *Blakely*, 124 S Ct at 2536 ("[The *Apprendi*] rule reflects two longstanding tenets of common-law criminal jurisprudence: that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours,' and that 'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason[.]'") (internal citations omitted).

[197] See *Booker*, 125 S Ct at 756–57 (remedying constitutional violation by modifying United States Sentencing Guidelines to make them advisory, not mandatory). Compare Robinson and Spellman, 105 Colum L Rev at 1156–58 (cited in note 151) (asserting that *Blakely* articulates a rule recognizing proper prudential roles of jury and judge, but that *Booker* retreated from this sound framework by eliminating a role for the jury in sentencing, thereby "undermining the legitimacy of the Court's justification for creating the constitutional rule").

[198] See id at 2541–42 (responding to concerns that the Court's holding is unfair to criminal defendants; noting, among other things, that the Court's position was advocated by the National Association of Criminal Defense Lawyers).

On the other hand, if the jury did know about the consequences of conviction, then *Apprendi*-style formal procedural concerns with ensuring that the jury has authorized the maximum available punishment would seem less critical, and possibly superfluous. Solving the constitutional puzzle is not my project here, but if jury convictions explicitly were grounded in knowledge of the possible ensuing range of punishment, then the considerations that sustain the *Apprendi* line of cases sentencing rules would vanish—particularly as those rules relate to sentencing guidelines, which create a system for selecting a sentence within the limits established by the offense grade.

If the jury is aware of those limits (and particularly the upper limit), and if its conviction vote thus reflects an overt ratification of the full available range of punishment, then even if the jury does not know how the specific sentence within the statutory range will be determined—and even if the jury does not decide the specific facts that determine the sentence—it seems difficult to say that the jury has not "authorized the maximum punishment." In my view, such a system actually provides for jury "authorization" in a more meaningful way than a scheme that lets the jury decide facts affecting punishment, yet allows—and arguably encourages—the jury to remain ignorant of the meaning of those facts in terms of punishment.[199] And such a system surely involves the jury in punishment decisions more than the return to judicial sentencing *Booker* seems to invite.

In this respect, the present proposal in some ways incorporates and transcends the concerns that gave rise to *Apprendi* and its progeny. To the extent that the jury's imprimatur on an offense's grade, with knowledge of the concomitant punishment range, satisfies concerns about the need for the jury to ratify the maximum possible punishment, *Apprendi* and *Blakely* command too much by suggesting a requirement that the jury decide additional facts that determine a specific sentence within the grade range.

At the same time, *Booker* demands too little by apparently returning all sentencing-related punishment authority to the judge while also maintaining the jury's blindness as to its conviction-related punishment authority. Perhaps, then, the scope of these cases is too narrow, not too broad. Perhaps the right to jury

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[199] Compare Iontcheva, 89 Va L Rev at 314 (cited in note 5) (asking, *apropos* of the *Apprendi* line of cases, "why should juries be allowed to determine facts directly bearing on sentencing, but be kept in the dark about the actual consequences of their findings?").

trial should be a right to have the jury explicitly decide what the maximum punishment will be, not just to decide the *facts that determine* what the maximum punishment will be, which is all that the *Apprendi* line requires. In this context, it is worth noting that under present rules, in large measure, the parade of horribles mentioned by some members of the Court—a fear, for example, that the legislature will define a minor crime with a wide range of sentencing possibilities[200]—already has come to pass. Legislatures have run amok in imposing high potential maximum sentences and high mandatory minimum sentences. With respect to both, the jury has no idea that its decision to convict will lead to the harsh punishment that often ensues. Why should one's right to a jury trial stop short of being a right to have the jury act as an affirmative normative evaluator of the propriety of a given maximum punishment, rather than just a procedural or evidentiary decisionmaker whose findings have the corollary effect of cabining that punishment? This Article proposes that the jury's role, in keeping with the principles guiding the *Apprendi* line of cases, should include being a normative evaluator whose "authorization" of the maximum punishment is knowing, not accidental.

D. Starting a Conversation

A large part of the problem of allocating responsibility between the first and second punishment decisions—conviction and sentencing—is that offense definitions are too broad and crude, leaving sentencing rules to shoulder too much of the burden. Many of the relevant factors that the Federal Sentencing Guidelines now address should appear more appropriately within the offense definitions of the criminal code itself.[201] Making the initial punishment decision explicit, rather than covert, might encourage more and better decisionmaking about how the two distinct punishment decisions should relate to each other. It might promote more legislative deliberation about how much we should

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[200] See *Blakely*, 124 S Ct at 2558 (Breyer dissenting) ("Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts."); *Apprendi*, 530 US at 541–42 (O'Connor dissenting) (discussing the possibility of legislatures responding to the Court's rule by enacting criminal statutes with broad sentencing ranges and allowing the demonstration of *absence* of certain facts to mitigate a sentence).

[201] See notes 192–94 and accompanying text (discussing the current allocation of rules as between the federal criminal code and sentencing guidelines).

limit the defined punishment range for an offense grade imposed at conviction, thereby circumscribing judicial sentencing authority without eliminating it. Then the second decision about sentencing would serve to refine the grading judgment even further and more precisely, but would not be a selection from among a wide array of possible punishment levels.

One of the potentially most useful aspects of the present proposal is that it begins a dialogue about punishment that involves all the relevant institutional players: legislatures, sentencing commissions, judges, and juries.[202] Each retains a role, and each incorporates and can respond to the messages that it receives from the others. As experience offers us information about how juries use the information that we give them, we can rearrange the allocations of punishment decisions between grading and sentencing rules, making each broader or narrower when and to the extent that doing so seems desirable.

CONCLUSION

Recent United States Supreme Court case law has reinvigorated analysis of the role and function of the criminal jury. This renewed attention to the jury's role is a positive and significant development, but its potential will be unnecessarily confined unless it enables inquiry beyond a narrow focus on the constitutional right to jury trial. Numerous subconstitutional or extraconstitutional issues regarding the proper scope of jury authority also merit consideration.

This Article has discussed one such issue. Our system currently gives juries explicit power to resolve contested moral issues in individual cases—such power is, in fact, a central aspect of the jury's institutional purpose. Our system also gives the jury's conviction vote practical significance as an initial stage in the process of determining an offender's punishment. Yet the system erects an artificial barrier between fact-finding and punishment decisions, making the jury's conviction vote, in terms of its punishment-limiting consequences, a decision without an informed—and thus arguably without a true—decisionmaker. This

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[202] See Marder, 6 J Gender Race & Just at 369 (cited in note 100) ("The jury . . . performs a limited, but quite critical, role. It allows ordinary citizens to express disagreement with the law, its enforcement, or its sentencing scheme, and it makes this feedback available to the other branches of government. The other branches can then respond to avert crisis.").

Article has argued that we should tear down this wall and provide juries with information about the punishment ramifications of their conviction votes.

While the present proposal empowers the jury, it need not undermine the role or authority of the legislature or judge. Instead, a more transparent and informed jury decision-making process holds the hope of facilitating a conversation among all these institutions, checking each one's weaknesses or excesses while playing to each one's strengths.