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OLD WINE IN NEW BOTTLES: A RECONSIDERATION OF INFORMING JURORS ABOUT PUNISHMENT IN DETERMINATE- AND MANDATORY-SENTENCING CASES

By Lance Cassak & Milton Heumann*

"This is without question the worst case of my judicial career..."[1] So observed United States District Court Judge Gerard Lynch in 2002 in a case before him involving a defendant facing a mandatory-minimum ten-year sentence on a charge of advertising the distribution of child pornography.[2] That case and Judge Lynch's actions and observations, about which more will be said later, brought dramatic if brief attention to an issue that we first wrote about more than twenty years ago: whether and under what circumstances jurors should be told about the punishment faced by defendants in cases before them.

If, as Victor Hugo observed, no army is as powerful as an idea whose time has come,[3] it must also be true that many an

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[1] Benjamin Weiser, *A Judge's Struggle To Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1.

[2] *Id*.

[3] This is a rough translation of Hugo's statement, "On resiste a l" invasion des armees; on ne resiste pas a l'invasion des idees." V. HUGO, HISTOIRE D'UN CRIME (1852).

idea has been crushed that appeared too soon. Over twenty years ago, we wrote an article, "Not So Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases,"[4] (*NSBI*) in which we argued that in cases involving mandatory sentencing schemes, defendants may have a constitutional right to have the jurors who are deciding their cases be informed about the punishment they face. In this article we reconsider the idea of informing jurors about punishment in the case before them.

We would love to report that following publication of *NSBI*, courts took up our lead and began, in the appropriate cases, to inform jurors about punishment— but that does not appear to have happened. Failing that, it would be nice to be able to cite a rush of critical commentary and further study shortly after publication that triggered a professional and scholarly debate on the topic that further explored and tested the data and arguments we first presented— we cannot do that either. We would settle for knowing that a few close friends and relatives had read or even skimmed the article, but even here we are left wondering. For at least ten years after publication, the article does not appear to have influenced many or done much.[5]

However, beginning in the 1990's, the idea of informing jurors about punishment gained some new currency from both courts and commentators. Starting in 1993, in some reported cases, courts confronted a request by defendants that jurors be informed about the punishments the defendants faced and did not reject the argument out of hand, as the General Rule thought to govern such requests would have them do.[6] In

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[4] Milton Heumann & Lance Cassak, *Not So Blissful Ignorance: Informing Jurors about Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983).

[5] Other than starting a continuing friendship between the authors, which is nothing to sneeze at.

[6] The General Rule to which we refer holds that jurors are not to be told about the punishment to be meted out in the cases in which they sit because their role is limited to finding facts and determining guilt and judges have sole responsibility for determining punishment. For an explanation of the so-named "General Rule," see *Shannon v. United States*, 512 U.S. 573, 589 (1994); *see infra* Part I.A; and *see also* Part II (discussing the General Rule's treatment in the case law that is examined this article).

addition, some scholars and commentators took up the issue as well. We do not want to misrepresent what occurred: the cases and commentary are still a trickle rather than a flood, but how this question has been addressed over the last decade or so led us to think that it would be worthwhile to revisit the issue.

After a brief summary of the argument we made in *NSBI*, we turn to three cases in which defendants asked to have the jurors deciding their fate be advised about the punishment the defendants faced. In each case the punishment involved a mandatory sentencing scheme, and, most importantly, in each case, the court's response to those requests differed significantly. We will then look again at some of the issues involved, including a discussion of some of the developments in the law since *NSBI*, offer some further thoughts about whether the legal climate is any more receptive to arguments in favor of advising jurors about punishment and, if not, whether it should be.

I. NSBI: THE DATA AND THE ARGUMENTS

"The life of the law has not been logic[,]" Justice Oliver Wendell Holmes famously asserted, "it has been experience."[7] In that spirit, the starting point for the argument in *NSBI* that jurors in cases involving mandatory sentences should be told about the punishment was not legal doctrine (or logic, for that matter), but observations and data drawn from experiences in Michigan's criminal courts following the passage of a gun control bill in Michigan. That statute aimed at reducing the number of crimes committed with guns by imposing a mandatory sentence on anyone convicted of a felony and carrying a gun.

Effective January 1, 1977, Michigan passed the Felony Firearm Statute, a mandatory sentencing statute known as "the Gun Law" that provided that anyone who possessed a firearm while committing a felony would automatically receive a sentence of two years, in addition to any penalty he or she might receive in connection with the underlying felony. In addition, the Wayne County Prosecutor, whose jurisdiction contained Michigan's largest city (Detroit) and its environs, announced

[7] O.W. HOLMES, THE COMMON LAW 1 (1881).

that he would charge defendants with violation of the Gun Law whenever the facts warranted and would not permit plea bargaining on the charge.[8] The Gun Law was widely publicized.[9]

The expectation was that the Gun Law would produce more uniformity and certainty in sentencing in cases of crimes involving guns. But that did not pan out. A review of the results of cases, coupled with interviews with prosecutors, defense attorneys and judges, following passage of the Gun Law, revealed several interesting developments. To begin with, notwithstanding county policy to charge under the Gun Law whenever possible and not to engage in plea bargaining, lawyers continued to seek ways to avoid the statute. Most notably, lawyers frequently opted for bench trials in an effort to avoid the Gun Law. Some bench trials were "wired" – that is, lawyers informally worked out deals on sentences with the judges who sat on the case; in other cases, there was no informal understanding regarding the sentence but lawyers correctly predicted that a given judge, sitting in a case where application of the mandatory sentence seemed harsh, would find some way around the Gun Law charge, either by way of a complete acquittal or a conviction on a misdemeanor charge that avoided the Gun Law.[10]

Moreover, and more relevant to the argument in *NSBI* and this article, even in those cases that went before juries, not all cases in which the Gun Law was charged resulted in imposition of the mandatory two-year sentence. In cases involving a charge of felonious assault along with a charge under the Gun Law, defendants escaped the two-year sentence called for by the Gun Law in forty of forty-three cases. In thirty-two of the forty cases, the jury acquitted the defendant on all counts; in three of the cases, the jury returned a conviction on misdemeanor charges and in five of the cases, the jury convicted on the underlying felony but acquitted the defendant on the Gun Law charge.[11] What was most unusual about the results of the cases that went

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[8] Heumann & Cassak, *supra* note 4, at 345-46.

[9] *Id*. at 346-47.

[10] *See generally supra* Part I.

[11] Heumann & Cassak, *supra* note 4, at 352 & nn.24-27.

to trial was not only the conviction/acquittal rate, but the increase in the number of cases that actually went to trial. While it is certainly possible that some of the acquittals can be attributed to weak cases going to trial, interviews with judges, prosecutors and jurors revealed that those involved in the cases believed that something more was at work: that jurors knew that the mandatory sentence was called for in the case and that knowledge affected their deliberations, which ironically may have led some defense counsel to look more favorably on the prospects of a jury trial than they ordinarily would have. As we summarized it at the time,

> Thus, one can argue that the Gun Law forced more weak cases to trial, resulting in acquittal patterns not dissimilar to those found in the period prior to passage of the Gun Law. The interview data . . . however, coupled with the increase in the *number* of jury trials, suggests [sic] something else. Judges, prosecutors and defense attorneys felt that not only weak cases, but equity cases as well (*i.e.*, minor felonies in which two years' imprisonment was viewed as too harsh a punishment) constituted the jury trial docket. In these cases, judges, prosecutors and defense attorneys believed that jurors were aware of the potential punishment the defendant faced, and that this knowledge led to some of the acquittals.[12]

How did jurors, or at least some of them, come to learn about the Gun Law? Part of the answer lies in Michigan's efforts to publicize the law; after all, the point of the law was as much to deter gun use as it was to impose harsher penalties in cases involving a gun. Michigan residents were *supposed* to know about the law, and some of them later served on juries in which the charges were brought under the law. It is also the case that defense attorneys sought to sneak mention of the law into the cases, frequently through voir dire. Interestingly, prosecutors did not always object to such efforts, nor did judges sanction attorneys for those tactics, reflecting the dissatisfaction of many prosecutors and judges with respect to the Gun Law process.[13]

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[12] *Id*. at 352 n.27.

[13] *Id*. at 353-56.

The data from our study did not tell us precisely how many juries had one or more members who knew about the Gun Law.

A. THE GENERAL RULE

The main reason why defense counsel had to try to "sneak in" mention of the Gun Law is that the general practice in both state and federal courts is that juries are not to be told about punishment, at least in non-capital cases. Indeed, calling it a general practice understates the matter; it is more of a hard and fast rule with few exceptions. We summarized the General Rule:

> The structure of the federal and most state judicial systems provides for a simple separation of functions in noncapital criminal trials. Jurors must confine themselves to finding the facts and returning a verdict according to the law as explained by the court. The court, after the verdict has been rendered, decides what punishment the accused is to suffer if the jury has returned a verdict of guilty. From this allocation of duties a General Rule has emerged that juries are not to be told anything about the possible disposition of the accused.[14]

One standard jury instruction reads as follows:

> Under the Federal system of criminal procedure you are not to concern yourself in any way with the sentence the defendant might receive if you should find him guilty. Your function is solely to decide whether the defendant is guilty or not guilty of the charges against him. If, and only if, you find him guilty of one or more of the charges, then it becomes the duty of the court to pronounce sentence.[15]

There are two rationales for the General Rule, both of which are somewhat ironic in the context of cases involving mandatory sentences. The first, suggested above, is a separation of powers or responsibilities argument: since the jury plays no role in the

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[14] *Id.* at 358-59 (quoting 1 DEVITT & BLACKMER, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 10.01 (1977)).

[15] *Id.*

sentencing of the defendant, which is the responsibility of the court, telling the jurors about punishment introduces extraneous information that might improperly influence their decisions.[16] Second, some courts expressed a concern that presents the exact opposite of the mandatory-sentencing situation: that telling jurors about a type of punishment – the possibility that a defendant might be treated leniently at sentencing – would encourage jurors to find defendants guilty in cases they might not otherwise.[17]

The two rationales for the General Rule are, as noted, somewhat ironic or misplaced in cases involving mandatory sentences. To begin with, mandatory sentencing schemes largely eliminate the traditional judge-jury roles in sentencing, and indeed, the legislature removes part of the judge's interpretive powers. In such cases, it is the jury that determines the sentence (because the sentence follows from a conviction) and it is the judge who is not involved in the sentencing process. Moreover, in this context, our data seemed to show that informing jurors about punishment worked to the benefit rather than the detriment of defendants.

B. THE CONSTITUTIONAL ARGUMENTS

Did the fact that a defendant's chance of acquittal might turn on whether one or more jurors knew about the mandatory sentence imposed by the Gun Law give that defendant a right to have jurors told about the punishment? We suggested it might and sought to locate such a right in two separate constitutional provisions.[18]

The first was the Due Process Clause found in both the Fifth and Fourteenth Amendments, drawing upon those cases, such

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[16] *Id*.

[17] *Id*. at 358-61.

[18] An article that followed *NSBI* argued that granting a defendant's request to inform jurors about a mandatory sentence should follow from the jury's historic role as bulwark of liberty between the accused and the government. *See* Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1233 (1995).

as *Irvin v. Dowd*,[19] in which the United States Supreme Court ruled that jurors' verdicts should be based on the evidence presented in court and not on facts learned and impressions formed outside of the courtroom. One may note, as we conceded at the time, that this proposes a novel application of the Due Process Clause, for in this setting, the complaint is coming from the defendant whose trial has *not* been "tainted" and that recognizing the right actually requires the introduction of outside influences and information into the trial. Nonetheless, in a number of other cases, including such landmark decisions as *Rochin v. California*[20] and *Poe v. Ullman*,[21] the Court had given a very broad reading to the concept of due process, rooted in the "fundamental fairness" of the proceedings and a sense of fair play. A right to inform jurors of punishment grounded in the Due Process Clause derives essentially from that concept of "fundamental fairness."[22]

We also explored the idea that a right to inform jurors about a mandatory sentence might be found in the Equal Protection Clause of the Fourteenth Amendment. At the time that we wrote *NSBI*, the reach of the Equal Protection Clause was a, if not *the*, "hot" issue in constitutional law. The Court was in the midst (in hindsight perhaps the denouement) of the equal protection revolution begun essentially by the Warren Court, in which *Brown v. Board of Education* symbolically stands at the summit, a revolution that was refined or compromised by the Burger Court.[23] Each term of the Court, it seemed, featured at

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[19] 366 U.S. 717 (1961).

[20] 342 U.S. 165 (1952).

[21] 367 U.S. 497 (1961).

[22] Heumann & Cassak, *supra* note 4, at 373-76.

[23] For differing views of what the Warren Court wrought regarding equal protection and whether the Burger Court advanced or retreated from what its predecessor accomplished, *see* Michael J. Klarman, *An Interpretive History of Modem Equal Protection*, 90 MICH. L. REV. 213 (1991); Derrick Bell, *The Burger Court's Place on the Bell Curve of Racial Jurisprudence*, *in* THE BURGER COURT: COUNTER-REVOLUTION OR CONFIRMATION 57 (Bernard Schwartz ed., 1998) [hereinafter THE BURGER COURT, Schwartz ed.]; Stephanie Seymour, *Women as Constitutional Equals: The Burger Court's Overdue Evolution*, *in* THE BURGER COURT, Schwartz ed., *supra*, at 66; Paul Brest, *Race Discrimination, in* THE BURGER COURT: THE COUNTER-

least one significant equal protection ruling, with a number of significant decisions yet to follow the publication of *NSBI*.

We stated the question under the Equal Protection Clause as if defendants "otherwise similarly situated who are treated dissimilarly both because of the general prohibition on informing jurors of punishment and the arbitrary happenstance of jurors' knowing of the applicability of the mandatory sentence in one case but not in another, states an invidious classification cognizable under the equal protection clause."[24]

If it did, under the Court's multi-tiered analysis of equal protection questions, "strict scrutiny" would be warranted because such an invidious classification affects a fundamental right of the defendant, namely the right to a trial by jury.[25]

Our argument for a right under the Equal Protection Clause was less enthusiastic than our assertion of a claim under the Due Process Clause. We noted at least three problems with finding such a right in the Equal Protection Clause. The least problematic aspect was that the Equal Protection Clause protects against invidious *classifications*, and what was going on in Michigan was not the establishment of a formal classification, *per se*, but rather arbitrary treatment. However, in a case decided shortly before publication of *NSBI*, the Court found a classification similar to that we were analyzing in an analogous setting. In *Logan v. Zimmerman Brush Company*,[26] the Court found that arbitrary treatment in the failure of an Illinois state agency to address a claim in a timely fashion created a classification of the sort that could be redressed under the Equal Protection Clause.[27] More troublesome was the fact that courts

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REVOLUTION THAT WASN'T 113 (Vincent Blasi ed., 1983) [hereinafter THE BURGER COURT, Blasi ed.]; Ruth Bader Ginsburg, *The Burger Court's Grapplings with Sex Discrimination*, *in* THE BURGER COURT, Blasi ed., *supra*, at 132; Martin Shaprio, *Fathers and Sons: The Court, the Commentators, and the Search for Values*, *in* THE BURGER COURT, Blasi ed., *supra*, at 218.

[24] Heumann & Cassak, *supra* note 4, at 377.

[25] *Id.* at 379.

[26] 455 U.S. 422 (1982).

[27] The conduct under review in *Logan* was the inadvertent failure of the Illinois Fair Employment Commission to consider Logan's claim of discriminatory treatment within the time required by statute for handling

presented with equal protection challenges to specific sentences (albeit not those involving sentencing under a mandatory sentencing scheme) had been unreceptive to such challenges as long as the sentence was within the statutory bounds and the statute setting the bounds was facially neutral. Finally, while the prospect of jury nullification underlay a claim under the Due Process Clause as a secondary consideration, the equal protection claim seems to call more directly for a right to equal jury nullification.[28]

That was the argument we made in *NSBI*. In the ten years that followed publication, we looked for but did not find any reported cases in which courts allowed jurors to be told of the punishment faced by the defendant in cases before them.[29] There were, on the other hand, cases in which a request to inform jurors about punishment were rejected.[30]

II. THE CASES

Let there be no mistake: the General Rule continues to hold tremendous sway over judges, both federal and state, and we are under no delusion to the contrary. Defendants continue to seek to inform jurors about the punishment they face, yet those efforts are nearly always rebuffed.[31] It may well say something

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such complaints. While the essence of the decision was a ruling in Logan's favor under the Due Process Clause, six Justices also recognized an equal protection claim, albeit an "unconventional one," because those claims heard within the statutory time period received "full consideration on the merits" including "full administrative and judicial review," while those that are not heard within the time frame "are unceremoniously, and finally, terminated." *Id.* at 438-439 (Blackmun, J., concurring). For a fuller discussion, see Heumann & Cassak, *supra* note 4, at 379-381.

[28] Heumann & Cassak, *supra* note 4, at 381-82.

[29] We were told of one judge in Tennessee who told jurors of the punishment involved in the case before him, but our efforts to inquire more about that case went unanswered.

[30] *See, e.g.*, Shannon v. United States, 512 U.S. 573 (1994); United States v. McDonald, 933 F.2d 1519 (10th Cir. 1991); and United States v. Goodface, 835 F.2d 1233 (8th Cir. 1987).

[31] *Id.*

that defendants continue to press the issue despite how well-entrenched the General Rule is, but the courts' practically universal and unwavering commitment to the General Rule sends its own message that one cannot ignore either.

We turn now to a detailed examination of three non-capital cases in which efforts were made to inform jurors about the punishment faced by the defendants, cases which all suggest at least some inclination to buck the General Rule. The three cases present something akin to variations on a theme, as in each case the issue is raised in a slightly different way and the court's handling of the issue is different as well. We begin in a federal courtroom in Tennessee in 1993.

A. UNITED STATES V. DATCHER

In 1993, Douglas Datcher stood trial in federal court in Nashville Tennessee before the Honorable Thomas A. Wiseman Jr.[32] At the time of the case, Judge Wiseman had been on the federal bench for fifteen years, having been appointed by President Jimmy Carter. The defendant in the case, Datcher, faced three charges: attempt to distribute a controlled dangerous substance, conspiracy to distribute the controlled dangerous substance and use of a firearm in connection with the attempted distribution. The sentence for a conviction of the first charge would be determined by the federal sentencing guidelines; the last two charges carried mandatory sentences calling for terms of an additional ten and five years respectively.[33]

In an effort to avoid the harsh effect of the mandatory sentences his client faced, before the trial began, Datcher's attorney moved for permission to advise the jury of the punishment his client faced, to question the jury on voir dire

[32] Judge Wiseman's surname calls to mind two other similarly-named jurists – John Minor Wisdom and William Wayne Justice – both of whom received recognition for their roles in cutting edge civil rights cases. On Judge Wisdom, *see* JACK BASS, UNLIKELY HEROES (1981); on Judge Justice, *see Morris Dees Justice Award Goes To Texas Federal Judge*, 36 SPLC REPORT (December 2006), *available at* http://www.splcenter.org/center/splcreport/article.jsp?aid=232 (last visited Apr. 23, 2007).

[33] United States v. Datcher, 830 F. Supp. 411, 412 (M.D. Tenn. 1993).

regarding the punishment faced by his client, and for a special instruction to the jury from the court regarding the punishment faced by Datcher. Judge Wiseman granted the motion to allow Datcher's attorney to advise the jurors about the punishment, although he rejected the requests to question the jurors about it on voir dire and for a special instruction regarding the punishment Datcher faced.[34]

In explaining his decision, Judge Wiseman began, tellingly, with a discussion amounting to a defense of jury nullification:

> The drafters of the Constitution "clearly intended [the right of trial by jury] to protect the accused from the oppression of the Government" . . . Part of this protection is embodied in the concept of jury nullification . . . "The Founding Fathers knew that, absent jury nullification, judicial tyranny not only was a possibility, but was a reality in the colonial experience". . . Although we may view ourselves as living in more civilized times, there is obviously no reason to believe that the need for this protection has been eliminated.[35]

Judge Wiseman proceeded to find a right for the defendant to advise the jury of the punishment he faced in the role of the jury as the institution interposed between the accused and the government in the criminal justice system. Drawing upon descriptions of the jury, taken from some of the Supreme Court's landmark cases discussing jury composition, as "the 'conscience of the community' in our criminal justice system" and as necessary "'to prevent oppression by the Government,"'[36] Judge Wiseman concluded,

> When measured by this standard, a defendant's right to inform the jury of that information essential 'to prevent oppression by the Government' is clearly of constitutional

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[34] *Id*. at 412 n.1.

[35] *Id*. at 413 (quoting Singer v. United States, 380 U.S. 24, 31 (1965) and Steven I. Friedland, *On Common Sensed and the Evaluation of Witness Credibility*, 40 CASE W. RES. L. REV. 165, 173 (1990), respectively).

[36] *Id*. at 414- 15 (quoting Witherspoon v. lllinois, 391 U.S. 510, 519 & n.15 (1968) and Williams v. Florida, 399 U.S. 78, 100 (1970), respectively).

> magnitude. That is, if community oversight of a criminal prosecution is the primary purpose of a jury trial, then to deny a jury information necessary to such oversight is to deny a defendant the full protection to be afforded by jury trial. Indeed, to deny a defendant the possibility of jury nullification would be to defeat the central purpose of the jury system.[37]

Judge Wiseman found his conclusion fully consistent with, or at least not contrary to, the positions taken by both the Supreme Court and Congress concerning jury participation in sentencing.[38] He argued that, while the Supreme Court had refused to find that the Sixth Amendment guarantees a defendant a *right* to jury sentencing, the Court had issued decisions acknowledging that, in Judge Wiseman's description, "[a] jury may nevertheless rightfully participate in sentencing." Neither the Congress nor the Court, insisted Judge Wiseman, precluded the result Judge Wiseman reached: "Congress has not specifically excluded awareness of a possible sentence from juror considerations at trial. The Supreme Court has not mandated that juries be in the dark on the issue of sentence."[39]

He believed that those cases that followed the General Rule had made "two errors": losing "sight of the true purpose of the jury" and misreading Supreme Court precedent as "a prohibition on giving any information about sentencing to the jury."[40] Not only had the Court held only that "jury sentencing is discretionary rather than mandatory," noted Judge Wiseman, but "[t]here is no statutory prescription against making the jury aware of possible punishment."[41] The focus of the General Rule of the jury's fact-finding role, insisted Judge Wiseman, created "an artificial and poorly constructed fence around the jury's

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[37] *Id*. at 415.

[38] *Id*. (quoting Spaziano v. Florida, 468 U.S. 447, 462-465 (1984)).

[39] *Datcher*, 830 F. Supp. at 417.

[40] *Id*. at 416.

[41] *Id*.

role."[42] The jury still had a role to play in overseeing punishment to be meted out:

> [E]ven if the jury has no right to set a general sentence, it must retain the power to veto a sentence in a particular case if its oversight function is to be fulfilled . . .
>
> To provide awareness of a sentence is not to allow sentencing by the jury. Rather, the jury only approves or disapproves of the penalty range as set by Congress, as that range applies to a specific case. This is exactly the oversight purpose intended of the jury. This oversight restores some of the discretion and particularized justice taken away by the Guidelines, but it represents only a minimal yet necessary intrusion on Congress' work: it would be a "radical departure from [the] tradition [respecting the intrinsic worth of all persons] to accept for a defined class of persons, even criminals, a regime in which their liberty is determined by officials wholly unaccountable in the exercise of their power."[43]

However, notwithstanding this strongly stated defense of the role of the jury to reject the punishment to be imposed, Judge Wiseman made it clear that it was a power to be exercised only in extreme cases, "those cases where criminal law and community norms greatly diverge." "'What makes for health as an occasional medicine,'" Judge Wiseman quoted a leading case, "'would be disastrous as a daily diet.'"[44] Thus, courts were not to expressly advise jurors of their power to nullify, and exercise of such power was appropriate only when jurors were moved by the circumstances of the case before them to do so on their own.

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[42] *Id*. at 415.

[43] *Id*. at 416-17.

[44] *Id*. at 417 (quoting United States v. Dougherty, 473 F.2d 1113, 1136-37 (D.C. Cir. 1972)).

Judge Wiseman's ruling was not appealed.[45] Nonetheless, the Sixth Circuit shortly thereafter in *United States v. Chesney*,[46] rejected the argument put forward in *Datcher* in favor of a routine application of the General Rule.[47]

B. UNITED STATES V. PABON CRUZ

Fast forward nine years to a federal courtroom in the Southern District of New York. In 2002, Jorge Pabon Cruz was on trial accused of, among other charges, "advertising to receive, exchange or distribute child pornography in violation of 18 U.S.C. section 2251 (c)(1)(A)."[48] Under the facts of the case, violation of that statute carried a mandatory minimum sentence of ten years in prison. Pabon was also charged with distributing child pornography in violation of 18 U.S.C. section 2252A(a)(2)(B). The latter charge carried a possible sentence of five years in prison and the sentence was not a mandatory one. The case was tried before the Honorable Gerard Lynch, a highly regarded judge with both significant experience as a prosecutor and a scholarly bent.[49] Indeed, perhaps ironically, the year before the *Pabon* case, Judge Lynch published an article in which he discussed, in a thoughtful yet somewhat critical way, the use of mandatory sentences.[50]

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[45] According to one source, the prosecution considered seeking to block Judge Wiseman's actions by writ of mandamus, but elected not to do so. Sauer, *supra* note 18, at 1278 n.8.

[46] 86 F.3d 564 (6th Cir. 1996).

[47] *See, e.g., id* at 574.

[48] United States v. Pabon Cruz, 255 F.Supp. 2d 200, 204 (S.D.N.Y. 2003), *aff'd in part and remanded*, 391 F.3d 86 (2nd Cir. 2004).

[49] Before taking the bench, Judge Lynch had run the criminal division of the United States Attorney's Office for the Southern District of New York, the same office prosecuting *Pabon*, and before, during and after the *Pabon* case was the Paul J. Kellner Professor of Law at the Columbia University School of Law. *See* Weiser, *supra* note 1, at A1; and *see* Faculty Biography of Gerald E. Lynch, Columbia Law School Homepage, *at* http://www.law.columbia.edu/fac/Gerard_Lynch (last visited May 21, 2007).

[50] Gerard E. Lynch, *Sentencing Eddie*, 91 J. CRIM. L. & CRIMINOLOGY 547 (2001).

The facts behind the case suggested, at least to the prosecutors, a serious offense. Using file-sharing software on his computer that allowed users to send and receive images, Pabon participated in a chat room and, using the name "Big Thing," advertised child pornography. The evidence showed that 2,857 people had responded to Pabon's advertisement and that he had distributed over 11,000 images. Some of the images were quite graphic.[51]

Other facts, though, could be said to argue against a harsh punishment for Pabon. For one thing, he did not make any money from his activities, nor had he participated in making the images or had contact with any of the children whose pictures he sent out. In addition, Pabon was something of a sympathetic figure, at least as far as that was possible given the charges he was facing. To begin with, he was a teenager at the time of the offense. Moreover, he had something of a difficult childhood having been raised by a mentally-disabled mother and teased by schoolmates because of that. Also at the time of his arrest he was a computer student on scholarship at the University of Puerto Rico.[52]

Because Pabon did not dispute distributing the images, the trial was a short one, with testimony taking only two days.[53] The issue of whether the jurors should be told of the punishment faced by Pabon arose in connection with a request by the prosecutors to be allowed to show the images that Pabon had distributed, which defense counsel not surprisingly resisted. On the other hand, Pabon's defense counsel wanted the jurors to be told the possible consequences of a guilty verdict, to which the prosecution objected strongly. At least part of defense counsel's concern was the belief that a jury might erroneously believe that it was *distribution* of child pornography, rather than *advertising* its distribution, that carried the harsher penalty and that a jury might therefore opt to convict on the advertising charge and acquit on the distribution charge believing it was sparing Pabon a harsh sentence.[54]

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[51] *Pabon Cruz*, 255 F. Supp.2d at 204.

[52] Weiser, *supra* note 1, at A1.

[53] *Id*.

[54] *Pabon Cruz*, 255 F. Supp.2d at 205.

Judge Lynch decided to grant both requests, allowing prosecutors to introduce fifteen images advertised by Pabon, and proposing to tell the jurors about the maximum and minimum sentences available for each charge. As explained by Judge Lynch, the two decisions were related:

> I must say, I find both sides a little bit inconsistent in that respect. The defense seems to want the jury to make some kind of a judgment about whether the penalty is appropriate for the conduct without letting the jury see what the conduct consists of. On the other hand, the government, which had the opportunity to have a fact finder who would be bound to apply the law and the evidence, chose a fact finder, I assume, because it wanted a judgment of the community, and yet it does not want the community to know what it is actually judging about or what the consequences of its judgment are.[55]

Judge Lynch was also persuaded by the argument of defense counsel that jurors might misunderstand which of the two charges carried the harsher penalty. As he explained his reasoning in a post-conviction ruling, he noted that the defense counsel were

> certainly correct that the same logic supporting the admission of the photographs – *i.e.*, that a jury is inevitably engaged in something more than a "linear scheme of reasoning and inevitably must confront the difficult moral project of deciding "to face the findings that can send another human being to prison [or] to hold out conscientiously for acquittal" ... also supports the view that jurors should be aware of the moral consequences of their decisions. This is especially the case where, as here, the average juror might well not remotely imagine that advertising child pornography not only carries a harsher penalty than actually delivering it, but that the penalty is a mandatory

[55] This quote of Judge Lynch's remarks is from the Court of Appeals decision. *Id*.

> ten years in prison, even for a defendant who is little more than a child himself.[56]

These quotes from Judge Lynch suggest two more themes at work in this case. First is the prospect of jury nullification, which, as Judge Wiseman had in *Datcher*, Judge Lynch disavowed, but also did so in comments that appeared ambiguous. Judge Lynch was careful to make clear that, in informing the jurors about the punishment faced by Pabon, he would also give the jurors the standard instruction on jury nullification and not permit the defense to argue nullification to the jury.[57] He went on to say, however, that "I think there is a difference between saying that the court does not and cannot approve of nullification, and ignoring the fact that juries have historically played this role." Although he insisted that jurors should not be encouraged to engage in nullification, he noted that "historically jurors have sometimes done that, and the judgment of history is sometimes that when they do that, they are in effect lawless and evil, and at other times the judgment of history is that they've done the right thing."[58] Indeed, in remarks that were reported in the newspaper but not in the subsequent decisions in the case, Judge Lynch noted that while jury nullification was not to be encouraged, he added that "[w]e recognize that jurors do act on their conscience and that, to some degree, that is why we have jurors and not technicians deciding guilt and innocence." Although he did say he did not think that informing jurors about punishment would be likely to provoke them to acquit Pabon, if that did happen because of the harshness of the sentence, "that, it seems to me, would constitute a significant exercise of the historic function of the jury."[59]

Second, whether or not informing the jurors of the punishment faced by Pabon were logically compelled by the decision to show them the pornographic images, Judge Lynch was also clearly bothered by the severity of the mandatory

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[56] 255 F. Supp.2d at 214. (citation omitted).

[57] *Id*. at 215.

[58] *Id*.

[59] Weiser, *supra* note 1, at A1.

sentence that would be imposed upon a finding of guilt on the advertising charge. Before the trial, Judge Lynch had encouraged the prosecution and defense to see whether they could strike a plea bargain or, failing that, arrive at different charges for Pabon. Judge Lynch went so far as to suggest at one point that the prosecutors needed to think more carefully about whether the case had been overcharged. (Prosecutors insisted that they had carefully considered their options, that Pabon was no more disadvantaged than other defendants, and that, given the facts of the case, the charges were warranted.) In one pre-trial hearing, Judge Lynch commented that if Pabon were convicted of having sex with a minor, his sentence would be only about five years. "This leads me," Judge Lynch noted, "to the rather astonishing conclusion that Mr. Pabon-Cruz would have been better off molesting a child."[60]

Unfortunately for Pabon, the jurors got to see the images but they never heard about the punishment he faced. Judge Lynch allowed the prosecutors to show the jurors fifteen of the images from Pabon's computer but before Judge Lynch could instruct the jurors about punishment, the government sought to block that instruction by petitioning the Second Circuit Court of Appeals for a writ of mandamus asking the appellate court to direct Judge Lynch not to inform the jurors of the punishment Pabon faced if convicted. The Court of Appeals sided with the prosecution and granted the petition.

The jurors found Pabon guilty on both charges and Judge Lynch imposed the mandatory ten-year sentence. But he did so reluctantly. Calling the sentence "unjust and harmful," he noted that it "has the potential to do disastrous damage to someone who himself is not much more than a child." It was thus that Judge Lynch described imposition of the sentence on Pabon, as noted at the beginning of this article, as "the worst case of my judicial career."[61]

This was almost, but not quite, the end of the story as far as Pabon was concerned. Pabon's counsel objected twice more to the failure of the court to inform the jurors of the punishment he faced. In ruling on a post-conviction motion raising that among

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[60] *Id.*

[61] *Id.*

other issues, Judge Lynch rejected the challenge. Judge Lynch was still sympathetic to the argument, and recited some of the reasons why, before noting simply that the Court of Appeals disagreed.[62]

Pabon raised the argument once more on appeal, again along with other issues. The Second Circuit was decidedly less sympathetic to his argument that the jurors should have been told about the ten-year sentence he faced. Although the court described the controversy and even quoted at some length the reasons Judge Lynch gave for wanting to inform the jurors about the mandatory sentence, the appellate court gave short shrift to the argument, falling back on the General Rule that jurors are not to be told about punishment because it is not part of their responsibilities.[63] Perhaps ironically, however, the Second Circuit vacated Pabon's sentence on an issue not raised before Judge Lynch, finding that the provision of the statute setting forth the possible punishment allows the trial court discretion to impose either the mandatory ten-year minimum sentence *or* a fine. The case was remanded to Judge Lynch for re-sentencing.[64] In May of 2005, Judge Lynch re-sentenced Pabon to four years in prison, less than half of the original ten-year mandatory sentence, with eight years of supervision.[65]

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[62] *Pabon Cruz*, 255 F. Supp. 2d at 217.

[63] United States v. Pabon Cruz, 391 F.3d 86, 94 (2d Cir. 2004) (relying upon the United States Supreme Court's discussion of the issue in *Shannon v. United States*, 512 U.S. 573 (1994)).

[64] *Id.* at 105. The dispute turned on language in 18 U.S.C. sec. 2251(d) that provides that a person violating the statute was subject to a punishment of no less than ten years nor more than twenty years or a fine "*and both*." *Id.* at 97 (quoting Pub. L. No. 104-208, § 121(4), 110 Stat. 3009-30 (1996) (emphasis added). The Second Circuit ruled that "and both" made no sense in that context and that Congress must have intended, upon a verdict of guilty, to permit a court to impose either the statutory prison term, a fine "*or* both." *Id.* The court's ruling thus opened the door to the possibility that one violating the sentence could receive either a custodial sentence of at least ten years (or more) or a fine with no jail time at all. *Id*. at 100-01.

[65] *See* Julia Preston, *Sentence Cut For Student in Child Pornography Case*, N.Y. TIMES, May 28, 2005, at B3.

C. PEOPLE V. BACA

The last of the three cases, *People v. Baca*,[66] comes from the California state court system. *Baca* is one of those cases that often provoke criticism of mandatory sentencing schemes. In this case, the defendant faced charges for petty larceny for shoplifting a box of drill bits at a hardware store and some batteries at a grocery store. However, because of prior convictions (two residential burglaries and a robbery), Baca faced a possible life sentence under California's famous (or notorious) Three Strikes Law if convicted of the two shoplifting charges. Baca was in fact convicted and sentenced to serve 25 years to life.[67]

Before the case went to the jury, Baca's counsel sought some instruction that would have advised the jurors of the harsh penalties he faced under the Three Strikes Law, based on an argument that Baca "had an absolute right to have the jury made aware of the harsh sentence which the court would be required to impose if he were convicted, and to have the jury acquit him if they felt that the sentence was too harsh, regardless of the strength of the evidence of his guilt."[68] The trial court refused. Instead, the court gave a standard instruction telling the jurors that in their deliberations, they were not to discuss or consider punishment at all. That ruling was upheld on appeal in a decision that simply applied the General Rule with little extra explanation or consideration.[69] Indeed, the appellate court opinion lacks either the rhetorical flourishes of Judge Wiseman's opinion in *Datcher*, or any hint of the angst of what Judge Lynch went through in the *Pabon Cruz* case. Moreover, it is not even the only time that defendants in California tried, unsuccessfully, to inform jurors that they faced harsh sentences

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[66] 48 Cal. App. 4th 1703 (Ct. App. 2nd Dist. 1996).

[67] *Id.* at 1705. That sentence on the first of the two counts of petty larceny also included an additional two years "for prior prison term enhancements" and another two-year term on the second of the two petty larceny counts, to run concurrently with the life sentence on the first count. *Id.*

[68] *Id.* at 1706 (quoting from Baca's appellate brief).

[69] *Id.* at 1706-08.

under the Three Strikes Law.[70] In that regard, the case is no different from the vast majority of cases in which defendants try unsuccessfully to have jurors informed of punishment.

Then why mention *Baca*, along with *Datcher* and *Pabon Cruz*? Because, interestingly enough, the jurors in that case *were* alerted to the possible punishment faced by Baca, even if indirectly. The trial judge, for one, expressly told the jurors that the case was a "three strikes" case, apparently to alert them that they would hear about Baca's prior convictions and have to decide certain things based on those convictions. And the defense counsel, in summation, also told the jurors that the case was a "three strikes" case and that as a result, the case is "about as serious as it gets in a courtroom. And I assume that you will agree with me that any case that involves those kinds of consequences deserves or warrants pretty careful conscientious consideration and deliberation."[71] The prosecutor countered the defense summation by informing the jurors that they could not consider punishment.[72]

D. HORROR STORIES AND THE FEDERAL SENTENCING GUIDELINES

Datcher, *Pabon Cruz*, and *Baca*, present the question of whether jurors should be informed of punishment in different settings: one court that was confident it was the right thing to do, another in which the court wanted to do it but was ultimately rebuffed and relented, and a third in which the information came in indirectly, the last instance reminiscent of the practice in Michigan a quarter-century ago when defense counsel found ways to get information about the Gun Law to the jury without the formal assistance of the court.[73] As noted, three

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[70] *See* People v. McKenzie, 2004 WL 2538140 (Cal. Ct. App. 5th Dist. 2004).

[71] *Baca*, 48 Cal. App. 4th at 1706-07.

[72] *Id*. at 1707.

[73] *See supra* Part II.A-C (discussing *Datcher*, *Pabon Cruz*, and *Baca*, respectively); *see generally* Heumann & Cassak, *supra* note 4, at 345-46 (for discussion on Michigan's Felony Firearms Statute (the "Gun Law")).

cases constitute a small number from which to claim a trend, much less from which to discern lessons. Nonetheless, as we will discuss shortly, we think they raise some interesting questions and considerations and may even be a start toward revisiting the seemingly absolute lines of the General Rule. At a minimum, they raise some questions and observations, which lead to even more questions.

We begin with an observation: the cases reviewed present the issue concerning informing jurors about punishment in a somewhat different setting than the situation in Michigan that gave birth to *NSBI*. In Michigan, while juries frequently found the mandatory penalty harsh, and thus acquitted, there was also the problem to be addressed of what might be called systemic discrimination: some defendants were benefiting from jurors' knowledge of the law, meaning that some were at a disadvantage if their jury pool was ignorant of the Gun Law. In contrast, what appears to have motivated Judge Wiseman and Judge Lynch, as well as the defense counsel in *Baca*, was not a sense of broad discrimination over many cases but unjustly severe sentences in individual cases.

This observation leads to a number of questions. First, what accounts for this renewed interest in informing jurors about punishment? One possible impetus may be similar "horror stories" of similarly disproportionate penalties under mandatory sentencing systems.

Judges Wiseman and Lynch are certainly not the only judges to confront what appear to most to be draconian consequences of mandatory sentencing schemes. "Three-strikes" statutes such as were involved in *Baca* – in which a defendant's third felony conviction results in a sentence to a lengthy prison terms, have given rise to a number of publicized cases that have the raised eyebrows of many – and shocked some.

For example, a homeless man in Los Angeles was sentenced to twenty-five years to life for trying to force open a church door; the man had previously received food from the priest at that church and was apparently trying to reach that priest for another meal.[74] A robbery of a gas station that netted $26 for a thief in Maryland resulted in his being sentenced to life in prison

[74] Bob Egelko, *State Court Sidesteps "3 Strikes" Test Case*, SAN FRANCISCO CHRONICLE, December 22, 2000, A3.

without parole under that state's three-strikes law.[75] One defendant received a sentence of 25 years to life under California's Three-Strikes Law for a 2000 conviction for possession of crack cocaine because of a conviction for a violent offense more than thirty years earlier.[76] Indeed, California's statute has resulted in sentences of twenty-five years to life for thefts of a pair of sneakers,[77] $20 of instant coffee,[78] a $30 toolbox,[79] and pockets full of chocolate cookies. The judge in the latter case expressed regret for the sentence but maintained she had no other choice under the law.[80] A mentally-ill Brooklyn man persuaded a judge to impose a sentence of sixteen years to life instead of the statutory twenty-five years to life, for which the defendant thanked the judge for showing "mercy," stating: "I really appreciate it."[81] Theft of $150 worth of children's videotapes resulted in two terms of 25 years to life, to be served consecutively, as did a conviction for shoplifting golf clubs.[82] Since both of those sentences are drawn from cases before the United States Supreme Court in which the Court ruled that those sentences did *not* violate the Eighth Amendment's prohibition of cruel and unusual punishment,[83] it is clear that

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[75] Philip P. Pan, *Md. Robber Gets Life, No Parole*, THE WASH. POST, March 2, 1996, B1.

[76] Michael Landsberg, *Local Elections/District Attorney*, LOS ANGELES TIMES, November 5, 2000, B1.

[77] *Id.*

[78] *"3 Strikes" Upheld in Coffee Theft*, SAN DIEGO UNION-TRIBUNE, June 22, 2000, A3.

[79] The defendant here eventually had her sentence commuted. Onell R. Soto, *Clemency Granted In the Theft of $30 Toolbox*, SAN DIEGO UNION-TRIBUNE, May 1, 2004, NC1.

[80] Reuters, *Cookie Thief Gets 25 Years in California*, THE TORONTO STAR, October 28, 1995, A 18.

[81] Nancie L. Katz, *Jacket Thief Strikes Out*, N.Y. DAILY NEWS, June 18, 2004, 48.

[82] Lockyer v. Andrade, 538 U.S. 63, 66 (2003); Ewing v. California, 538 U.S. 11, 19 (2003).

[83] *See supra* note 82.

relief from such sentences will have to come from somewhere else.

Other horror stories of draconian sentences include a thirteen-year old boy who found himself sentenced to life in prison after a playmate upon whom he was practicing "wrestling moves" died.[84] Jurors who later found out about the automatic sentence claimed to be "horrified" to learn of the consequences of their verdict, and even prosecutors expressed some regret with the outcome of the case.[85] And a Grateful Dead fan, convicted of selling LSD to an undercover agent, had an initial sentence of five years increased to ten years under a mandatory-minimum sentencing statute because the one gram of LSD sold was on heavy blotter paper rather than in a sugar cube, and the heavy paper triggered the higher mandatory sentence. The resulting sentence was more than some rapists receive.[86]

A second driving force may have been that, along with the proliferation of mandatory sentences, there has been a dramatic increase in determinate and guideline sentencing schemes. These include the federal sentencing guidelines as the most prominent, and which, like many state guidelines systems, severely narrowed judicial discretion. One prominent scholar, Michael Tonry, has described the federal sentencing guidelines as "the most controversial and disliked sentencing reform initiative in U.S. history."[87] The federal guidelines, Tonry continued

> are commonly criticized on policy grounds (that they unduly narrow judicial discretion and shift discretion to prosecutors), on process grounds (that they foreseeably cause judges and prosecutors to circumvent them), on ethical grounds (that by forcing key decisions behind closed doors, they foster hypocrisy and undermine

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[84] Dana Canedy, *As Florida Boy Serves Life Term, Even Prosecutors Wonder Why*, N.Y. TIMES, January 5, 2003 A1.

[85] *Id.*

[86] Dirk Johnson, *As Mandatory Terms Pack Prisons, Experts Ask, Is Tougher Too Tough?*, N.Y. TIMES, November 8, 1993, A16.

[87] MICHAEL TONRY, SENTENCING MATTERS 72 (1996).

> the integrity of federal sentencing), on technocratic grounds (that they are too complex and hard to apply accurately), on fairness grounds (that, because only offense elements and prior criminal records are taken into account, very different defendants receive the same sentence), on outcome grounds (that they have not reduced sentencing disparities), and on normative grounds (that they are too harsh).[88]

Some judges have gone so far as to refuse to preside over drug cases to protest the inflexibility of the guidelines and the harsh sentences that can result.[89]

The federal guidelines, like most federal initiatives in criminal law and sentencing, reach broadly and are sufficiently widespread and influential. Though they are a combination of guidelines and mandatory sentences, the very rigid nature of the guidelines, combined with the actual mandatory sentencing provisions, certainly contribute to the climate that questions guidelines schemes in general, as illustrated above in the cases involving mandatory schemes. That dissatisfaction with the federal guidelines produces more scrutiny and intense feelings generally than if the objectionable scheme were limited to a single state like, say, Michigan.[90] In addition, the federal guidelines have had a period of time to work and therefore for criticisms to develop and dissatisfactions to deepen. And as that scrutiny of the federal guidelines has developed, it has encouraged explorations of more problems with sentencing generally and solutions to those problems.

Moreover, there is one other feature of the federal guidelines that does go directly to the problem presented in these cases.

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[88] *Id.* For other serious critiques of the federal guidelines, *see* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998); Daniel J. Freed, *Federal Sentencing In the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 YALE L.J. 1681 (1992).

[89] STITH & CABRANES, *supra* note 88, at 197 n.2.

[90] On the disproportionate influence of the federal sentencing guidelines over the states despite fewer cases, *see* Douglas A. Berman & Steven L. Chanenson, *The Real (Sentencing) World: State Sentencing In the Post-*Blakely *Era*," 4 OHIO ST. J. CRIM. L. 27 (2006).

That is the frequently-remarked upon shift in discretion away from the judges in sentencing, giving prosecutors substantially more sway over penalties.[91] That shift raises two additional issues: to whom should responsibility for sentencing shift and, more generally, what happens to the General Rule when that shift in power transpires?

III. JURIES AND DECISIONS ABOUT PUNISHMENT

We have examined three cases that fed off of the proliferation of determinate sentencing systems and the dissatisfaction with those schemes. Those cases all start from one of the most striking features of the new determinate sentencing systems: the shift of power from judges to prosecutors, contrary to the premises of the General Rule. We turn now to three other instances – felony jury sentencing, capital cases, and the Supreme Court's recent decisions involving fact-finding in sentencing – that confront the General Rule in another way, by virtue of the way in which jurors are generally given substantial roles to play in sentencing decisions.

With regard to punishment in criminal cases, the General Rule – and the devotion to that rule – contemplates no role for the jury, suggesting a mindset that juries' deciding punishment is improper and unwise.[92] There are, however, exceptions to the rule. The first is jury felony sentencing, in which juries in fact decide punishment or play critical roles in that decision. Second are those systems currently in use which give the jury a central

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[91] *See*, *e.g.*, STITH & CABRANES, *supra* note 88, at 126.

[92] We confine our discussion to the criminal justice system. It is of course, well accepted that in civil cases jurors decide not only the question of liability but the consequences of that question as well, at least with regards to compensatory damages. Indeed, the jury's right or ability to decide the amount of compensatory damages is a right protected under the Seventh Amendment to the United States Constitution. *See* Feltner v. Columbia Pictures, 523 U.S. 340 (1998). No similar right exists with regard to deciding punitive damages, but nonetheless, jurors regularly decide punitive damages as well and, apart from occasionally grousing in response to awards in some celebrated cases, this function or responsibility of the modern civil jury is also well accepted.

role in implementing the death penalty. Finally, of note is the recent revolution in sentencing in which the Supreme Court has found in the Sixth Amendment right to a jury trial the requirement that, generally speaking, juries find the facts that determine the punishment.

We begin with a brief overview of the historical role of jurors in criminal cases. We will then examine jury sentencing in non-capital cases, the role of juries in capital sentencing schemes, and the Supreme Court's recent decisions in *Apprendi v. New Jersey* and the cases that followed that decision.

A. THE ENGLISH COMMON LAW BACKGROUND

It is easy to think that the General Rule derives from a long historical tradition in which, as the General Rule allocates responsibilities, jurors decided only guilt or innocence and judges alone determined the appropriate punishment. It is true, after all, that English common law dating back centuries placed responsibility for sentencing in the hands of judges.[93] That misstates the historical tradition in a way that is instructive. In fact, for much of the time from Medieval times until the eighteenth or nineteenth centuries, juries played an important role in deciding punishment for serious offenses, even if juries were not formally assigned such responsibility by statute, court decision or other official decree. Before the modern era, most major crimes, from homicide to serious property crimes, were capital offenses, and the prescribed punishment – death – followed from a finding of guilt. There were, though, ways in which that result could be avoided when the facts of the case warranted it. Some of the mitigating techniques, such as benefit of clergy and pardons, were administered by judges or others in the system. But trial juries who were aware that the punishment was death because that was the dominant penalty for felonies, also "had considerable discretionary power to tailor the application of the law as they thought necessary in particular cases."[94]

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[93] Edward A. Linden, Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 970 (1967).

[94] J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 406 (1986).

In those cases in which a sentence of death seemed excessive given the facts of the case, juries could and often did decide that a sentence of death would not be imposed either by deciding to acquit the defendant or, where possible, to find him guilty of a lesser charge. For example, in a case in which the defendant faced a charge of theft, a jury that thought death too harsh a punishment in that case could decide either to acquit the defendant, or to devalue the amount of the stolen goods so as to find him guilty of petty larceny, which did not carry a death sentence. This practice was known as delivering a "partial" verdict or, in Blackstone's memorable phrase, "pious perjury".[95] The ability of juries to find ways around imposition of the death penalty in a given case was given further impetus in the early eighteenth century as transportation – sending a guilty defendant to the New World for a period of penal servitude – added to the possible punishments.[96] In one leading study, J.M. Beattie described the work of the jury as follows:

> In reaching their verdicts, and particularly in exercising their discretion to alter the charge laid in the indictment, trial jurors were undoubtedly influenced by a variety of considerations. The character of the defendant as well as of the offense were of prime importance. But there was also the question of the penal consequences of their verdicts: jurors could anticipate precisely the sentence that would follow particular decisions, and their willingness to mitigate capital charges must have been influenced to some extent by punishments available to the courts as alternatives to the gallows, punishments that were to change strikingly over the century and a half after 1660. Juries thus determined not only the general issue of the accused's guilt or innocence, but also, for

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[95] THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800, at 295 (1985).

[96] *See id.* at 406-30; JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 57-60 (2003); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L. J. 951, 963 (2003).

> many of those they did convict the sentence that would follow.[97]

In summarizing the process he noted that "most offenses had mandatorily set punishments. Once the verdict was in, the judge's role in sentencing was simply to announce the mandatory punishment.... Juries imposed the real sentences by their verdicts on the charged or lesser offenses; judges sentenced in name only."[98]

That may overstate the operation of the system somewhat, and understate the role judges played in sentencing. For one thing, judges had discretion that juries did not with regard to a wide range of punishments for lesser offenses, as well as their own ability to influence the outcomes in cases involving serious offenses.[99] A better description may be that sentencing was the product of shared powers and responsibilities between the courts and juries.[100] But the larger point still remains: that jurors played a vital, if informal, role in determining punishment. A fuller description of how this played out gives a better sense of the role of the jury *vis á vis* punishment:

> The substantive law was harsher than social conditions and attitudes would allow. Moreover, juries were forced to make decisions about individuals partially on the basis of the reputation of those individuals in the community. Fact-finding involved an assessment of personal worth: Was the suspect the sort of person likely to have committed a certain act with malice? And almost inevitably trial jury verdicts came to be judgments about who ought to live and who ought to die, not merely determinations regarding who did what to whom and with what intent.[101]

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[97] BEATTIE, *supra* note 94, at 429.

[98] *Id.*

[99] *See* Stephanos Bibas, *Judicial Fact-finding and Sentence Enhancements In A World of Guilty Pleas*, 110 YALE L.J. 1097, 1128 (2001); Erik Lillquist, "The Puzzling Return of Jury Sentencing: Misgivings About Apprendi," 82 N.C. L. REV. 621, 639 (2004).

[100] Lillquist, *supra* note 99, at 639.

[101] GREEN, *supra* note 95, at 98.

Studies indicate that jurors were not reluctant to use this power. In his study of eighteenth-century England, Beattie found that juries returned verdicts of acquittal in 36.8% of all cases, and partial verdicts in another 14.3% of the cases. Convictions rates in cases of murder, forgery, infanticide and rape were, respectively, 22.6%, 27.3%, 20.9% and 14.3%. Lower rates of acquittal and partial verdicts were found in petty larceny cases.[102]

B. THE COLONIAL AMERICAN EXPERIENCE

A similar system appears to have been at work in the American colonies, many of which relied upon or borrowed from the English legal system, although with some qualifications. For example, generally the American colonies imposed the death penalty for most serious offenses, the same as their English forbears. As one recent study summarized the colonial experience, "English colonists of the seventeenth and eighteenth centuries came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft— all were capital crimes in England. All became capital crimes in America."[103] Moreover, as England toughened its criminal code in the eighteenth century to make more offenses, including some minor property crimes, punishable by death, the American colonies by and large followed suit.[104]

That generalization must be qualified by noting variations in practice among the different colonies. Southern colonies tended to follow English law. Some of the Northern colonies did not treat some property crimes such as robbery and arson as capital offenses, and in that regard were more lenient than England, although in those same colonies some moral crimes, such as

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[102] BEATTIE, *supra* note 94, at 411. Only fraud, assault and attempted rape cases had conviction rates of 50% or higher. *See also* Lillquist, *supra* note 104, at 637.

[103] STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 5 (2002).

[104] *Id.* at 7.

adultery, did carry the penalty.[105] Moreover, colonists appeared to be much more reluctant to impose the death penalty than their English cousins. Although an option like transportation that was used in England to avoid the death penalty was not available in the colonies, juries in the colonies did exercise their power to mitigate death sentences that seemed unduly harsh, notably by acquittal, comparable to the European practice described above. In Massachusetts, for example, seventeenth century juries appear frequently to have spared those charged with adultery, to the consternation of community leaders.[106]

A brief word about colonial experience with jury trials in criminal cases is also in order. By the time of the American Revolution, the jury was viewed as an important safeguard against royal authority, as reflected in descriptions of the jury as a "bulwark" of liberty that are still employed by courts to

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[105] *Id.* at 6.

[106] Lillquist, *supra* note 99, at 639-41. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 41-44 (1993); BRADLEY CHAPIN, CRIMINAL JUSTICE IN COLONIAL AMERICA 40-58 (1983); John M. Murrin, *Magistrates, Sinners, and a Precarious Liberty: Trial By Jury in Seventeenth Century New England, in* SAINTS & REVOLUTIONARIES: ESSAYS ON EARLY AMERICAN HISTORY 152, 190-92 (David D. Hall et al. eds., 1st ed. 1984). Professor Friedman notes the use of mitigating devices such as the benefit of clergy and offers numerous examples of cases in which the death penalty was not imposed because it was thought too harsh, but does not give juries a central if informal role in the process. Stuart Banner, in his recent study of the history of the death penalty in America, describes a nuanced system:

> Capital punishment was more than just one penal technique among others. It was the base point from which other kinds of punishment deviated. When the state punished serious crime, most of the methods at its disposal were variations on execution. Officials imposed death sentences that were never carried out, they conducted mock hangings... and they dramatically halted real execution ceremonies at the last moment. These were methods of inflicting a *symbolic* death, a penalty that mimicked some aspects of capital punishment without actually killing the defendant. Officials also wielded a set of tools capable of *intensifying* a death sentence– burning at the stake, public display of the corpse, dismemberment, and dissection– ways of producing a punishment worse than death. Taken together, these provided a wide range of possible punishments for serious crime, within a penal system that in principle included only one.

BANNER, *supra* note 103, at 54.

describe the right to jury trial today.[107] One scholar noted that the Founders did not believe jurors to be infallible, but described the attitudes toward the jury at the time of the Constitution as follows:

> The Founders considered the jury to be superior to a single judge in finding facts because it embodied the common sense of the twelve individuals with a variety of experiences and knowledge. Juries also were viewed as more trustworthy than judges. Juries represented the community and hence were presumed to be fair and impartial. Judges, in contrast, were deemed inherently biased in favor of the government, the wealthy, and the powerful. Moreover, because the jury was composed of several individuals who were not known to the parties until the day of trial, corrupting the jury seemed far more difficult than corrupting a judge.[108]

The British effort to deprive colonists of "the benefits of trial by jury" was among the grievances set forth in the Declaration of Independence,[109] and even before it found a place in the Sixth Amendment of the Bill of Rights, the right to trial by jury in criminal cases was assured in Article III of the Constitution and was the only right to be included in every state constitution drafted between 1776 and 1787.[110]

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[107] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 151-54 (1968); United States v. Gaudin, 515 U.S. 506, 510-11 (1995), Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

[108] Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 745-46 (1993).

[109] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 116-18 (1997).

[110] *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 81-118 (1998); AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 120 (1997); JACK N. RAKOVE, ORIGINAL MEANINGS 307, 319 (1996); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 47-59 (1986); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); LARRY KRAMER, THE PEOPLE THEMSELVES 28, 29, 157 (2002).

However, in the seventeenth century, enthusiasm for jury trials was more mixed. Although as a general proposition, almost every colony provided that defendants charged could have felony cases decided by a jury, the use and enthusiasm for jury trials appear to have varied. According to one study, use of trial by jury for serious offenses was most enthusiastically embraced in Rhode Island and, at the other extreme, not available at all in New Haven, with the other colonies falling somewhere in between. Summary procedures were generally used for minor offenses, not surprising in communities that equated crime with sin, in which contrition, rather than challenge, was thought to be the proper response to a criminal charge. Procedures were carried out generally in quick fashion, with the court playing a role more akin to the inquisitorial function usually associated with Europe, rather than the role of passive umpire we use today.[111] In addition, there was frequent resort to informal bargaining, akin to plea bargaining, as reflected in colonial records that show court cases that were abruptly terminated.[112]

With regard to cases involving serious crimes punishable by death, trial by jury was routinely used in most colonies; notwithstanding the equation of crime and sin, where the final resolution was death, popular sentiment was that "the larger community should be involved in any judicial decision that terminated life."[113] But even here, trial by jury was rarely used; between 1640 and 1660, for example, there were only two jury trials for capital cases in Massachusetts, and there were none in that time frame in either Maine or Connecticut.[114] This was partly because of the difficulty in empanelling a jury in a sparsely populated region; also a defendant who faced overwhelming evidence of his guilt might opt to be tried by a

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[111] Murrin, *supra* note 106, at 19-31.

[112] *See* KERMIT L. HALL, THE MAGIC MIRROR 35 (1989); *see also* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2004) (noting that the first plea bargain on record dates to England in the sixteenth century).

[113] *See* Murrin, *supra* note 106, at 189.

[114] *Id.* at 119.

judge before whom he would seek leniency.[115] This changed somewhat toward the end of the century as people became more litigious.[116] Similarly, resort to jury trials in Virginia was rare before the middle of the eighteenth century, at which point their use increased significantly.[117]

Again, how the system operated in practice is key. In sixteenth century Massachusetts, for example, magistrates appear to have had some opportunity to overrule jury verdicts in capital cases with which they disagreed, although the remedy in that situation was for a new trial, not imposition of the penalty favored by the magistrate.[118] One careful study, noting the various stages a criminal defendant went through, each with its own opportunity to influence if not determine punishment, describes the practice in Virginia at the end of the eighteenth century as "a joint effort, a culmination of several sequential decisions by a series of judges, juries and elected officials."[119]

C. FELONY JURY SENTENCING

Following the American Revolution, in some of the new states a more formal role for jurors in sentencing came at the end of the eighteenth and into the nineteenth centuries. The impetus for this was the movement away from death as the primary punishment for most serious offenses to a system in which other punishments were now imposed, including, most importantly, terms of imprisonment. As views of the causes of crime shifted from sin and individual failings to "bad company, vice, rotten cities, temptations [and] weaknesses in the family,"

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[115] *Id.* at 183; EDGAR J. MCMANUS, LAW AND LIBERTY IN EARLY NEW ENGLAND: CRIMINAL JUSTICE AND DUE PROCESS 1620-1692, at 98-104 (1993).

[116] *See* Murrin, *supra* note 106, at 152.

[117] A.G. ROEBER, FAITHFUL MAGISTRATES AND REPUBLICAN LAWYERS CREATORS OF VIRGINIA LEGAL CULTURE, 1680-1810 (1981).

[118] Murrin, *supra* note 106, at 152.

[119] Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937, 950 (2003).

penitentiaries became the centerpiece of punishment in the new Republic.[120]

Authorizing juries to decide punishment for felonies was first proposed in Virginia. As early as 1776, with the split from Great Britain, Virginia authorized juries to set the punishment for certain misdemeanors, including for anyone insisting upon and defending the authority of Great Britain.[121] The authority of juries to determine punishment was advanced further as part of an effort undertaken by Thomas Jefferson to draft a criminal code in 1779. Jefferson's bill "proposed a veritable encyclopedia of eighteenth-century punishment," including, among others, mandatory '"hard labor at public works'" for manslaughter and property crimes, hanging for homicide except death by poison for those convicted of murder by poison, castration for rapists and gibbeting for duelists.[122]

Jefferson's bill languished for a number of years. Before it came back to the Virginia legislature in 1796, Pennsylvania considered but, after extended debate, rejected the idea of jury sentencing and left sentencing to judges in 1786. In 1796, however, Virginia, again as part of a broader penal reform statute designed in part to achieve greater certainty with regard to felony punishments, gave juries responsibility for determining felony sentences, with imprisonment at hard labor the prescribed penalty for most offenses. The length of imprisonment was not set, but was a discretionary sentence to be selected by the jury for each individual defendant. Some of the more exotic corporal punishments in Jefferson's original proposal – such as castration and lex talionis – had been removed.[123] Virginia returned to sentencing by judges briefly in

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[120] *Id.* at 977. *See also* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE REPUBLIC (1972). This is the classic account of the rise of the penitentiary as part of the early Republic movement establishing the use of similar institutions to deal with a number of social problems.

[121] Linden, *supra* note 93, at 971.

[122] King, *supra* note 119, at 951.

[123] *Id.* at 953.

the nineteenth century but responsibility for sentencing was returned to juries in 1882 to stay.[124]

Most of the original thirteen states followed Pennsylvania and assigned the responsibility to select punishment to judges; in those states, judges exercising discretion came to dominate sentencing.[125] But some of the other new states in the early Republic, in addition to Virginia, opted for jury sentencing. Georgia adopted jury sentencing, at least briefly, in 1816, and ultimately returned to it later, and Kentucky also followed Virginia's lead. By the middle of the nineteenth century, just before the Civil War, jury sentencing in some form was adopted in the following additional states: Alabama, Arkansas, Illinois, Indiana, Missouri, Tennessee, and Texas. Some states pursued it piecemeal. Alabama, for example, gave juries responsibility to decide punishment for a few offenses at first, slowly adding to the list as time went on. Thus, in the first half of the nineteenth century, jury sentencing took hold in a substantial number of the states at the time,[126] even more impressive when one considers that at least three of the other states– North Carolina, South Carolina and Florida – did not even build their first penitentiaries until after the Civil War. A number of states, including North Dakota and Oklahoma, established jury sentencing between the end of the nineteenth century and the early twentieth century, such that by 1919, fourteen states had some form of jury sentencing, and in a number of other states, including Delaware, Utah and New Mexico, juries could recommend punishment. Some states abandoned jury sentencing in the twentieth century but as late as 1960, thirteen states still had jury sentencing for at least some noncapital offenses. Presently, six states – Arkansas, Kentucky, Missouri,

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[124] Linden, *supra* note 93, at 971-972.

[125] Bibas, *supra* note 99, at 1128.

[126] *See* Hoffman, *supra* note 96, at 964. Judge Morris Hoffman and Robert Wright assert that jury sentencing was adopted in half the states in the nineteenth century. *See id.*; and Robert Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355 (1999). That estimate is close, but does not appear to be fully borne out by the numbers. It is true, however, that by 1846, when Texas adopted jury sentencing, there were nine states that had adopted the practice in some form, out of twenty-eight states then admitted to the Union, approximately a third of the states. *Id.*

Oklahoma, Texas and Virginia – employ jury sentencing.[127] The Uniform Code of Military Justice also provides for "juries" to decide punishments, although those jurors are military officials, not persons drawn from the civilian population.[128]

Students of jury sentencing tie the rise of the practice to a number of causes and developments in the early Republic and antebellum periods, including suspicion of what was perceived as a judiciary that was elitist or overly royalist in bent, faith in the jury as part of the system of checks and balances, and as an opportunity for direct participation in the government. It was also a logical extension of jury authority at a time when juries had greater authority to interpret the law, and was conversely an effort to reduce jurors' proclivities to engage in acts of jury nullification, notably in cases involving charges of seditious libel and under the Fugitive Slave Act.[129]

Subsequently, in the twentieth century, two different sentencing reform movements undermined the idea of jury sentencing, perhaps leading many of the states that had been using it to abandon the practice. First was the rise of the rehabilitative ideal as the touchstone for sentencing in the first half of the twentieth century. Under this model, sentencing became the province of experts who would try to tailor the sentence to the needs of the individual defendant. Judges and other repeat players in the criminal justice system were considered to have the necessary expertise more than jurors, who generally served on only one case. Yet in the last quarter of

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[127] *Id.* at 966; Lillquist, *supra* note 99, at 666; Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 317-320 (2003); King, *supra* note 119, at 937. There is not universal agreement as to which states employed jury sentencing. For example, while Hoffman puts the number in 1960 at thirteen– listing the statutes relied upon for that number, Lillquist has that number as only ten states. *Compare* Hoffman, *supra* note 96, at 966 *with* Lillquist, *supra* note 99, at 646.

[128] Uniform Code of Military Justice, 10 U.S.C. § 852 (2007).

[129] *See, e.g.,* Jenia Iontcheva, *supra* note 127, at 317-25; Adriann Lanni, *Jury Sentencing In Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L. J. 1775, 1790-91 (1999). In her study of the establishment of jury sentencing in Virginia, Nancy King attributes it to political power struggles rather than distrust of the judiciary or juries' authority to interpret the law. *See* King, *supra* note 119, at 987-88.

the twentieth century, in another shift in sentencing philosophy, dissatisfaction with the rehabilitative ideal led states and the federal government to adopt determinative sentencing schemes, such as mandatory sentences and guidelines. This undermined the rationale for jury sentencing from the opposite direction. Now sentencing was more a matter of math than the type of consideration for which jurors would have any talent.[130] As summarized by one proponent of jury sentencing: "The onset of determinate sentencing kept the professionalization originally introduced by the rehabilitative model, while jettisoning much of what remained of individual judicial discretion. The sentencing trajectory had thus progressed as follows: From citizens' judgment in the early republic, to discretion by judges guided by criminal justice professionals in the early twentieth century, to mathematical formulas in the late twentieth century."[131] In that setting, jury sentencing came to be seen as "archaic."[132]

It is beyond the scope of this article to weigh in on, much less try to resolve, the debate over the pros and cons of jury sentencing.[133] But two observations about that debate are worth making. First, and most obviously, to the extent that the General Rule rests on or has fostered a belief that jurors do not have the ability to determine punishment, jury sentencing schemes suggest the opposite. Admittedly a distinctly minority preference even at the height of its popularity, the practice is nonetheless one that has been in use in a number of states, some for about two hundred years.

Second, much of the criticism leveled at jury sentencing is simply inapplicable to, or has less force against, mandatory sentences. One prominent criticism is that because of jurors' inexperience and lack of expertise with sentencing generally,

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[130] Jenia Iontcheva, *supra* note 127, at 327-30.

[131] *Id.* at 330.

[132] *Id.* at 331.

[133] For some sense of the terms of the debate, compare Hoffman, *supra* note 96, and Lanni, *supra* note 129, with Lillquist, *supra* note 99, and Wright, *supra* note 126. *See also* Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 WASH. U. J. URB. & CONTEMP. L. 3 (1994).

jury sentencing results in disparate and therefore arbitrary sentences.[134] Whether that criticism is true when jurors are selecting from among a range of punishments, that specific objection has little if any validity when the sentence has been mandatorily set and the jurors are deciding only whether that punishment is appropriate given the facts of the case before them.

One recent critic of jury sentencing raises a similar objection in slightly different form, arguing that, in jury sentencing systems, if

> [g]iven more information about the sentences that other defendants receive ...jurors could frequently be influenced by whatever information they happen to glean from other sources as to possible punishments. Assuming that this information is not given systematically, but instead is the result of random processes, the result is that jurors will be internally inconsistent in their punishment decisions.[135]

To begin with, this concern seems to contemplate a very haphazard and poorly-functioning sentencing process. And with regard to mandatory sentences, we argued for routine and systematic disclosure of the relevant information, that is, the mandatory sentence. In fact, if the experience we observed in Michigan that led to *NSBI* was duplicated elsewhere, the problem of random and inconsistent access to information comes when jurors are *not* told about punishment, not when they are so informed.

Similarly, jury sentencing presents the very real problem of how to put before a jury types of evidence – for example, regarding a defendant's prior convictions or other bad acts – that may be relevant to sentencing considerations but should not be considered in deciding the underlying question of guilt. One way around this is to bifurcate the guilt and punishment phases of the case, as most jury sentencing schemes do. But again, this concern does not come into play in mandatory

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[134] *See* Iontcheva, *supra* note 127, at 354; Wright, *supra* note 126, at 1376; Weninger, *supra* note 133, at 5.

[135] Lillquist, *supra* note 99, at 702.

sentencing schemes, where the same evidence that demonstrates guilt imposes the punishment.

Finally, the same can be said of the objection that jury sentencing is unwelcome because it adds to the cost of criminal trials, particularly when the trial is split into guilt and punishment phases. Objecting to jury sentencing because it costs more may simply reflect less than enthusiastic support for the concept generally. Nonetheless, whatever merit this concern has generally, there may be little if any additional expense when the same evidence determines both guilt and punishment.

D. JURIES AND THE DEATH PENALTY

There is a second area of law in which, like jury sentencing, juries are usually authorized to decide the appropriate punishment, or at least are directly involved in the decision: the death penalty. In certain regards, jury involvement in the death penalty presents a mirror image of the current use of jury sentencing. Unlike jury sentencing schemes, which give juries say over a wide range of sanctions but are used only in a small number of states, under modern death penalty schemes determination of a particular punishment – whether or not to impose the death sentence – is almost exclusively and everywhere the province of juries.

"The imposition of the death penalty," wrote Justice Harry Blackmun, "is an expression of community outrage. Since the jury serves as the voice of the community, the jury is in the best position to decide whether a particular crime is so heinous that the community's response must be death."[136] This is partly because the decision of whether to impose a sentence of death is driven by more than just legal considerations or principles. As expressed by Justice John Paul Stevens in an often-quoted passage,

> Because it is the one punishment that cannot be prescribed by the rule of law as judges normally understand such rules, but rather is ultimately understood only as an expression of the community's outrage– its sense that an individual has lost his moral entitlement to live, I am

[136] Spaziano v. Florida, 468 U.S. 447, 461 (1984).

> convinced that the danger of an excessive response can only be avoided if the decision to impose the death penalty is made by a jury rather than by a single governmental official. That conviction is consistent with the judgment of history and the current consensus of opinion that juries are better equipped than judges to make capital sentencing decisions. The basic explanation for that consensus lies in the fact that the question whether a sentence of death is excessive in the particular circumstances of any case is one that must be answered by the decision maker that is best able to "express the conscience of the community on the ultimate question of life or death."[137]

Judge Patrick Higginbotham put it in a somewhat more muscular way: "[T]he ultimate call is visceral. The decision must occur past the point to which legalistic reasoning can carry; it necessarily reflects a gut level hunch as to what is just. The collective lay view of the jury, then, is understandably attractive. By nature, the jury's decision is inscrutable."[138] By the last third of the twentieth century, it has been observed, the decision of whether to impose the death penalty is one of the "few ... areas of law where the jury still received judicial blessing to function as the conscience of the community."[139] Even ardent opponents of the death penalty recognize the centrality of the jury's role in deciding the punishment, although not as a cause for celebration or civic duty.[140]

The same impetus that gave rise to jury sentencing – the search for different punishment options – would ultimately lead to juries' express authority to determine who receives the death

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[137] *Id.* at 468-70 (Stevens, J., concurring in part and dissenting in part).

[138] Patrick E. Higginbotham, *Juries and the Death Penalty*, 41 CASE. W. RES. L. REV. 1047, 1048-49 (1991).

[139] JEFFREY B. ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 216 (1994).

[140] AUSTIN SARAT, WHEN THE STATE KILLS: CAPITAL PUNISHMENT AND THE AMERICAN CONDITION 126-57 (2001) (describing the role of the jury as rationalizing and legitimizing the inappropriate use of state power).

penalty. As we have seen, jurors exercised a real power to decide who lived or died when the death penalty was a mandatory sentence for most felonies, but that power was not formally authorized. In Virginia, the same penal reform impetus in 1776 that led eventually to jury sentencing proposed eliminating the death penalty for any crimes other than murder or treason. Similarly, frustrated by jurors acquitting apparently guilty defendants to avoid imposition of the death penalty when they deemed it too harsh a penalty, Pennsylvania in 1794 began to differentiate degrees of murder.[141]

Tennessee was the first state to give juries discretion whether to impose a sentence of death for murder in 1838, followed within the decade by Alabama and Louisiana. Other states followed suit. In 1867, Illinois became the first northern state to allow juries to impose a punishment short of death for first-degree murder, thereby abandoning mandatory death sentences. Again, other states followed.[142] As one scholar summarized developments:

> By 1900, twenty-three states plus the federal government authorized juries to use their discretion to choose life or death for persons convicted of capital crimes. By the end of World War I, all but eight states had abolished the death penalty or converted to jury discretionary sentencing. As of 1963, the process was complete: in every state where juries had authority to impose a death sentence, they had discretion to spare the life of a defendant convicted of a capital crime.[143]

For most of our history, the jury's decision whether or not to impose the death penalty was left completely in the hands of the jury without additional guidance. In one opinion from the middle of the twentieth century, the Supreme Court approved a jury instruction in which the jury was advised that "The power [to impose a penalty short of death] is conferred solely upon you and in this connection, the Court cannot extend or prescribe to you any definite rule defining the exercise of this power, but

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[141] BANNER, *supra* note 103, at 98.

[142] *Id.* at 214-216; ABRAMSON, *supra* note 139, at 217.

[143] ABRAMSON, *supra* note 139, at 217.

commits the entire matter to your discretion." The Court ruled that a jury's exercise of discretion in deciding whether to impose the death penalty could be based on "any consideration" that the jury saw fit to take into account.[144] In 1971, in *McGautha v. California*,[145] the Court rejected a constitutional challenge to a sentence of death imposed under a system that left the decision completely in the hands of the jury with nothing to guide them. The Court seemed to say that the lack of guidance was actually a strength of the system:

> In light of history, experience and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.[146]

Indeed, Justice John Marshall Harlan, writing for the majority, went so far as to describe the task of setting workable guidelines to identify who was deserving of the death penalty as "beyond human ability."[147]

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[144] Andres v. United States, 333 U.S. 740, 743 n.4 (1948).

[145] 402 U.S. 183 (1971).

[146] *Id.* at 207-08.

[147] *Id.* at 204.

That changed in the wake of *Furman v. Georgia*.[148] In that case, the Court essentially invalidated then-existing death penalty schemes, in a one-paragraph *per curiam* opinion accompanied by opinions from each of the justices resulting in one of the longest decisions in the Court's history.[149] Because of the number and breadth of the opinions and because each of the five members in the majority authored a separate opinion in which no other Justice joined, one must be cautious about what general characterizations one makes and what broad themes one draws from the case.[150] While at least two of the Justices were of the opinion that capital punishment is *per se* unconstitutional,[151] others in the five-member majority expressed a concern that went to the heart of the unfettered discretion afforded juries in the decision-making process, a concern about the arbitrariness and randomness of the decision to impose the death penalty. As Justice Stewart articulated the concern in an oft-quoted

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[148] 408 U.S. 238 (1972).

[149] For brief overviews of the case, see Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1; Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections On Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361-63 (1995); ABRAMSON, *supra* note 139, at 215-19; and Banner, *supra* note 103, at 257-66; *but see* Symposium, *Second International Symposium on Offical Law Reporting*, Ass'n of Reporters of Judicial Decisions, July 30, 2004, at 44, *available at* http://arjd.washlaw.edu/images/symposium04.pdf (*Furman* was, in fact, the second longest decision reported up until 2003, with *McConnell* v. *Federal Election Comm'n*, 540 U.S. 93. The decision in *Dred Scott* remains to this day the longest in the history of the Court. *See* Dred Scott v. Sanford, 60 U.S. 393 (1857)). For a more in-depth study by one of the attorneys in the case, see MICHAEL MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1st ed. 1973).

[150] Steiker & Steiker, *supra* note 149; ABRAMSON, *supra* note 139.

[151] Justices William Brennan and Thurgood Marshall indicated in their opinions that they thought the death penalty was *per se* unconstitutional. There is some difference of opinion about whether Justice William O. Douglas also thought so. *Compare* BANNER, *supra* note 103, at 261 (describing Justice Douglas as opposed to capital punishment per se) *with* Steiker & Steiker, *supra* note 149, at 362 (opining that Douglas, along with Justices Byron White and Potter Stewart, would have found capital punishment acceptable if structured properly).

passage: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."[152] Justice White similarly objected that there was "no meaningful basis for distinguishing" between the small number of cases in which defendants received the death penalty and the larger number in which they escaped it.[153]

One impact of the decision in *Furman* was to spur legislative action. Because a majority of the justices did not rule out capital punishment in some form, in the immediate wake of the decision, five legislatures announced plans to introduce new capital sentencing schemes, and by 1976, thirty-five states and the federal government had passed new legislation.[154] State legislatures and the federal government re-worked their legislative schemes to meet the concerns of the Supreme Court, resulting in a variety of different systems. In a quintet of cases handed down (appropriately or ironically depending on your political and policy preferences) two days before the Nation's Bicentennial, the Court announced that the death penalty is not *per se* unconstitutional and began a process of addressing the new legislative schemes.[155] Some legislative responses – such as a renewed interest in mandatory death sentences – were quickly struck down by the Supreme Court.[156] In other regards, legislatures struggled to create systems in which the discretion of the decision maker was guided, and the Court, since *Furman*, has spent a considerable amount of time addressing those systems.[157]

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[152] 408 U.S. at 309.

[153] 408 U.S. at 313. For discussions of *Furman* that highlight arbitrariness as a concern, see ABRAMSON, *supra* note 139; and Steiker & Steiker, *supra* note 149.

[154] BANNER, *supra* note 103, at 267-68.

[155] The cases are: Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); and Roberts v. Louisiana, 428 U.S. 325 (1976).

[156] *Woodson*, 428 U.S. at 305.

[157] ABRAMSON, *supra* note 139; BANNER, *supra* note 103.

Notwithstanding the concern about unbridled juries and "guided discretion" in *Furman* and the cases that followed,[158] the decision to determine the appropriateness of capital punishment in individual cases is currently still overwhelmingly a jury function. Of the thirty-eight jurisdictions – thirty-six states, the federal government and the federal military – that provide for capital punishment, twenty-nine leave the decision in the hands of the jury;[159] three more states employ a hybrid system in which the jury decides or recommends the sentence but that decision can be overridden by a judge,[160] and two states leave the decision of the sentence in the hands of the judge, although the jury must find the aggravating factors sufficient to warrant death.[161]

One last point about the jury's role in capital sentencing decisions is warranted. At least until recently, the impetus for jury involvement in capital cases has largely been legislative-driven. Notwithstanding the Supreme Court's frequent testimonials to juries as the bulwark of liberty and a central player in our constitutional system, the Court has, so far at least, rejected the argument that decisions regarding sentences of death must, as a matter of constitutional law, be made by the jury.[162] In the first few post-*Furman* cases in which the issue

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[158] ABRAMSON, *supra* note 139, at 219.

[159] Those states are: Arkansas, Arizona, California, Colorado, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Missouri, Mississippi, North Carolina, New Hampshire, New Jersey, New Mexico, Nevada, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Washington. *See* Death Penalty Information Center, *at* http://www.deathpenaltyinfo.org (last visited February 5, 2007).

[160] Those states are: Alabama, Delaware, and Florida. *Id.*

[161] Those states are Montana and Nebraska. *Id.* Those are two of the five states that, before the Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), left the determination totally up to the judge. The other three states – Arizona, Colorado and Idaho – have switched to having the jury make the decision. *See* Bryan Stevenson, *The Ultimate Authority On the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing*, 54 ALA. L. REV. 1091, 1094-95 (2003).

[162] *See, e.g.*, Spaziano v. Florida, 468 U.S. 447 (1984).

was raised, however, the Court's analysis turned not on the role of the jury but on the capabilities of judges to perform that function – deciding whether to impose death as a penalty – despite the fact that "the jury serves as the voice of the community" and is "in the best position" to make that assessment. The Court ruled only that, as a matter of constitutional law, judges could adequately perform that function.[163] Indeed, in some regards, the Court noted, judges might be better able to impose more consistent penalties across cases.[164]

This analysis took a new turn in 2002 in *Ring v. Arizona*.[165] That case involved Arizona's death penalty scheme, which left the decision of whether to impose the death penalty in the hands of the judge alone. At issue was not a direct attack on the judge as decisionmaker, but on who should make the determination of whether aggravating or mitigating factors exist sufficient to justify the death sentence. Reversing a decision issued twelve years earlier,[166] the Court ruled that the existence of aggravating and mitigating factors to be considered in deciding whether to impose the death penalty had to be presented to and made by a jury, not a judge. The Court thereby invalidated Arizona's death penalty scheme, which left the decision of whether to impose a sentence of death solely in the hands of the judge based on factual findings made by the judge alone.

The Court's analysis was different than it had been focusing, not on whether a judge could, as a practical matter, make those findings as capably or efficiently as could a jury. Rather, the Court centered on the Constitution's right to jury trial and the historic function of the jury:

> The Sixth Amendment jury trial right ... does not turn on the relative rationality, fairness or efficiency of potential factfinders. Entrusting to a

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[163] *Id.* at 461.

[164] Proffitt v. Florida, 428 U.S. 242, 252 (1976) (Stewart, Powell, & Stevens, JJ., plurality). For an extended discussion and excellent overview see Stevenson, *supra* note 167, at 1099-1100.

[165] 536 U.S. 584 (2002).

[166] Walton v. Arizona, 497 U.S. 639 (1990).

> judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the state.... The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free".[167]

The majority went on to cast doubt on whether judicial fact-finding in capital cases is in fact superior to jury fact-finding, noting the vast majority of jurisdictions that left the decision of whether to impose a sentence of death to the jury.[168] Thus, the Court's opinion in *Ring* moves the analysis away from considerations of judicial competence or even basic considerations of efficiency and effectiveness, and to the proper role of the jury in deciding punishments.[169]

Ring, ironically, comes out of a series of cases involving non-capital sentencing considerations. Those cases are the third instance that calls into questions the General Rule. It is to that line of cases that we now turn.

E. THE APPRENDI-BLAKELY-BOOKER REVOLUTION

No discussion of whether jurors should be informed of punishment can be complete without a consideration of what the Supreme Court has done since 2000 in a line of cases stretching from *Apprendi v. New Jersey*[170] through *United States v. Booker*,[171] and, as this article is nearing completion, *Cunningham v. California*.[172] That line of cases, allocating the

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[167] *Ring*, 536 U.S. at 607 (quoting Apprendi v. New Jersey, 530 U.S. 466, 498 (2000)) (Scalia, J., concurring).

[168] *Id.*

[169] Stevenson, *supra* note 161, at 1110.

[170] 530 U.S. 466 (2000).

[171] 543 U.S. 220 (2005).

[172] 127 S. Ct. 856 (2007).

appropriate roles for sentencing decisions consistent with the Sixth Amendment's right to a trial by jury, seems to speak forcefully, if not directly, to the issue posed in this article.

1. Jones v. United States

We start with the Supreme Court's decision in *Jones v. United States*,[173] a case decided the year before *Apprendi.* Up to that point, as reflected in cases such as *Willliams v. New York*,[174] the United States Supreme Court had essentially taken a "hands-off approach" to sentencing, failing to find any due process limitations on sentencing process and decisions. This was so even during the era of the Warren Court and later, when the Court expanded defendants' rights in just about every other phase of the criminal justice system.[175]

On the surface, *Jones* presented a case of statutory interpretation. The federal carjacking statute[176] set forth three different punishments, depending on the harm caused by the charged conduct. If the carjacking resulted in little or no harm to the victim, the maximum punishment was 15 years; serious bodily injury authorized a maximum sentence of 25 years; for death, the maximum sentence was life in prison.[177] The question under consideration was whether the statutory scheme set forth three different and distinct offenses with differing elements, or a single offense with different sentencing options. In a 5 to 4 decision, the Court ruled that the statute was comprised of three distinct crimes, all the elements of which, including the amount of harm suffered by the victim, had to be presented to and decided by the jury based on a reasonable doubt standard.

The majority could have rested its decision on a careful parsing of the statutory language along with lessons drawn from other federal statutes and comparable state statutes, as the

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[173] 526 U.S. 227 (1999).

[174] 337 U.S. 241 (1949).

[175] Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 47 (2006).

[176] 18 U.S.C. § 2119 (1998).

[177] *Id. See also Jones*, 526 U.S. at 229-31.

dissent urged, and left it at that. And the Court did engage in such an analysis, but went further. Finding that its conclusion regarding the reading of the statute was a close call, the Court opted for the reading it chose, in part, to avoid constitutional problems it saw posed by the alternative interpretation, specifically a clash with the Due Process Clause and the Sixth Amendment right to trial by jury. The Court posed the question thus: "when a jury determination has not been waived, may judicial fact-finding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" The majority concluded that factual findings by a judge could *not* replace jury fact finding, consistent with the constitutional right to a trial by jury, expressed in language that would be quoted or cited frequently in later opinions addressing the same issue:

> If a potential penalty might rise from fifteen years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping: in some cases, a jury finding of fact necessary for a maximum 15-year sentence would merely open the door to a judicial finding sufficient for life imprisonment.

Observing that "on a general level the tension between jury powers and powers exclusively judicial would likely have been very much to the fore in the Framers' conception of the jury right," the Court found support for its conclusion in the historical functioning of the jury. The Court quoted Blackstone's description of "trial by jury as 'the grand bulwark' of English liberties" which "would remain secure only 'so long as this *palladium* remains sacred and inviolate, not only from all open attacks, (which none will be so hardy as to make) but also from all secret machinations, which may sap and undermine it..." The Court pointed to a number of instances in the historical record in which jurors had played prominent roles in determining punishment, including the jury's ability to mitigate mandatory death sentences, as discussed above, and the relative lack of success that colonial legislatures had in restricting the power of the jury, as for example, in the failure to make determinations of libel a matter of law to be determined by the court, as opposed

to a question for the jury, as in such cases as the case of John Peter Zenger.[178]

Toward the end of the opinion, the majority included a passage that may have been intended to allay fears about the broader consequences of its ruling, but seems in hindsight more accurately to foreshadow what would follow next:

> In sum, there is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern. It is not, of course, that anyone today would claim that every fact with a bearing on sentencing must be found by a jury; we have resolved that general issue and have no intention of questioning its resolution. The point is simply that diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not settled.[179]

The Court's opinion in *Jones*, predominantly an issue of statutory interpretation, may be seen to represent a small step appropriate to the initial foray into this issue. A much larger step was taken the following term in *Apprendi*.

2. Apprendi v. New Jersey

The defendant in *Apprendi* faced charges on twenty-three counts, including a charge under New Jersey's "hate crimes"

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[178] John Peter Zenger was a New York City printer charged with seditious libel for publishing comments critical of William Cosby, the British Governor of New York in the 1730's. Zenger, represented by Andrew Hamilton (the preeminent lawyer of his time), argued he should not be found guilty because his statements were true, which was not a defense to libel at the time. The jury presumably accepted it as a defense and acquitted him. For more information on the trial and its signifcance in American jurisprudence see JAMES ALEXANDER**,** A BRIEF NARRATIVE ON THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL (Stanley Nider Katz ed., 1972) (1963).

[179] *Jones*, 526 U.S. at 248.

law, in connection with a shooting into the home of an African-American family. Apprendi entered a plea to three of the counts. As part of the plea bargain, prosecutors advised Apprendi that they would seek an enhancement of the possible sentence under the "hate crime" law and Apprendi reserved his right to challenge any such enhancement. Following an evidentiary hearing at which both sides introduced evidence going to the issue of Apprendi's motive for the shootings, the trial court found by a preponderance of the evidence that Apprendi's shooting was motivated by racial bias and with an intent to intimidate his neighbors. In accordance with the "hate crime" law, the court sentenced Apprendi to twelve years in prison. That was greater than the maximum sentence of ten years he could have received without the enhancement under the "hate crimes" law.

The New Jersey Appellate Division and the New Jersey Supreme Court upheld the sentence. The United States Supreme Court, however, reversed the sentence imposed and struck down the statutory scheme that authorized the judge to find facts to enhance the penalty, this time on constitutional grounds, not as a matter of statutory interpretation. The decision was again a close one (5 to 4) with five different opinions, with the Court's more liberal members – Justices John Paul Stevens, David Souter and Ruth Bader Ginsberg – joining the two most committed originalists – Justices Antonin Scalia and Clarence Thomas – to form the majority. The dissenters included Chief Justice William Rehnquist and Justice Anthony Kennedy, as well as the pragmatic Justice Sandra Day O'Connor and Justice Stephen Breyer who, as a legislative aide to Senator Edward M. Kennedy and later an appellate court judge, played a central role in the creation and marketing of the Federal Sentencing Guidelines. That line-up, which had also been the split in *Jones*, would stay basically intact – with one momentary but significant departure in *Booker* – as this line of cases played itself out.

The Court began its analysis with another paean to the importance of the right to trial by jury, describing that right and the right of due process as "constitutional protections of surpassing importance,"[180] and invoking the iconic Justice Joseph Story and William Blackstone:

[180] *Apprendi*, 530 U.S. at 476.

> As we have, unanimously, explained ... the historical foundation of [the importance of trial by jury and due process] extends down centuries into the common law. "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties,"... trial by jury has been understood to require that "the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors...."[181]

The Court stressed the importance of a defendant's being aware of the possible punishment he might receive from the face of the indictment and, as it had in *Jones*, relied on history and the jury's real, if informal role, in determining punishment at the time of the framing of the Constitution:

> The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime....
>
> Thus with respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)....
>
> Just as the circumstances of the crime and the intent of the defendant at the time of the commission were often essential elements to be alleged in the indictment, so too were the circumstances mandating a particular punishment."[182]

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[181] *Id.* at 477 (citations omitted).

[182] *Id.* at 478-480. For a critique of the Court's history in the opinion, see Jonathon F. Mitchell, *Apprendi's Domain*, 2007 SUP. CT. REV. (forthcoming 2007).

"The historic link between verdict and punishment," the Court continued,

> and the consistent limitation on judges' discretion to operate within the limits of the legal penalty provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.[183]

Thus, the Court concluded that Apprendi's right to a trial by a jury of his peers had been violated by a sentence based on facts found by the trial court and not the jury. While trying to make clear that it was not questioning the ability of judges to take facts into consideration in the exercise of their discretion "in imposing a judgment *within the range* prescribed by statute," the Court nonetheless held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[184]

If the decision in *Jones* passed without considerable fanfare, the Court's ruling in *Apprendi* caused shockwaves. In dissent, Justice O'Connor called the decision "a watershed in constitutional law."[185] She was not alone in viewing *Apprendi* as a critically important ruling. Despite asserting that the actual holding of *Apprendi* is actually more limited than some of the reaction indicated, one prominent scholar, echoing Justice O'Connor, described the impact of the Court's decision in colorful terms:

> The ground on which the Court reversed Apprendi's sentence, that the factual findings on which the sentence was based should have been made by a jury rather than the sentencing judge, could lead to a far more dramatic result: a revolutionary reconstruction of our procedures for determining guilt and punishment. As soon as

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[183] *Id.* at 482-483.

[184] *Id.* at 481, 489.

[185] *Id.* at 524 (O'Connor, J., dissenting).

> *Apprendi* was decided, at the very end of the October 2000 term, commentators characterized the case as possibly the greatest blockbuster in a term of blockbuster decisions. The dissenting justices characterized the decision as a "watershed" rule of criminal procedure. Talking heads and their writing counterparts predicted that, because of *Apprendi*, federal criminal law would be radically remodeled, jailhouse doors would open and legislatures would resort to redrafting statutes to evade the case's far-reaching consequences. Some criticized the revolutionary regime, while others thought that the Court had acted appropriately as long as its actions would not upset the Federal Sentencing Guidelines.
>
> The apocalyptic predictions came true in part. *Apprendi* caused a great flurry of activity in and around federal courts, including a proliferation of seminars, an avalanche of *pro se* habeas petitions and motions for re-sentencing, and a steadily increasing stream of scholarly articles. Lawyers, *pro se* litigants, and judges have spent many hours trying to determine *Apprendi's* scope.[186]

The decision in *Apprendi* raised a host of questions, including whether the sentencing structure established by the Federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial.[187] As one assessment of the *Apprendi* line of cases summarized developments:

> Lower courts struggled to determine *Apprendi's* reach and impact. Construed broadly, it cast considerable doubt on many sentencing statutes

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[186] Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution*?, 87 IOWA L. REV. 615, 616 (2002).

[187] For consideration of that issue see for example *id.*; Jane A. Dall, *A Question For Another Day: The Constitutionality of the United States Sentencing Guidelines Under* Apprendi v. New Jersey, " 78 NOTRE DAME L. REV. 1617 (2003); and Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775 (2002).

> and guidelines that called for judges to find certain facts at sentencing. *Apprendi* generated much litigation but lower federal and state courts typically construed *Apprendi* narrowly in an effort to preserve existing sentencing structures.[188]

As ground-shaking as *Apprendi* was conceived to be, it was in fact, only the beginning.[189]

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[188] Berman & Bibas, *supra* note 175, at 50.

[189] Two decisions two years later moved the ball somewhat, although in different directions. One was *Ring v. Arizona*, in which, as we have already discussed, the Court ruled that aggravating and mitigating factors in capital sentencing schemes must be found by a jury, not a judge. A second case, decided the same day as *Ring*, pointed in the opposite direction. In *Harris v. United States*, 536 U.S. 545 (2002), the Court addressed the sentence of a person convicted under federal drug trafficking laws that created a minimum sentence of five years for a conviction if the defendant was carrying a gun, but that increased that mandatory-minimum to seven years if the defendant was found guilty of "brandishing" the firearm. The hearing in that case was a bench trial; thus, the finding that Harris had brandished his gun was necessarily found by a judge. At issue in *Harris* was whether the sentence was unconstitutional under *Apprendi* and, more specifically, whether an earlier decision, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), was overruled by *Apprendi*. *McMillan*, decided fourteen years before *Apprendi*, had ruled constitutional a sentencing statute that increased the minimum penalty for an offense, although not beyond the statutory maximum, based on a finding by the sentencing judge that the defendant possessed a gun. A plurality of the Court upheld the sentencing statute and did not see a conflict between *McMillan* and *Apprendi*:

> *Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime [and thus the domain of the jury] by the Framers of the Bill of Rights. That cannot be said of a fact increasing the mandatory-minimum (but not extending the sentence beyond the statutory maximum) for the jury's verdict has authorized the judge to impose the minimum with or without the finding.

Harris, 536 U.S. at 547.

The Court thus created an exception to the rule in *Apprendi* for sentencing decisions that involve raising a mandatory-minimum sentence. That remains one of only two articulated exceptions to the *Apprendi* line. The other exception involves facts showing a prior conviction, which can be found and imposed by a judge, rather than a jury. The source of that exception is *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), a case that pre-dates the decision in *Jones*. The rationale for that exception is that evidence of a prior conviction is unrelated to the offense before the jury and is the type of factor that judges, as opposed to juries, have always taken into consideration. *See Almendarez-Torres*, 523 U.S. at 268-70. None of the

3. Blakely v. Washington

Another giant step was taken in *Blakely v. Washington*,[190] a case involving a challenge to a sentence imposed under the State of Washington's sentencing guidelines. In *Blakely*, the defendant abducted his estranged wife at knifepoint in an effort to persuade her to forego divorce proceedings. As a result of the unorthodox and unsuccessful efforts at reconciliation, Blakely was arrested and charged with first-degree kidnapping. He eventually pled guilty to second-degree kidnapping involving domestic violence and use of a firearm. Washington State guidelines provided for a sentence between forty-nine and fifty-three months for second-degree kidnapping with a firearm, and in accordance with the plea bargain, the prosecution sought a sentence for Blakely of fifty-three months. However, after a three-day hearing, the court issued thirty-two findings of fact and, based on finding, *inter alia*, that Blakely acted with stealth, violence and "deliberate cruelty", imposed a sentence of ninety months, more than three years longer than the fifty-three month maximum provided for in the guidelines.

In another 5-4 decision, the Supreme Court applied the bright-line rule laid down in *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt,"[191] and reversed Blakely's sentence. In so ruling, the Court rejected an argument that the requirement from *Apprendi* for jury fact finding only applies to sentences in excess of the statutory maximum set by the legislature (in this case, ten years) rather than the guidelines range, and made clear that the relevant consideration is the sentence that could have been imposed based on the facts actually found by the jury:

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decisions in the *Apprendi* line of cases has shown the slightest inclination or interest in disturbing that holding. *See supra* Part III.F. *Harris* itself was seen by some as a potential limitation to *Apprendi*, a signal from the Court that it would carry the reasoning of that case no further. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 40-42 (2003). That, as we shall see, was not to be.

[190] 542 U.S. 296 (2004).

[191] *Id.* at 302.

> [T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional facts. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment" ... and the judge exceeds his authority.[192]

The Court grounded its decision on the jury's role as part of the democratic polity:

> Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary.... *Apprendi* carries out this design by insuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.... The jury could not function as circuit breaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State actually seeks to punish.[193]

The Court rejected an argument that this could be accomplished by a legislative scheme that replaced *Apprendi's* bright-line rule with a more subjective test that would allow judges to determine sentencing factors as long as they were reasonable, expressing doubt that

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[192] *Id.* at 303-304.

[193] *Id.* at 305-307.

> the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.[194]

In so ruling, the majority tried to address fears concerning the reach of its decision, claiming that it was not declaring unconstitutional all determinate sentencing schemes. The majority also tried to outline some of the options open to legislatures and criminal defendants under its ruling. Finally, the Court said its decision was not an assessment of which sentencing scheme was most efficient or fair to defendants, but simply the product of the Framers' vision of the allocation of authority in providing for a right to trial by jury.

Any effort to allay concerns about the reach and furor of the decision was not broadly successful. The reaction to the decision in *Blakely* surpassed even *Apprendi's* post-decision impact. One commentator opined that the decision "may be the most consequential and important criminal justice decision, not only of the last Term or decade or even of the Rehnquist Court, but perhaps in the history of the U.S. Supreme Court," and called the "potential impact of Blakely on modern sentencing systems ... truly staggering."[195] One critic of the decision put it more dramatically, if also snidely:

> On June 24, 2004, five black-clad figures seized control of the Criminal Justice Express, crashed through warning barriers, flattened the Washington State Sentencing Guidelines, opened the throttle, and sent the train hurtling from the main line down the old rail spur where the Federal Sentencing Guidelines and the sentencing systems of numerous states lay tied helplessly to the tracks. Whereupon the 2003 Term of Court being concluded, the justices twirled their collective

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[194] *Id.* at 308.

[195] Douglas A. Berman, *The Roots and Realities of Blakely*, 19 CRIM. JUST. 5, 10 (Winter 2005).

> mustachios, sent their robes off to the cleaners, and went on vacation. Two months on ... the rest of us stand staring slack-jawed, some delighted and some aghast, at the disarray and paralysis in the locomotive's wake and the impending carnage at the end of the line.[196]

At a hearing on the impact of *Blakely* held by the United States Senate Judiciary Committee conducted a few weeks after the decision, a senator asked the collective group of experts to name another case that in their estimation had the same impact on the "practical working out of justice" in the criminal justice system as *Blakely*. The witnesses could not do so. Each of the decisions considered – *Mapp v. Ohio*,[197] *Gideon v. Wainwright*,[198] and *Miranda v. Arizona*[199] – was important, but had limited impact compared to *Blakely*, since each applied to a discrete and therefore limited aspect of criminal justice.[200] As one of the participants at that Senate hearing summarized what he took away from the exercise,

> In retrospect, this moment in the Judiciary Committee hearing room highlights two important points about Blakely. First, it really is unprecedented in effect. No Supreme Court opinion in living memory, perhaps no opinion in American history, has caused near-paralysis of either state or federal criminal justice systems by placing the outcome of every case in doubt. Second, each of the landmark cases to which *Blakely* was compared announced a bedrock principle of American constitutional criminal procedure and an easily explained rule to ensure that the principle was honored, but the principle of

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[196] Frank O. Bowman, *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, 218 (2004).

[197] 367 U.S. 643 (1961).

[198] 372 U.S. 335 (1963).

[199] 384 U.S. 436 (1966).

[200] Bowman, *supra* note 196, at 251-52.

> *Blakely* is obscure and its rule is highly unlikely to ensure anything but confusion.[201]

Many believed that *Blakely*, although directly dealing only with a state guidelines system, portended the demise of its federal counterpart, the Federal Sentencing Guidelines. Indeed, in the immediate wake of the decision, some lower federal courts began to so hold, although others refused to reach that conclusion until the Supreme Court ruled on the issue.[202] The Court did that the following term in *United States v. Booker*.[203]

4. United States v. Booker

The impact of the reaction to *Blakely* is reflected in how quickly the Court agreed to hear *Booker* and a companion case, *United States v. Fanfan*.[204] Those cases were heard, after an expedited briefing schedule, on the first day of the 2004 Term.[205] *Booker* and *Fanfan* actually presented two questions: first, whether the rule in *Apprendi* and *Blakely* applied to the Federal Sentencing Guidelines; and, second, if it does, what the appropriate remedy would be. Answers to those two questions produced two opinions, both by 5 to 4 votes.

As to the first, the Court reaffirmed the ruling in *Apprendi* and held that because the Federal Sentencing Guidelines "are mandatory and binding on all judges,"[206] jury fact-finding was required to avoid a violation of the Sixth Amendment right to trial by jury. After a brief review of the Court's rulings in *Jones*, *Apprendi*, *Ring* and *Blakely*, the majority concluded that there was no "distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue" in *Blakely*.[207] Although the majority said that the

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[201] *Id.* at 252. *See also* Berman, *supra* note 195, at 5.

[202] Berman, *supra* note 195, at 11.

[203] 543 U.S. 220 (2005).

[204] *Id.*

[205] Berman, *supra* note 195, at 11.

[206] *Booker*, 543 U.S. at 233.

[207] *Id.*

Federal Guidelines would pass constitutional muster if they were only advisory, the mandatory nature of the Guidelines doomed them. The Court rejected an argument that because the Guidelines provide for departures in certain circumstances, they were not mandatory:

> [H]owever, departures are not available in every case, and in fact are unavailable in most. In most cases, as a matter of law, the Commission will have adequately taken all relevant factors into account, and no departure will be legally permissible. In those instances, the judge is bound to impose a sentence within the Guidelines range.[208]

The Court also insisted that it was not creating a new rule or fashioning a new right, but was instead applying established constitutional principles to new legislatively-created circumstances to protect the time-honored right to trial by jury:

> It is quite true that once determinate sentencing had fallen from favor, American judges commonly determined facts justifying a choice of a heavier sentence on account of the manner in which particular defendants acted. In 1986, however, our own cases first recognized a new trend in the legislative regulation of sentencing when we considered the significance of facts selected by legislatures that not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime.... Provisions for such enhancements of the permissible sentencing range reflected growing and wholly justified legislative concern about the proliferation and variety of drug crimes and their frequent identification with firearms offenses.
>
> The effect of the increasing emphasis on facts that enhanced sentencing ranges, however, was to increase the judge's power and diminish that of the jury. It became the judge, not the jury, that determined the upper limits of sentencing, and the facts determined were not required to be

[208] *Id.* at 234.

> raised before trial or proved by more than a preponderance.
>
> As the enhancements became greater, the jury's finding of the underlying crime became less significant. And the enhancements became very serious indeed....
>
> [T]he Court was faced with the issue of preserving an ancient guarantee under a new set of circumstances. The new sentencing practice forced the Court to address the question of how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime. And it is the new circumstances, not a tradition or practice that the new circumstances have superseded, that have led us to the answer first considered in *Jones* and developed in *Apprendi* and subsequent cases culminating with this one. It is an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance.[209]

The Court further reasoned that it mattered not that the Federal Guidelines were the product of a Commission situated in the Judicial branch, rather than the creation of a legislative body. And the majority repeated what it had concluded with in *Blakely*: that consideration of whether the requirement of jury-factfinding is less efficient or expedient does not change the conclusion. "[T]he interest in fairness and reliability protected by the right to a jury trial – a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment – has always outweighed the interest in concluding trials swiftly."[210]

What, then, would happen to the Federal Sentencing Guidelines? Were they to be struck in their entirety? Or was there some way to amend the Guidelines to enable them to pass constitutional muster? That was the subject of the second

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[209] *Id.* at 236-237.

[210] *Id.* at 244.

majority opinion in *Booker* dealing with the question of remedy. This time, Justice Breyer wrote an opinion for a five-member majority in which the other three dissenters to the first opinion (Chief Justice Rehnquist and Justices O'Connor and Kennedy) joined, as did Justice Ginsburg, the only Justice who joined both opinions. Justice Breyer considered two options: i) either retain the Guidelines completely as written but with a requirement added to the statute that any fact-finding be conducted by jury; or ii) sever that portion of the Guidelines that made them mandatory. Justice Breyer and the other four Justices adopted the latter approach.

Justice Breyer treated the question essentially as one would tackle a case involving statutory interpretation, looking to see what Congress would want done. According to this second opinion, the use of jury factfinding in implementing the Guidelines was fundamentally inconsistent with the Guidelines as envisioned, drafted and passed by Congress. Such a feature was not only inconsistent with the Sentencing Reform Act's language, but it would prevent sentencing based on the defendant's "real conduct" that underlay his conviction, which could only be gleaned from sources such as pre-sentence reports and the like, and thus undermine the basic statutory goal of reducing sentencing disparity across sentences. Breyer thus reasoned that the jury-factfinding structure was not what Congress would have wanted had it been confronted with the choice, but would instead "destroy" what Congress was trying to accomplish with the Guidelines.

And so, echoing a portion of the first opinion in which Justice Stevens indicated that any constitutional concerns would disappear if the Guidelines were not mandatory, Justice Breyer held that the portion of the Sentencing Reform Act that made the Guidelines mandatory was severed. The Guidelines would, henceforth, be advisory.

The double-nature of the Court's ruling in *Booker* continues the high drama previously in the *Apprendi* line of cases. To be sure, the "merits" portion of the decision continues the *Apprendi* rule and, addressing a question that had haunted *Apprendi* since the time of the decision, applies it to one of the most significant pieces of legislative sentencing reform in the twentieth century, a piece of legislation that was both broad in scope and extensive in influence. On the other hand, the practical effect of the decision, at least the remedial portion, was

to return things to the pre-Guidelines days. Whether the Guidelines themselves, now only advisory, would continue to be so influential as to make the advisory label meaningless or would really untether federal judges is an open question.[211] But the effect of *Booker* may ironically be to write juries completely out of most federal sentencing decisions if judicial discretion returns to pre-guidelines form.

5. Cunningham v. California

The *Apprendi* rule continues to be a hot topic in sentencing, as reflected in the fact that the Court accepted three more cases bearing upon related issues in the 2006 Term. But for anyone who thought that *Booker* might signal or encourage the Court to back away from the *Apprendi* rule, the first of the Term's cases to be decided, *Cunningham v. California*,[212] sends a different message.

At issue in *Cunningham* was a California determinate sentencing scheme (the DSL) that looked something like the structure at issue in *Jones*. Under the determinate sentencing scheme in place in California since 1977, the legislature established three fixed sentences for most crimes: a lower sentence, a middle sentence and an upper sentence. Conviction for an offense without more brought the middle tier sentence. But a judge was also to consider whether "there are circumstances in aggravation or mitigation of the crime," sufficient to justify imposition of the upper sentence if aggravating circumstances are found, or of the lower sentence if mitigating factors are found. In making that decision, the trial court was authorized to look at numerous things, including the trial record, the probation report, and "any further evidence introduced at the sentencing hearing." The offense at issue in

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[211] One recent study of courts' efforts to deal with the holding in *Booker* indicates that while some federal Circuits take *Booker* at its word and treat the federal guidelines as purely advisory, most Circuits have "adopted a presumption of reasonableness for guideline sentences and a sliding scale of review for non-guideline sentences in which the scope of review varies proportionally to the sentence's distance from the applicable guideline range." Alan Vinegrad & Douglas Bloom, *Sentencing Guidelines*, N.Y.L.J, January 30, 2007.

[212] 127 S.Ct. 856 (2007).

Cunningham, continuous sexual abuse of a child under age of 14, carried a presumptive sentence of 12 years, with a lower sentence of 6 years and an upper sentence of 16 years. The sentencing judge found that aggravating facts outweighed mitigating facts and imposed the upper sentence of 16 years.

The Court struck down California's sentencing structure based on *Apprendi's* bright line rule. The decision was 6 to 3, two new justices having replaced two justices – Chief Justice Rehnquist and Justice O'Connor – who had regularly dissented in the earlier cases; Chief Justice John Roberts joined the usual majority line-up, and Justice Samuel Alito joined the usual dissenters.

The Court briefly reviewed the relevant cases from *Jones* to *Booker*, and did not indicate any inclination to back away from a strict reading of the rule: "If the jury's verdict alone does not authorize the sentence," the Court stated, "if instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied."[213] The Court found the California law a clear violation of the Sixth Amendment right to trial by jury. "Because the DSL allocates to judges sole authority to find facts permitting the imposition of an upper term sentence, the system violates the Sixth Amendment."[214] The Court rejected an argument that the California scheme was similar to an "advisory" system the Court indicated would pass muster in *Booker*:

> California's DSL does not resemble the advisory system the Booker Court had in view. Under California's system, judges are not free to exercise their "discretion to select a specific sentence within a defined range." ... California's Legislature has adopted sentencing triads, three fixed sentences with no ranges between them. Cunningham's sentencing judge had no discretion to select a sentence within a range of 6 to 16 years. His instruction was to select 12 years, nothing less and nothing more, unless he found facts allowing the imposition of a sentence of 6 or 16 years.

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[213] *Id.* at 869.

[214] *Id.* at 170.

> Factfinding to elevate a sentence from 12 to 16 years, our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies.[215]

For anyone who thought that the Court's decision in *Booker* might provide an easy out for existing state systems, the majority suggested otherwise: "*Booker*'*s* remedy for the Federal Guidelines, in short, is not a recipe for rendering our Sixth Amendment case law toothless."[216]

F. WHAT HAS THE SUPREME COURT WROUGHT?

The language as well as conception of the reach of the Sixth Amendment right to jury trial found in the *Apprendi-Booker* line of cases certainly seem to work primarily to promote, and to the advantage of, juries as important players in sentencing decisions. And that is how many have read the cases.[217] One scholar recently described the Court's decisions as representing the "inexorable movement towards a more expansive interpretation of the jury's role in determining punishment."[218] Two other sentencing experts asserted that,

> The Court's ringing endorsement of the right to jury decisions is equally an endorsement of the jury's determination of who, in society, is blameworthy. Thus, the ideal of retributive justice, as applied to sentencing, can be found in the Court's re-discovery and re-affirmation of the right of the jury – that is, the polity – to set out all

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[215] *Id.*

[216] *Id.*

[217] Laura I. Appleman, *Retributive Justice and Hidden Sentencing After Blakely*, 68 OHIO ST. L. J. (forthcoming 2007); Lillquist, *supra* note 99; and Herman, *supra* note 186.

[218] *See* Appleman, *supra* note 217 (manuscript at 4, on file with authors).

> criminal punishment, no matter what form it may take.[219]

And another prominent scholar opined that, "[t]he true center of the debate *Apprendi* reopens is not just about how to parcel out the roles of judge and jury, but how to allocate the power of citizen participation in the criminal justice process between the legislature and the jury."[220] Indeed, one commentator, a federal judge, writing in the wake of *Apprendi* and *Ring*, but before *Booker*, went so far as to say that the principles in those cases would require jury sentencing:

> The Court seems balanced on an impossibly difficult saddlepoint: if the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to a jury trial by the simple artifice of labeling elements as "sentencing factors"; yet there seems to be no principled basis upon which to truly distinguish elements from sentencing factors....
>
> Apart from sheer nose-counting and crystal ball reading, there are principles in these cases that seem ineluctably to lead to the conclusion that jury sentencing is constitutionally compelled. Once the Court recognized that the Sixth Amendment imposes limitations on the power of legislatures to label facts as "sentencing factors" instead of "elements," it seems quite illogical and ultimately fruitless to devise a constitutional test for this distinction that is formalistic and entirely dependent on the particular architecture legislatures elect to use in constructing their sentencing schemes.[221]

The Court, of course, did not go that far in the cases that followed *Ring*.

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[219] Berman & Bibas, *supra* note 175, at 32.

[220] Herman, *supra* note 186, at 633.

[221] Hoffman, *supra* note 96, at 982-83.

But not everyone has read the cases the same way.[222] Some have seen the Court's work, particularly after *Booker*, as returning power to judges rather than ensuring a place for juries in deciding sentences.[223] After all, despite their efforts to carve out a role for jurors in the sentencing decision, the Court has refused at the same time to expressly reconsider, much less reverse, prior decisions that left sentencing fully in the hands of judges, leaving a jurisprudence that two prominent sentencing experts have described as "at best confusing, at worst conceptually incoherent."[224]

Moreover, as noted above, the Court's ruling in *Booker* has signaled to legislatures a way around *Apprendi* and *Blakely*, and thus, to avoid having jurors participate in sentencing by making sentencing outcomes "advisory" rather than mandatory, returning federal sentencing to the purely discretionary decisions made by judges before the Guidelines were created.[225] As a result, notwithstanding the Court's repeated invocation of the right to trial by jury as central to the Framers' conception of freedom from oppressive government, the right may reasonably be seen as a weak one that can be eluded by a determined legislature. "[W]hile some members of the Court talk about protecting jury decision-making," notes one highly critical take on the Court's rulings, "the obvious solution to the problem the Court has created is to return to discretionary judicial sentencing."[226] As another recent assessment put it,

> After finding in *Booker* that the federal sentencing guidelines violated the constitutional rule announced in *Blakely*, the Court did not construct

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[222] *See* discussion *infra*.

[223] *See* Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387 (2006); Emily Bazelon, *Diagramming Sentences: The Supreme Court's War on Sentencing Guidelines*, SLATE, Jan. 23, 2007, *at* http://www.slate.com/id/2158034/ (last visited Apr. 20, 2007).

[224] Berman & Bibas, *supra* note 175, at 37.

[225] *Id.*

[226] Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?* 58 STAN. L. REV. 195, 200 (2005).

> a remedy that advanced jury factfinding as it could have done by requiring a bifurcated procedure with a post-conviction jury factfinding hearing for sentencing. (Of course such sentencing hearings would be rarer than trials.) Instead, the Court abolished the need for any jury basis for sentencing issues! The Court converted its announced constitutional right to jury factfinding and jury judgment making ... into judicial authority to engage in policymaking, rule articulation, factfinding, and judgment-making.... The supposed constitutional need for jury decisionmaking for sentencing has been remedied by giving judges greater decisionmaking authority. It is hard not to see this contorted remedy as undermining the legitimacy of the Court's justification for creating the constitutional rule.[227]

Still, notwithstanding the valid criticism of the *Apprendi-Booker* line of cases, the full reach and articulation of which may be still evolving, it is difficult to conclude other than that the role of jurors in sentencing decisions is significantly different as a result of those decisions. It may well be that the *Booker* decision draws a roadmap for legislatures to avoid the right spelled out in *Apprendi* and *Blakely* but, as of yet, the right still exists and legislatures have not opted out. It is easy to criticize the shortcomings in the Court's reasoning in some of the cases, but that does not mean that the decisions should be dismissed and that the commitment to a role for the jury in sentencing decisions that the Court has located in the Sixth Amendment should not be taken seriously.

IV. A REVIEW AND A PROPOSAL

We are left to tackle some questions. The first is the question with which we began this article, whether the current legal landscape is any more receptive to or makes any more attractive

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[227] Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1158 (2005).

the argument we put forward in *NSBI*, that jurors should be informed about punishment in cases involving mandatory sentence systems. Second, what should be done?

We began this study by examining in detail three recent cases in which defendants sought to have the jury told about the punishment they faced. Each court handled the question differently and, notwithstanding different outcomes, each court left intact the General Rule. Judge Wiseman in *Datcher* came closest to repudiating the General Rule, although his opinion is crafted in language that is careful not to reach as far as one might take its reasoning. Judge Lynch, similarly, decided it was appropriate in the facts of that case to advise the jury of the penalty Pabon Cruz faced, but the Second Circuit prevented that. The court in *Baca* handled the matter indirectly. We also considered "horror stories" of draconian sentences under mandatory sentencing schemes and the impact of the dissatisfaction with determinate sentencing systems in general, and the federal guidelines specifically, in the circumstances that have given rise to these cases.

We then looked briefly at the historical role of juries in criminal cases before discussing three instances in which, contrary to the premises of the General Rule, jurors *are* given a central role in the decision of what punishment is proper. In jury felony sentencing, generally speaking, jurors decide among a number of punishment options in a broad range of cases. In capital cases, the question is limited to a particular type of punishment but it is the most important decision posed by the criminal justice system. Finally, in the *Apprendi* line of cases, jurors now have responsibility for making the factual findings in determinate sentencing systems. While that is not precisely the same as making the ultimate decision as to punishment, those factual findings are critical to decisions that are finally made. Jury sentencing is mostly a relic from before *NSBI*, although it still exists in some states. The jury's role in capital punishment likewise has feet in the periods both before and after we wrote, although post-*NSBI* developments are important. The *Apprendi* line of cases, of course, presents a whole new development that most observers see as revolutionary. All three relied on a concept of the role of the jury as central to the liberties protected by the Constitution. With regard to jury sentencing and capital sentencing schemes, the end result is that jurors are usually responsible for decisions about the appropriate punishment;

with regard to the *Apprendi* line of cases, one might say that the jury is still out.

It would be easy to quarrel with our use of these three jury sentencing schemes. After all, the heyday of jury felony sentencing, if it had a heyday, is in the past. As for capital punishment, the Court frequently notes that "death is different,"[228] suggesting that principles found in those cases do not apply elsewhere. And as for *Apprendi* and its progeny, the full doctrinal ramifications are at best evolving, and at worst incoherent.

Nonetheless, we think it would be a mistake to dismiss them and not see in them principles or grounds for further expansion of the role of the jury for at least three reasons. First, all three reflect confidence in the ability of juries to address issues related to punishment, including making the decision about punishment itself.

Second, the capital cases and *Apprendi* line rest squarely on a view of the jury as central to the criminal justice system, as protection against an overreaching executive and legislature. Indeed, as noted, we trust jurors with the most important and ominous decision – whether to impose death – our criminal justice system faces. If the paeans to the jury as fundamental to the protection of liberties are sincerely put forward, these are stirring reminders of principles that should have broad application; and if they are not to be given broader application, the reasons for not doing so should be more than rote following of a long established rule. It is difficult to believe that such tributes are offered simply as rhetorical devices to sell the result in a particular case, yet, other than in capital cases, and now the *Apprendi* line, that is how courts and legislators, generally speaking, have treated them. It is difficult to see why those principles are not taken more seriously. If they are, they provide a basis for expanding what we tell jurors about punishment.

Finally, the refusal to expand the reach of the jury for no other reason than deference to the General Rule ignores another fact known to be true: that the jury is not a static, unchanging institution. The jury is and has been constantly in a process of

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[228] *See* Furman v. Georgia, 408 U.S. 238, 286-89 (Brennan, J. concurring); and *id.* at 306 (Stewart, J. concurring). *See* Jeffrey Abramson, *Death-Is-Different-Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004) (discussing and collecting cases).

evolution, from who can sit on a jury, to what we ask juries to do.[229] That process has not, to be sure, involved a steady expansion of the powers of jurors. Nonetheless, juries today look nothing like what the original juries looked like, and we ask them to do different things than we did a century or centuries ago.

Thus, the legal landscape *has* changed in the years since *NSBI* first appeared, perhaps most notably with *Apprendi* and its progeny, but also with developments in the jurisprudence of capital sentencing and the further resort to determinate sentencing schemes and guidelines that had begun before *NSBI* but that have continued to this day. A macro view of sentencing now sees one anomaly piled on top of another. One existed twenty years ago: that we trust, and indeed have come to rely upon, juries to make the most critical decision of who lives and dies, but we do not trust them to decide lesser penalties. Add to that a new anomaly: that we entrust and insist that juries make factual findings that determine sentencing outcomes in non-capital cases, but tell them neither what they are doing nor what the results of those decisions will be.[230] And that landscape is significantly different than the premise upon which the General Rule rests – that judges alone decide punishment and juries have no role in sentencing decisions – for two reasons. First, now jurors *do* have a role in sentencing, and second, the critical decisions about sentencing are frequently being made by prosecutors, legislatures and juries, not judges.

For all these reasons, we believe that the current legal landscape does present a more receptive context for the argument that jurors can and should be told about mandatory

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[229] On the evolution of the jury see for example GREEN, *supra* note 95; and George Fisher, *The Jury's Rise as Lie Detector*, 107 Yale L. J. 575 (1997); Matthew P. Harrington, *The Law- Finding Function of the Jury*, 1999 WIS. L. REV. 377 (1999); FRIEDMAN, *supra* note 106; WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW 165-71 (1975).

[230] Iontcheva, *supra* note 127, at 338 ("More generally, the *Apprendi*-line of cases fail to address the question of why juries should be allowed to determine facts directly bearing on sentencing, but be kept in the dark about the actual consequences of their findings. In most states, and at the federal level, juries are entrusted with the responsibility of deciding between life and death; yet even after *Apprendi*, they are often denied the power to decide between five years and life imprisonment.").

sentences that follow from their verdicts. If one still resists that notion, one needs a better reason for that position than the General Rule.

A. A PROPOSAL

What, then, is the proper course of action to follow in situations involving presumptive sentencing, where jurors' random knowledge of the penalty may affect the outcome of the case? We see at least four options.

First, the old standby: we could do nothing. Under this scenario, things simply continue as they are. Some will be upset that, in certain cases, similarly situated defendants are not treated alike, while others will complain about defendants who are deprived of a chance for acquittal depending on the caprice of what knowledge jurors bring with them to the case. But the debate, if any, will remain largely philosophical and not change anything.

A second option is similarly passive, what we might call "nothing, plus". In this scenario, no steps are taken to tell jurors about the mandatory sentence, but we rely on the knowledge or belief that jurors will know about their power to acquit (nullify), and act appropriately. We draw inspiration for this option from Judge Harold Leventhal's opinion in *United States v. Dougherty*,[231] which offered a somewhat backhand argument for jury nullification. After expressing concern about the "anarchy" that might result from an express recognition of the jury's right to nullify, Judge Leventhal softened his remarks somewhat:

> The jury system has worked out reasonably well overall, providing 'play in the joints' that imparts flexibility and avoids undue rigidity. An equilibrium has evolved – an often marvelous balance – with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution. There is reason to believe that the simultaneous achievement of modest jury equity and avoidance of intolerable caprice depends on formal instructions that do not

[231] 473 F. 2d 1113 (D.C. Cir. 1972).

> expressly delineate a jury charter to carve out its own rules of law.[232]

Judge Leventhal noted the variety of sources, other than what they are told by the court, from which jurors learn what they can actually do: informal conversation, literature, television and other media, history and tradition. He concluded, "[t]he totality of input generally convey adequately enough the idea of prerogative, of freedom in an occasional case to depart from what the judge says."

This option would be the same as doing nothing, but with a more optimistic twist. Jurors would not be told of the punishment in a mandatory sentencing case but, if you subscribe to this view, you are confident that in the end, justice will be done because rarely but in the right cases, jurors will take matters into their own hands with no prompting from the courts.

A third option takes this a step further. This would be to move jurors subtly and indirectly in the direction of doing the "right" thing but without, again, actually telling them about the punishment in a case involving a mandatory-minimum sentence. This option is suggested by Judge Jack B. Weinstein's observations about jury nullification.[233] Like Judge Leventhal, Judge Weinstein does not favor telling jury's about their power to nullify: "I would not instruct juries on the power to nullify or not to nullify. Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested."[234] But Judge Weinstein is comfortable with jurors' nullifying and even with judges' taking steps, short of express recognition of the power, to foster it in the appropriate cases: "[A]lthough juries should not be instructed that they have the power to nullify, the judge can and should exercise discretion to allow nullification by flexibly

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[232] *Id.* at 1134.

[233] Jack Weinstein, *Considering Jury "Nullification:" When May and Should a Jury Reject the Law To Do Justice*, 30 AM. CRIM. L. REV. 239 (1993).

[234] *Id.* at 250.

applying the concepts of relevancy and prejudice and by admitting evidence bearing on moral values."[235]

This compromise position, however, is not without its limitations, at least in the context of informing jurors about mandatory sentences. At least two come to mind. First, Judge Weinstein may have had in mind as the kind of case to which his approach would apply those with political or moral overtones. Although recognizing a wide range of cases to which his concept might apply, he offers numerous examples of persons engaging in civil disobedience objecting to what they perceive as unjust laws, such as prosecution of civil rights protesters in the 1960s, or cases involving the return of fugitive slaves in the nineteenth century and more recently the actions of those on both sides of the abortion debate.[236] In that setting, a judge can encourage or assist jurors in exercising their moral judgment without directly advising about the right to nullify simply by allowing into evidence or argument matters – such as the defendant's motives for his actions or his political beliefs – that strictly speaking have nothing to do with the offense charged, but that the jury may want to take into consideration in its deliberations.

But that analysis changes somewhat in a mandatory sentencing case. In that setting, the relevant information is not necessarily – or even at all – what political or moral considerations drove the defendant in his actions. In mandatory sentencing cases, the relevant information is the nature of the punishment that, if the jury finds the facts to convict, follows automatically, a punishment that the jurors may nonetheless consider to be unduly harsh under the circumstances. And it is difficult to see how that can be conveyed indirectly. Telling jurors that the defendant faces a serious punishment if convicted without mentioning the precise punishment is the worst of both worlds: jurors are told generally about punishment but left to guess about what it is. Of course, a judge could always allow evidence of the defendant's political beliefs or moral sentiments in those mandatory-sentencing cases in which the judge thought a jury might find that evidence important. But that would require the judge to guess about

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[235] *Id*. at 240-41.

[236] *Id*. at 242-43.

which cases jurors might want that information. Or he could allow that evidence in every mandatory-sentencing case, but then the mandatory sentence has nothing to do with whether the jury votes to acquit or convict. That may well influence the jury in certain cases, but it risks being 'underinclusive', that is, not covering all of the cases that direct information about the mandatory punishment would affect, sort of like medicine intended to cure high blood pressure that also, in certain patients randomly chosen, also relieves headaches. If it is knowledge of a certain or mandatory punishment that will be the difference, that is the information that needs to be conveyed.

The second objection is that this option, like the "nothing plus" option, still tries to do indirectly what can be more effectively accomplished directly. More to the point, if we want jurors to know about the mandatory punishment out of a concern or belief that that information will influence their deliberations, both "nothing plus" and this third option are very uncertain ways of accomplishing what we want to do.

For that reason, we propose a fourth option, involving two steps or phases. First, we propose that jurors be told about the punishment in mandatory sentencing cases. If one wants to limit the jurors' use of the information, an instruction along the following lines might be given:

> You may believe that your sole role in this case is to determine whether the prosecution has proven, beyond a reasonable doubt, that the defendant has committed the offense charged, and that any punishment that follows from that determination is for the court to determine. That may often be true, but it does not tell the full story in this case. This case involves a mandatory sentence of __ years for the offense charged, a sentence that this Court must impose upon the defendant if you find him guilty. I tell you this so that you understand fully what we know right now to be the consequences of your verdict. While it is proper and advisable for you to follow the law as I give it, you are not required to do so. You must, however, keep in mind that we are a nation governed by laws. Refusal to follow the court's instructions as to the elements of the crime charged should occur only in an extraordinary case. If you are convinced

> that, notwithstanding your finding that the defendant has committed the offense charged, the circumstances surrounding the offense are such that the legislature and your fellow citizens would not have wanted or could not have envisioned imposition of the otherwise mandatory sentence in these circumstances, you may vote to acquit. If you do not believe that such extraordinary circumstances are present in this case, you should follow the instructions on the law as previously given to you by the court.[237]

If this does not assuage concerns enough, one could go further. Drawing from the capital punishment cases, courts and legislatures could identify a set of aggravating and mitigating factors that a jury should consider in deciding whether the case before them rises to the level of "extraordinary." The possibility of bifurcating hearings to separate out guilt and sentencing considerations also exists.

This fourth option, no less than the others, raises some questions and may present some complications. Might it, for example, make trials more complicated and costly by encouraging introduction of evidence as to mitigating and aggravating factors that do not directly deal with the elements of the offense? It might, although there are countervailing pressures at work as well. If the circumstances of an offense give rise to many aggravating factors, prosecutors are likely to try to bring those out anyway, and perhaps to add additional charges. As for mitigating factors, defendants will want to bring those out, but if that is too forceful a part of their case, it compromises their ability to argue that they did not commit the offense in the first place. In either event, one refinement could be to limit introduction of evidence of aggravating factors by

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[237] This instruction paraphrases a similar but not identical instruction proposed by David Brody to advise jurors of their power to nullify. Among other changes, we have substituted language about a verdict's being "repugnant" to jurors with a direction that the jurors consider whether, in the circumstances of the case, the legislature and citzenry would have wanted the mandatory sentence to be applied. *See* David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 121 (1995).

allowing it only when the defendant introduces evidence of mitigating factors.[238]

Step two of our proposal would entail careful study, including rigorous research, of what actually happens when jurors are told about the mandatory sentence. One aspect of the debate over whether to inform jurors about punishment so far is that it has largely been an abstract and hypothetical one. This may explain the continuing, largely unwavering allegiance to the General Rule expressed by many notwithstanding the glaring doctrinal developments moving away from it as a practical matter. There has not been much empirical work that has sought to determine what will *actually* happen if jurors are told about punishment in mandatory-sentencing cases.

One recent research study does suggest that the results might be less than some fear. A number of experiments conducted by three social scientists examined what happened when jurors were expressly told of their power to nullify.[239] The studies set out to test whether the "chaos" predicted by Judge Leventhal in *United States v. Dougherty* would result if jurors were advised of their power to nullify.[240] "Chaos" was defined as

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[238] Of course, this option might still make trials longer and more costly, but whether to pursue criminal justice reforms is not always or even often decided strictly on the basis of cost. Indeed, it is a particularly odd if not ironic objection to an effort to address a problem with mandatory sentences, which dictate, on policy grounds, a very expensive punishment option– terms of imprisonment – without an individualized consideration of whether punishment is most effective for each defendant. A more serious consideration involves what to say to jurors in cases involving multiple charges, not all of which involve mandatory sentences. One choice is to inform jurors of the mandatory sentence for the charge to which it applies but say nothing about the punishment for the other charges. A second approach would be to tell jurors about the mandatory sentence only if it is the most serious charge faced by the defendant. A third option would be to limit information about punishment to those cases in which all offenses charged involve mandatory sentences. Which approach to adopt might be determined based on how the system operates in practice and which option works best.

[239] R. Neidermeier et al., *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?* 23 LAW AND HUMAN BEHAVIOR 331 (1999).

[240] *Id.* at 332-33, 348.

"undisciplined and biased juror judgment."[241] The studies involved a mock trial in which a doctor was charged with murder after he had given a blood transfusion involving unscreened blood to a man who later died as a result of that transfusion. The use of unscreened blood was technically illegal, although the doctor-defendant had done so only in a medical emergency after all filtered blood had run out. Jurors were given an instruction advising them of their right to nullify. Interestingly for our purposes, the defendant faced a mandatory sentence; the jurors were informed of the mandatory sentence, but the instructions they received included the standard one that they were not to consider possible punishment in reaching their verdicts. Those latter instructions were not tested by the studies' authors as part of the nullification instructions.[242]

The authors found that while the nullification instructions "seemed to heighten jurors' concerns about fairness," jurors generally showed a "prudent use of the power to nullify."[243] The authors concluded that "our juries resisted the lure of being liberated from the evidence by the nullification instructions. Within the context of the commonplace biases examined in these experiments, juries appeared to behave in a generally responsible manner.... [O]ur tentative answer is that nullification instructions do not provoke chaos."[244] That conclusion is consistent with other recent studies of acquittal rates in states in which jurors have been told about their power to nullify.[245]

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[241] *Id.* at 331.

[242] *Id.* at 334-36.

[243] *Id.* at 348.

[244] *Id.* at 350.

[245] *See* Brody, *supra* note 237, at 111-14. Also worthy of note is a study by Nancy King and Rosevelt Noble of sentencing in Virginia and Arkansas in non-capital cases under felony jury sentencing systems. That study found that sentences handed down by juries tended to be more severe than those handed down by judges. Nancy J. King & Rosevelt L. Noble, *Jury Sentencing in Noncapital Cases: Comparing Severity and Variance With Judicial Sentences In Two States*, 2 J. EMP. LEG. STUD. 331 (2005). *See also* Lillquist, *supra* note 99 (suggesting that jurors' greater roles in sentencing decisions following *Apprendi* will likely result in harsher sentences).

That study was limited and its conclusions are necessarily tentative. We similarly cannot be certain what will happen if jurors are told of the punishment in cases involving mandatory-sentences. But we think that it is a question that warrants study. It is possible that jurors in those cases, like the mock jurors in the study discussed, will act cautiously with the information provided. It may also happen that jurors will vote to acquit in many cases. That, however, is also information worth having, as it may reflect the general community's general dissatisfaction with that particular mandatory sentence, something that should be fixed through the legislative process rather than in the criminal justice system.

V. SOME FINAL QUESTIONS ADDRESSED

A. MANDATORY SENTENCING

Developments since *NSBI* first appeared, discussed above, prompt reconsideration of two other questions that were properly raised about our argument. First, is *NSBI* not really a plea for better-informed jurors or consistent treatment of defendants, but really an unstated attack on mandatory sentencing, *per se*? It is not, or at least it was not meant to be. There are in fact groups such as Families Against Mandatory Minimums and the November Coalition, and persons, including current Supreme Court Justices,[246] who have argued against mandatory sentences on policy grounds. We are not trying to advance those arguments or even participate in that debate. But we have assumed that most, if not all, mandatory sentences indicate legislative intent of the proper penalty as a general matter, but not necessarily a zero tolerance policy for any deviation from the prescribed sentence

Support for such a view arises from several considerations. First, this approach reflects how legislation generally operates:

[246] *See* ABA Justice Kennedy Commission, Report to the ABA House of Delegates (August 2004), *available at* http://www.abanet.org/crimjust/kennedy/JusticeKennedyCommissionReportsFinal.pdf. (setting forth recommendations, including, *inter alia,* "repealing mandatory-minimum sentences").

legislatures pass legislation directing a specific course of action based on a belief as to how things work in general, but expect that those charged with applying the statute will in the appropriate case make necessary adjustments in particular cases when the general conditions sought to be remedied do not exist.[247] This is particularly so with regard to legislation that is passed as much for political and symbolic purposes, as tough or mandatory sentencing measures frequently are, as opposed to careful policy considerations.

Finally on this point, it is useful to recall the Court's reliance in *Jones* and *Apprendi* , on the practice of colonial juries to apply the law in capital cases but to mitigate in appropriate circumstances. This suggests that a zero tolerance policy for mandatory sentencing schemes would be a significant departure from accepted practice that should not be assumed unless stated unambiguously by the legislature. It might even raise constitutional issues and harkens back to that concern as a guide to statutory interpretation in *Jones*. "The power to mitigate or nullify the law is no accident," one scholar has recently written, "[i]t is part of the constitutional design – and has remained part of that design since the Nation's founding."[248]

To be clear, we are not saying that mandatory sentences are unconstitutional in light of the *Apprendi* line of cases. We leave that argument to the more ambitious constitutional theorists and originalists. We note only that mitigation of the punishment by juries is and was an accepted practice for a

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[247] Professor Henry Wigmore has noted that

> Law and Justice are from time to time inevitably in conflict. That is because law is a general rule ... while justice is the fairness of this precise case under all circumstances.... Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.

Brody, *supra* note 237, at 97. *See also* RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 253 (2003) (describing jury as "safety valve" that legislatures rely upon in passing legislation); and J. LEVINE, JURIES AND POLITICS 104 (1992) (noting jurors' ability to "redefine" ambiguous laws in appropriate circumstances).

[248] Barkow, *supra* note 189, at 36; and *see also* Sauer, *supra* note 18, at 1257-58.

considerable time and that the Court has pointed to that for grounding the constitutional right to a jury trial.

B. JURY NULLIFICATION

This relates to a second concern: jury nullification. The specter of jury nullification can fairly be said to haunt the topic of involving jurors in sentencing decisions, and we addressed the issue in *NSBI*.[249] We raise it again to note only that, as the legal landscape has developed, it may be a misnomer in the current situation. Concern that advising jurors about punishment will encourage jury nullification comes from the General Rule. If, however, one accepts that, as a general proposition, jurors have a role in sentencing decisions, subject only to certain exceptions, and further that this derives from the constitutional right to trial by jury, then advising jurors about punishment and allowing them to act on that information is not a matter of jury nullification, but simply one manner in which the jury carries out its assigned and constitutionally protected duty.[250]

Further, consider again how a determinate sentencing scheme changes the usual analysis. In a standard case involving discretionary sentencing, two players — the prosecutor and the judge – make decisions whether to bring charges and impose punishment that turn on considerations beyond simply whether the defendant is guilty of the offense. Prosecutors may decline to bring charges against someone they know committed the offense for any number of reasons, including that the facts of the case warrant lenient treatment. Similarly, judges can decide that, notwithstanding that a defendant has been found guilty, the circumstances of the case call for no or minimal punishment. That looks something like nullification, although

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[249] *See* Heumann & Cassak, *supra* note 4, at 386-89.

[250] This point has been made more generally. *See* Weinstein, *supra* note 233, at 244 ("When jurors return with a 'nullification' verdict, then, they have not in fact nullified anything: they have done their job."). *See also* Barkow, *supra* note 189, at 36; Nancy Marder, *The Myth of the Nullifying Jury*, 93 NW. L. REV. 877 (1999); and Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997).

few if anyone call it that.[251] It is hardly surprising, then, that as determinate and mandatory sentencing systems cut judges out of the process, juries could exercise the same function judges perform in discretionary sentencing cases. The current system, however, leaves only the prosecutor with the option of deciding that the facts of the case do not warrant punishment.

Nonetheless, if this remains a source of unease, steps can be taken to address the problem, as in the form of an instruction to jurors about the mandatory sentence the defendant faced that includes as well cautionary language about how or under what circumstances that information should be used in the jury's deliberations and decision.[252]

C. WHAT ELSE SHOULD JURORS BE TOLD?

We come to a final area of inquiry, the typical slippery slope argument. If jurors in mandatory sentencing cases should be told about the punishment the defendant faces because that may affect the jury's verdict, what other information that might affect that decision should they be told? Should they be told, for example, about squalid prison conditions or the possibility of physical assault that the defendant faces if convicted and sentenced to a term of years? Or should they be told about the different quality of lawyering that might affect how the evidence is presented?

We do not believe that providing that additional information follows necessarily from the argument presented in *NSBI* and revisited in this article. Informing jurors about the punishment that will be imposed under a mandatory sentencing scheme tells them about an aspect of the case as it is supposed to work: upon a conviction, the penalty will follow. Indeed, it is the jurors who do not know about the penalty to be imposed that have an incomplete understanding of what the legislature has intended. Information about horrible or brutal prison conditions or the possibility that the defendant received ineffective assistance of counsel, on the other hand, is not of the same kind. It is not

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[251] *But see* Weinstein, *supra* note 233, at 246 (noting that prosecutors nullify all the time).

[252] *See* Brody, *supra* note 237.

information about how the system is supposed to work. Remedies for those conditions should come, but the source of those remedies should not be jurors. In that scenario, jurors are out of their element; they are not prison reformers. They are, however, directly and by design involved in the decision whether or not to send the defendant to prison and for how long.

VI. CONCLUSION

We undertook this re-examination of whether jurors should be advised of the punishment involved in determinate sentencing systems in light of a few cases and, more broadly, legal developments since the publication of *NSBI* that gave us reason to consider whether the time is ripe for this proposal. We have focused primarily on three cases — *Datcher*, *Pabon Cruz* and *Baca* – in which courts in the last fifteen years have been confronted with requests from defendants that juries deciding their fates be advised about the punishment they faced. We have also looked closely at three areas— jury sentencing, capital cases, and the *Apprendi* line – by which jurors do in fact have a significant role to play in sentencing. Finally, we have suggested a proposal in which jurors are advised of such punishments, followed by rigorous research into how that practice plays out in the real world.

In one sense, our proposal would certainly break new ground in a legal system that is still wedded to the General Rule. On the other hand, ours is also a system that believes – or at least pays lip service to the idea – that juries play a central role in safeguarding our basic liberties from an overreaching executive and legislature, and that assigns juries responsibility for so important a decision as whether defendants in capital cases will live or die. It is also a system in which the role of juries has changed over time, the Supreme Court has embarked on a "revolutionary" reconsideration of the role of the jury in sentencing, and in which the current systems of determinate sentencing have prompted considerable dissatisfaction. In this setting, we think it is worth exploring what would happen if jurors were informed about punishments in mandatory and determinate sentencing systems.