IMPROVING CRIMINAL JURY
DECISION MAKING AFTER
THE "BLAKELY REVOLUTION"

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ABSTRACT

The shift in sentencing fact-finding responsibility triggered by Blakely v. Washington will dramatically change the complexity and type of questions that many juries will have to answer. Among the most important challenges confronting legislatures now debating the future of their sentencing regimes is whether juries are prepared to handle these new tasks effectively—and, if not, what can be done about it. The literature addressing Blakely and jury reform advocates have essentially ignored these questions—yet absent reform, a number of limitations on juror decision making seriously threaten the accuracy of verdicts and the fairness, effectiveness, and credibility of the criminal justice system. In this essay, we assess juries’ capacity to handle their new post-Blakely responsibilities, considering problems of cognitive overload, frustration and loss of motivation due to complex structures, difficulties evaluating certain kinds of evidence juries do not ordinarily consider, distortions due to the framing of non-binary questions, and deliberation-related biases, among others. We then propose a model for sentencing-stage jury proceedings that would minimize these problems. Its components include bifurcation of proceedings, partial application of the rules of evidence, formulation of special verdict forms in certain specific ways that will minimize framing effects, structural simplification of sentencing tasks, a more active jury, and guidance for jurors on bias-reducing deliberation structures.
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J.J. Prescott and Sonja Starr†
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INTRODUCTION

In the wake of the Supreme Court’s June 2004 decision in Blakely v. Washington, jurors will play an increasingly central role in establishing the facts on which criminal sentences are based. Many state systems are already incorporating juries into their sentencing decision making, and many others are considering doing the same. Importantly, many of the questions juries will now face will be different in kind from the binary choices—guilty or not guilty—traditionally presented at the trial stage. Instead, post-Blakely jurors will face open-ended or multiple-choice questions, both quantitative and qualitative in nature, sometimes quite complicated, and often numerous. One of the major criticisms of Blakely and its predecessor, Apprendi v. New Jersey, has been that juries are, in practice, not good at making many of these more complex decisions. This point was notably raised by Justice Breyer in his majority opinion in United States v. Booker—a decision that created a curious tension, as the same Court that seven months earlier had revolutionized state guidelines sentencing by turning fact-finding over to the jury flatly rejected the same approach as unworkable in federal courts.

Neither the Blakely majority nor the Apprendi line’s scholarly defenders have disputed juries’ relative incapacity, instead arguing that inefficiency and even error is simply the price of honoring defendants’ Sixth Amendment rights. Yet this premise has been left largely unexamined, leaving key questions unanswered: in


2 530 U.S. 466 (2000).
what ways are juries likely to fall short in their new fact-finding tasks, and can these failings be remedied? Juries are indeed prone to a variety of decisional errors, many of which can be expected to occur more frequently and in novel ways as juries take on their post-Blakely responsibilities. In shaping and implementing post-Blakely sentencing frameworks, however, it is a mistake for policymakers and judges to assume that these incapacities are set in stone. Instead, Blakely should trigger serious attention to the ways these biases will play out in the sentencing setting, and to new reforms that can enable juries to adapt successfully to their new responsibilities—issues that existing jury reform literature has not even cursorily explored.

This Essay thus has two goals: to assess the cognitive and deliberative biases that will hamper post-Blakely jury performance, and to present a model of jury fact-finding that will minimize the effects of those biases. Unlike most current work on Blakely, we do not seek to answer the question whether, and to what extent, juries should be finding sentencing facts in the first place. We do, however, seek to inform the present debates on that question by providing a realistic assessment of juries’ capacities and a creative (sometimes even radical) approach to reform.

We identify four categories of potential post-Blakely problems, addressed in Parts II through V of this essay, respectively. First, effective consideration of the wide range of sentencing factors will require admission of certain types of evidence that juries ordinarily do not hear at the trial stage—yet juries may be prejudiced by this evidence if it is admitted at trial, and may be ill-equipped to evaluate much of it at any stage. Second, special verdict forms, or other means of presenting new and non-binary sentencing questions to the jury, risk distorting fact-finding through well-documented framing effects, and leaving the jury at sea when asked to draw ill-defined comparisons. Third, the tremendous complexity of jurors’ post-Blakely tasks threatens to cause cognitive overload, undermining information processing capacity and motivation. Finally, because sentencing offers jurors a wide range of verdict outcomes, they will be subject to deliberation biases—such as vote-trading or polarization—that have much less impact at the trial stage.

The solutions we propose to these problems encompass answers to each of the obvious post-Blakely policy questions facing legislatures, as well as some that have heretofore been ignored. We argue for bifurcation of proceedings in order to prevent prejudice from sentencing evidence at the trial stage and to reduce complexity and confusion at each stage of the proceedings. We recommend a partial application the rules of evidence at jury proceedings related to sentencing, permitting the jury to consider evidence that jurors are fully capable of weighing, like hearsay, but excluding, for instance, irrelevant or highly prejudicial information. In order to minimize cognitive overload and loss of motivation, we suggest reducing the structural complexity of sentencing tasks; making jurors more active in proceedings; and permitting experimentation with division of responsibilities among jurors. And to minimize deliberation biases, we propose a shift away from the traditional model in
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which jurors are provided no guidance at all on how to deliberate, in favor of judges recommending structures that may reduce post-Blakely biases.

Today, legislatures across the country face fundamental questions about the direction of post-Blakely sentencing regimes. These choices—not just whether to commit sentencing fact-finding to the jury, but how new jury proceedings should work—could hardly be more important. Thousands of individuals are sentenced each day in the United States, the vast majority in state courts, and the accuracy of sentencing outcomes are profoundly important not only to the affected defendants and victims, but also to ensuring a fair, credible, and effective justice system. Juries’ ability to perform their new tasks well is thus vital. Accepting jury incapacity is simply not an option.

I. SHAPING THE POST-BLAKELY JURY:
BACKGROUND AND OBJECTIVES

A. Blakely and its Aftermath

In Blakely v. Washington, the Supreme Court vacated as inconsistent with the Sixth Amendment right to trial by jury a sentence that had been enhanced under the state sentencing guidelines scheme based on a judge’s finding, by a preponderance of the evidence, that the crime was committed with “deliberate cruelty.” The decision built on the Court’s earlier holding in Apprendi v. New Jersey, which involved a statutory sentencing enhancement; in both cases, the Court held that, with the possible exception of criminal history, facts increasing a defendant’s maximum sentencing exposure must (if not pled) be proven to a jury beyond a reasonable doubt. In reaching this conclusion, the Court rejected the traditional distinction between offense elements and “sentencing factors,” reasoning that if a fact raises a defendant’s maximum sentence, it is functionally indistinguishable from an element.

In response to a flood of litigation and mass confusion, the Court soon addressed Blakely’s implications for the federal system. United States v. Booker, released in January 2005, contained two key holdings reached by different majorities. First, Justice Stevens wrote for the Apprendi-Blakely majority that Blakely’s Sixth Amendment holding applied to the federal Sentencing Guidelines. Second, Justice

4 124 S.Ct. at 2543.
5 530 U.S. at 494-96; see Almendarez-Torres v. United States, 523 U.S. 224 (1998) (holding that past offenses need not be proven to the jury for the purpose of applying a recidivist statute). The Court in Apprendi suggested that Almendarez-Torres may well have been wrongly decided, 530 U.S. at 489, but found it unnecessary to revisit the issue; some have argued that it should do so this Term in deciding Shepard v. United States, a case presenting a related issue. See Amicus Br. of Nat’l Ass’n of Crim Def. Lawyers in No.03-9168. But see Douglas Berman, Conceptualizing Blakely, 17 FED. SENT. R. ___ (forthcoming) (arguing that Blakely’s logic only requires juries to determine characteristics of the offense, not the offender).
6 Apprendi, 530 U.S. at 494-96; Blakely, 124 S.Ct. at 2539.
Breyer—writing for the four Apprendi-Blakely dissenters plus Justice Ginsburg—addressed the remedy, declining to shift fact-finding to the jury and instead rendering the Guidelines merely advisory. This solved the constitutional problem—so long as the Guidelines did not mandate a lower sentence, the Sixth Amendment did not bar a judge from choosing a higher one—but at the cost of abandoning a binding, determinate sentencing system.

The Court’s choice of remedy was based principally on practical concerns about jury fact-finding, echoing those outlined by the dissenters in Apprendi and Blakely. These include fears that jurors would become overwhelmed by the number of sentencing factors and amount of evidence involved; that determination of some sentencing factors would be legally difficult or factually complex; that defendants would be placed in a strategic bind at unitary proceedings, because introducing evidence on sentencing factors might seem to admit guilt; that sentencing-related guilt determinations would generally prejudice the jury in determining guilt, and that bifurcation to solve this problem would be too costly; and that some facts relevant to sentencing (such as probation reports or evidence of the defendant’s behavior at trial) are not available until after trial. Plea-bargaining would not eliminate these problems, Justice Breyer argued, for these considerations would affect each side’s incentives to enter a plea agreement. The Court acknowledged that its choice of remedy was “not the last word: The ball now lies in Congress’ court.”

Booker leaves state legislatures in guidelines states in an odd position—they have been told by Blakely to shift sentencing fact-finding to the jury, and yet a new majority of the Court has now declared that approach impracticable on the federal level. State sentencing schemes are somewhat less intricate than the federal guidelines, but many of the possible problems the Court raised are equally applicable on the state level. States are, however, free to disagree with the Court’s policy opinions—as is Congress, if it chooses—and most guidelines states have already begun moving toward jury fact-finding, often modeled on the Kansas system, which has

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7 See, e.g., Apprendi, 530 U.S. at 556-57 (Breyer, J., dissenting).
8 See Booker, 125 S.Ct. at 762 (citing, e.g., determination of loss in securities fraud cases).
9 See, e.g., Apprendi, 530 U.S. at 557-58 (Breyer, J., dissenting).
10 See, e.g., Blakely, 124 S.Ct. at 2546 (O’Connor, J., dissenting).
11 Id. See generally Booker, 125 S.Ct. at 779 (Stevens, J., dissenting) (arguing that these practical concerns are overstated and have not been borne out in states’ experiences after Blakely and Apprendi).
13 125 S.Ct. at 768.
14 See, e.g., WASHINGTON STATE SENTENCING GUIDELINES COMMISSION, ADULT SEN-
been in effect since a post-Apprendi decision of that state’s supreme court.\textsuperscript{15} But states that adopt jury fact-finding would be mistaken not to consider seriously how to deal with the various problems the Court raised.

\textit{Blakely} strictly and constitutionally circumscribes how all states and the federal government can arrange their sentencing systems, but we focus on the fourteen states that currently have binding guidelines or functionally equivalent statutory schemes.\textsuperscript{16} A look at these systems provides a sense of the new kinds of questions jurors will have to apply post-\textit{Blakely}. State guidelines are generally simpler than their federal counterparts, but nonetheless contain numerous sentencing factors that are quite diverse in kind. Some of the new questions for jurors will be objective in character—\textit{e.g.}, drug quantity, amount of economic injury, number of victims, age of offender, whether committed on school property. Others will be far more subjective, involving terms that have no clear definition or that appeal to jurors’ moral judgments. These include characterizations of a defendant’s state of mind (\textit{e.g.}, racial bias, as in \textit{Apprendi}, or “deliberate cruelty,” as in \textit{Blakely}), or of offense severity relative to other instances of the same statutory offense (\textit{e.g.}, “excessive brutality” or whether a victim is “vulnerable”).\textsuperscript{17} Still others will involve both subjective

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\textsc{16} JON WOOL & DON STEMEN, \textsc{AGGRAVATED SENTENCING: BLAKELY V. WASHINGTON PRACTICAL IMPLICATIONS FOR STATE SENTENCING SYSTEMS} I-2 (Vera Inst. of Justice, State Sentencing and Corrections Policy and Practice Review, Aug. 2004). In addition, although Booker makes clear that wholly \textit{voluntary} guidelines schemes are not affected by \textit{Blakely}, the decision may arguably still affect those states in which judges must provide justifications for departing from advisory guidelines. See \textit{id}. Moreover, many states that do not have guidelines schemes \textit{do} have particular statutory enhancements that have relied on judicial fact-finding, and these will also be affected by \textit{Blakely}. \textit{Id}.

\textsc{17} E.g., KAN. STAT. ANN. § 21-4716 (2003) (excessive brutality and vulnerable victim enhancements); WASH. REV. CODE § 9.94A.535 (2005) (vulnerable victim); OR. ADMIN. R. 213-008-002(1)(b) (2004) (“The degree of harm or loss involved was significantly greater than typi-
and objective components. Moreover, the complexity of juries’ task will vary, with even some of the most “objective” determinations proving quite difficult.

Each legislature that chooses a shift to jury fact-finding will be forced to confront several crucial structural and procedural questions: whether to shift all sentencing fact-finding responsibility to the jury, or instead only aggravating factors or some other subset; whether the resulting jury proceedings should be bifurcated into trial and sentencing phases or instead unitary; whether and to what extent the rules of evidence should apply at such proceedings; and how questions should be posed to the jury. In addition, legislatures should also consider reforms to courtroom or deliberation procedures to improve the jury’s sentence fact-finding capacities post-Blakely. It would be unwise for legislatures suddenly to increase and significantly change the burdens jurors face without providing them the tools they need to manage those new tasks.

B. Objectives of Jury Reform

This essay aims to identify, and propose solutions to, the biases introduced by shifting sentencing fact-finding power from judges to juries. Our specific recommendations are shaped by an understanding that jury reform must balance a number of competing goals. For instance, “accuracy,” in the sense of results that track the actual history of the events at issue, is certainly not only critical to effective deterrence and incapacitation of wrongdoers, but also has a vital moral purpose. But achieving an accurate outcome is plainly not the only goal of the criminal justice process.


19 See infra Part IV.

20 One important question is whether mitigating factors, in addition to aggravating ones, should be submitted to juries in post-Blakely proceedings. The Constitution imposes no such requirement, see Apprendi, 530 U.S. at 490, but there may be prudential reasons to consider both aggravating and mitigating factors at once.


22 See Charles Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts, 98 Harv. L. Rev. 1357, 1377-78 (1985) (arguing that jury verdicts serve a socializ-
curate” outcomes because it leads to guilty people going free; society accepts this because it values procedural fairness to criminal defendants, believing that wrongful convictions are far worse than erroneous acquittals. Slightly broader than “accuracy,” perhaps, is the concept of “rationality” in juror decision making. “Rationality” is often equated with the efficient maximization of one’s own welfare, but jurors are not driven in their decision making principally by self-interest, but by a sense of legal, civic, or moral duty.

We use terms like “rationality” and “accuracy” interchangeably as a shorthand to describe decision making that reaches, to the greatest extent possible in light of inevitable limits on jurors’ cognitive processes, the result the law requires based on the evidence. Thus, a rational juror would vote to find the presence of an aggravating sentencing factor if and only if the evidence supports that result beyond a reasonable doubt. The law recognizes, of course, that the strength of evidence and credibility of witnesses is debatable, such that there may be no single “rational” outcome. Likewise, sentencing factors do not consist solely of “objective” factual determinations; jurors will be asked to make value judgments. Nonetheless, the biases we discuss may still be described as “irrational,” even if they only cause jurors to change what was already a subjective judgment call. For instance, when different ways of framing questions trigger systematic changes in outcomes, random variation among jurors’ qualitative assessments or normative judgments is unlikely to be the cause; instead, the wording of the question must be biasing jurors’ conclusions. Distortions in value judgments due to suggestive question framing or deliberation structures may prevent the jury from reaching a result that truly represents the community.

23. Although some have argued that the presumption of innocence does not apply to already-convicted defendants at the sentencing stage, see Alan C. Michaels, Trial Rights at Sentencing, 81 N.C. L. Rev. 1771, 1778 (2003), Blakely stands for the proposition that it does apply, at least, as to the establishment of facts that increase a defendant’s sentencing exposure.


27. This is not to say that value judgments that are representative of the community are always “rational,” of course. Racial prejudice, for example, may be common in a particular community, and may well bias a jury’s value judgments as well as its factual conclusions. See, e.g., Erwin Chemerinsky, Eliminating Discrimination in Administering the Death Penalty, 35 Santa Clara L. Rev. 519, 524 (1995). We do not focus on racial bias here, however, believing that we could only give it short shrift in a short essay raising so many other issues, and sus-
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Producing “rational” or “accurate” outcomes in particular cases is, however, not the only objective of criminal jury processes. Other important considerations include the fairness of the justice system as a whole, as well as the effect of jury service on jurors themselves and on society more broadly. The jury has always played an important role in American democracy, and jury service is perhaps the only civic responsibility (other than paying taxes) that is legally required of most adult Americans. It is also the only way in which many Americans actively participate in government. One objective of jury reform, therefore, might be the improvement of the process from the jurors’ perspective, so that jury duty strengthens rather than undercuts jurors’ sense of civic duty. The jury also has an important symbolic role in the “ritual” of a criminal trial. The notion of facing one’s peers gives critical moral legitimacy to criminal trials—legitimacy that stems in part from the various traditions surrounding the jury trial and deliberation process. For these reasons, although enhancing the jury’s democratic or cultural role is not our primary objective, we recognize the need to ensure that reforms do not undermine that role, and we shape our recommendations accordingly.


For instance, Iontcheva Turner has argued for an expansion of jury sentencing, as opposed to merely sentencing fact-finding, in part because citizens’ engagement in democratic deliberation on critical moral issues “revitalizes and improves political life as a whole.” Jenia Iontcheva, Jury Sentencing as Democratic Practice, 89 VA. L. REV. 311, 341 (2003); see also Turner, supra note 18 (arguing that Blakely provides an opportunity for state legislatures to consider implementing jury sentencing).

See Laurence Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 HARV. L. REV. 1329, 1376 (1971) (arguing that a trial is a “ritual” as much as it is an “objective search for historical truth,” and that the jury’s role in that ritual is to “mediate between ‘the law’ in the abstract and the human needs of those affected by it”).

See Nesson, supra.

Projects with these goals already exist. See, e.g., American BAR ASSOCIATION AMERICAN JURY PROJECT, GENERAL PRINCIPLES (Proposed) (2004) (“ABA Proposed Principles”), available at http://www.abanet.org/juryprojectstandards (indicating the ABA’s view on which jury reform issues are most pressing).
guably improve decision making if done properly, but those issues have been
treated extensively elsewhere.\textsuperscript{34} We also do not focus on the issue of jury nullification,
because it is quite different in kind from the other problems we address: nullification results not from cognitive processing problems that cause an inability to apply the law correctly, but from a deliberate rejection of the result the law requires. However, we believe that \textit{Blakely} may have significant impacts on jury nullification—raising the new possibility of “sentencing nullification”—an issue that deserves further research in the coming years.\textsuperscript{35}

Finally, in considering whether to allocate certain decision-making responsibilities to juries or instead to judges, it will be important to understand both sides of the comparison: what are juries’ capacities and limitations relative to those of judges? We draw such comparisons where relevant, but primarily focus on juries and not judges. Some of the problems we discuss are specific to group behavior and do not apply to trial court judges at all. However, we also discuss cognitive biases affecting individual juror decision making that probably apply to some degree—and often to an equal or even greater degree—to judges.\textsuperscript{36}

We believe these problems are relevant to post-\textit{Blakely} policy debates for two reasons. First, these debates should not be limited to the question of how to allocate decision-making responsibilities between judges and juries, but should also focus on

\begin{itemize}
\item \textsuperscript{34}See, e.g., VALERIE P. HANS \& NEIL VIDMAR, JUDGING THE JURY (1986).
\item \textsuperscript{35}Jury nullification is today fairly uncommon, see Kamipono David Wenger \& David A. Hoffman, \textit{Nullificatory Juries}, 2003 WIS. L. REV. 1115, 1130 (2003), but we speculate that a new form of it might emerge after \textit{Blakely}: sentencing-related findings that contravene the evidence. This could result for a number of reasons: residual doubt or disagreement as to guilt on the underlying offense; sympathy for a defendant or anger at the state combined with reluctance to acquit entirely; and jurors’ belief that the sentences for particular crimes are too high. Cf. Kristin L. Sommer et al., \textit{When Modern Juries Fail to Comply With the Law}, 27 PERSONALITY \& SOC. PSYCH. BULL. 309, 311 (citing studies showing that “when people believe that their decisions may result in unfair (e.g., overly punitive) outcomes for others, these decision makers may augment the importance of information leading to particular (i.e., fair) conclusions”). On the other hand, the existence of the compromise option of “sentencing nullification” might, we speculate, reduce the incidence of jury nullification at the threshold guilt stage. See infra notes 210-212 and accompanying text (discussing compromise effect). Although jury nullification is widely decried as lawless, many scholars have defended it, arguing that it ensures that the jury’s judgment truly reflects the community’s judgment of defendant’s moral culpability, gives a voice to disempowered minorities, and provides a check on abuses of government power. See, e.g., Wenger \& Hoffman, supra, at 1138-43. Similar arguments might be made (perhaps more effectively) in the sentencing context, wherein nullification might be seen as a check on inflexible determinate sentencing systems that bar judges from tailoring sentences to the demands of justice in individual cases.
\item \textsuperscript{36}W. Kip Viscusi, \textit{Do Judges Do Better?}, in \textit{PUNITIVE DAMAGES: HOW JURIES DECIDE} 186, 206 (Cass R. Sunstein et al. eds., 2002) (“Judges are human and may reflect the same kinds of irrationalities as other individuals.”).
\end{itemize}
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how to improve the capacities of those decision makers. The allocation question may be constitutionally determined: Blakely means that if a state wants to maintain mandatory sentencing guidelines, it will have no choice but to shift to juries the responsibility to find certain sentencing-related facts. Given that fact, it should be an overriding policy priority to ensure they can perform those tasks well. Because judges are less likely to have wholly new responsibilities—although they may regain some of their old discretion—focusing on improving the structures and processes by which judges find facts is less urgent. Second, even where similar problems afflict juries and judges, juries may offer more opportunity for successful reforms. Judges are experts who tend to be confident in their abilities and to have developed longstanding patterns, and therefore are resistant to change. Separation of powers concerns may preclude political interference with judicial processes. And whereas a judge can instruct jurors to follow particular procedures, can control the framing of the questions they are asked, and can exclude evidence from their consideration, there is no supervisor who can perform a similar directing/gatekeeping role for judges, making it harder to implement reforms. Jury reform is subject to none of these limitations.

II. APPLICATION OF THE RULES OF EVIDENCE

In every state and in the federal courts, the rules of evidence applicable at trial do not apply at judicial sentencing proceedings. Indeed, at federal sentencing, a statute provides that there is “no limit” on the evidence judges can consider.\(^{37}\) As new procedures for jury factfinding related to sentencing are considered and designed in the wake of Blakely, one of the most important issues will be whether and to what extent the rules of evidence must or should apply to those proceedings. This Part addresses, in turn, the constitutional limits on this policy choice; the extent to which the prudential rationales underlying the rules of evidence mean that they should apply at such proceedings; and the problem of prejudice resulting from sentencing-related evidence being introduced at trial, which we think argues compellingly for bifurcation of proceedings. We principally refer to the Federal Rules of Evidence, despite our focus on state systems, because they have been the model for many states’ rules of evidence.

A. Constitutional Requirements

Most of the Federal Rules of Evidence, and their state counterparts, are not required by the Constitution even at trial, and thus presumably would not be constitutionally required at sentencing-related jury proceedings even after Blakely.\(^{38}\) How-


\(^{38}\) See, e.g., Dickerson v. United States, 530 U.S. 428 (2000) (“Congress retains the ultimate
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ever, some restrictions on evidence admission are grounded in the Confrontation Clause of the Sixth Amendment and similar confrontation rights under the Due Process Clauses of the Fifth and Fourteenth Amendments.\(^\text{39}\) For decades, the Supreme Court had held that these clauses barred admission of hearsay unless it bore certain indicia of trustworthiness roughly paralleling the hearsay exceptions in the Federal Rules of Evidence.\(^\text{40}\) In 2004, in Crawford v. Washington, the Court overruled these precedents, holding that the right to confront witnesses is procedural in nature and cannot be satisfied by substantive guarantees of that evidence’s reliability.\(^\text{41}\) Specifically, the Court held that the Constitution barred admission of testimonial statements of a witness not appearing at trial unless he was unavailable and the defendant had had a prior opportunity to cross-examine him.\(^\text{42}\) This rule overlaps considerably with the hearsay rule and its exceptions, but its restrictions on testimonial hearsay are generally stricter than most states’ rules provide, while it does not restrict nontestimonial hearsay at all.\(^\text{43}\)

Courts have generally held that the Constitution provides few limits on the introduction of evidence at sentencing. In 1949, in Williams v. New York, the Supreme Court upheld a sentencing court’s reliance on a presentence investigative report, which was hearsay.\(^\text{44}\) The Court explained that use of such reports “aid[s] a judge in exercising . . . discretion intelligently”\(^\text{45}\) and was consistent with hundreds of years of historical practice. Notwithstanding the Court’s subsequent decision in Specht v. Patterson,\(^\text{46}\) holding confrontation rights applicable in a proceeding to determine whether a defendant should be sentenced as a “habitual sex offender,” federal courts today uniformly hold that those rights do not apply to guidelines sentencing proceedings.\(^\text{47}\) Some lower courts had nonetheless provided a lesser degree of

\(^\text{39}\) See, e.g., In re Oliver, 333 U.S. 257, 273-74 (1948) (due process).

\(^\text{40}\) See, e.g., Ohio v. Roberts, 448 U.S. 56, 66 (1980).

\(^\text{41}\) 124 S.Ct. 1354, 1370 (2004).

\(^\text{42}\) Id. at 1374.

\(^\text{43}\) The Court suggested that its holding would not have changed the outcomes of many of its own previous decisions, id. at 1367-68, but that many lower court decisions applying its precedents had been wrongly decided. Id. at 1371-72.

\(^\text{44}\) 337 U.S. 241 (1949).

\(^\text{45}\) Id. at 245.

\(^\text{46}\) 286 U.S. 605 (1967).

\(^\text{47}\) Initially, after the Guidelines came into effect, there was a circuit split on this issue. See United States v. Fortier, 911 F.2d 100 (8th Cir. 1990), overruled by US v. Wise, 976 F.2d 393 (1992); 1991 WL 179608 (6th Cir. Sept. 17, 1991), vacated, 976 F.2d 1502 (6th Cir. 1992) (en banc); see also United States v. Fatico, 441 F. Supp. 1285, rev’d, 579 F.2d 707
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constitutional protection to defendants at sentencing, applying a “reasonably trustworthy” standard to hearsay—but Crawford abrogates these precedents. And many courts do not limit the use of hearsay at sentencing at all.

Blakely may change this picture, however. The text of the Sixth Amendment suggests that Confrontation Clause rights apply any time the right to the jury trial applies—namely, during “all criminal prosecutions.” It is not certain that the Supreme Court will reach this conclusion, however, as its construction of “criminal prosecutions” has varied based on which Sixth Amendment right is being applied.

We take no position on this constitutional question here. Nonetheless, we observe that in light of the Apprendi/Blakely rationale that facts that increase the defendant’s maximum sentence exposure are functionally indistinguishable from elements of the offense, it seems probable (although far from certain) that the Court will hold that Sixth Amendment confrontation rights apply at jury proceedings to determine sentencing facts.

At least one court so concluded in the death penalty context, after Ring v. Arizona applied Apprendi’s requirement to aggravating factors in capital cases. The Confrontation Clause only provides rights to defendants, however, and so its limits will apply in an asymmetric manner, not restricting the defendant’s own introduction of evidence.

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48 See Michaels, supra, at 1837-38; United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990).
49 See U.S. CONST. amend. VI; see also Adam Thurschwell, After Ring, 15 FED. SENT. R. 97 (2002).
50 See Michaels, supra, at 1780-81 & n.28 (collecting cases and giving examples).
51 If the same Confrontation Clause standards are applied at sentencing as at trial, Crawford suggests that testimonial portions of presentence reports may well be excluded. See Crawford, 124 S.Ct. at 1367 (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . . .”).
52 536 U.S. 584 (2002).
53 See United States v. Fell, 217 F. Supp. 469 (2002). Fell in fact held that all of the Rules of Evidence must apply in capital sentencing proceedings, but that holding was based in part on the “heightened reliability” considerations applicable in the death penalty context. Thurschwell, supra, at *6. In noncapital cases, it is not likely that courts would rule that all the rules apply.
54 At capital sentencing proceedings, defendants have an affirmative right to introduce mitigating evidence unrestricted by the rule against hearsay, see Lockett v. Ohio, 438 U.S. 586 (1978), but this Eighth Amendment right does not appear to apply at noncapital proceedings, see Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (holding that the Eighth Amendment provides no right to individualized sentencing in noncapital cases). Still, as discussed in Section B, there may be good prudential reasons for introducing further asymmetries in application of the evidentiary rules.
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B. Prudential Considerations

Of course, there may be good policy reasons to apply the rules of evidence at sentencing-related jury proceedings, even if they are not constitutionally required. This prudential analysis requires us to consider why we now exclude certain evidence at trial but not at sentencing: does it turn on juries’ and judges’ relative skills as decision makers, or on other differences between trial and sentencing proceedings? The rules of evidence are not monolithic, and so these rationales, and their implications for application post-Blakely, may vary widely. We provide only general guidance rather than a comprehensive rule-by-rule analysis, but further research is merited.

At the outset, we note that whether particular categories of evidence should be permitted at post-Blakely sentencing proceedings may also depend on one’s view of the overarching purpose of the rules of evidence. Consider the question whether jurors should be permitted to consider a probation office’s presentence investigation report. A proponent of an economic model of evidence law that weighs the gains in accuracy against the costs of gathering and weighing particular kinds of evidence might argue that presentence reports, which are prepared by experienced experts, are likely to be reliable and to contain a great deal of useful information, and that admitting them will actually reduce costs by obviating the need for live testimony. Meanwhile, a proponent of a model of evidence law that emphasizes the traditional rituals of trial might object that basing sentencing determinations on what jurors learn poring over the fine print of a long government document hides critical aspects of the process from public view and undermines that process’s legitimacy. This is only a hypothetical example, and there are counterarguments on both sides, but it

55 Neither distinction fully explains the current differential application of the rules of evidence in the federal system: the rules do not apply at bench trials, supporting the “judges are different” view, see Steven Clymer, Assessing Proposals for Mandatory Procedural Protections for Sentencings Under the Guidelines, 12 FED. SENT. R. 212 (2000), but they also do not apply at jury capital sentencing, suggesting that it is sentencing that is different. Similarly, in at least 14 states, the rules of evidence do not apply to jury proceedings in capital sentencing, although in other states the rules do apply to the state’s evidence but not to the defendant’s. See Carol S. Steiker, Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty, 77 N.Y.U. L. REV. 1475, 1481 n.23 (2002).


57 See Nesson, supra, at 1357 (arguing that the principal function of the rules of evidence is to make the verdict acceptable to the public); Tribe, supra, at 1391-92 (describing procedural rules, including confrontation requirements, as “partly ceremonial or ritualistic,” serving as “a reminder to the community of the principles it holds important”).

58 For instance, presentence reports might arguably be too complicated for jurors to understand or discuss usefully, or live witness testimony might be more accurate; conversely, these reports’ centrality to sentencing over many decades might make them part of the American sen-
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illustrates that the approach one brings to a question can often, unsurprisingly, dictate the result. We try here to balance the many concerns that underlie the law of evidence, including, for instance, “accuracy, efficiency, tradition, ritual, acceptability, and legitimacy.”

The reasons the rules of evidence are not applied at judicial sentencing proceedings are likewise complex. In Williams v. New York, the Supreme Court emphasized both longstanding tradition and “sound practical reasons.”

Rules of evidence . . . [were in part] designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. . . . Highly relevant — if not essential — to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.

This reasoning turns not on the nature of the judge as a decision maker per se, but rather on the nature of the sentencing decision. Arguably, the implication of this policy rationale is that juries who determine sentencing facts post-Blakely should be given access to as much information as possible—although Blakely’s rejection of the elements/sentencing factors distinction may itself be inconsistent with Williams’ emphasis on the purpose-based distinction. Moreover, many scholars have offered a different explanation: we do not apply evidentiary rules at sentencing because judges are more skilled at weighing the value of particular kinds of evidence and avoiding prejudice. And indeed, if juries are considerably less capable of processing and weighing certain kinds of information, or likelier to be irrationally biased by it, there is a strong argument for excluding information at sentencing-related hearings by applying the rules of evidence.

60 337 U.S. 241, 247 (1949).
62 See Richard D. Friedman, Minimizing the Jury Over-Valuation Concern, 2003 MICH. ST. L. REV. 967, 969 (2003) (arguing that “overvaluation” concerns can only justify exclusion if sufficiently extreme that “the truth-determination process is worse if the jurors hear the evidence than if they do not”). We would modify Friedman’s formulation: to justify exclusion, juries’ over-valuation must be significant enough that the added accuracy from admission is insufficient to offset other disadvantages of admission.
Empirical studies, however, provide only mixed support for this premise: juries are fairly competent at discounting the value of certain kinds of evidence (while judges are not immune from biases and information-processing problems of their own). In particular, the assumption that jurors are incapable of discounting and weighing hearsay evidence does not seem to be borne out by social science studies. Jurors have plenty of experience with similar processes in their daily lives. All of us constantly evaluate the credibility of information we receive, which generally entails treating secondhand information as less trustworthy than firsthand information unless we have some good reason for trusting the more distant source. So, to the extent that the Constitution permits it, there may be a good argument for permitting the liberal use of hearsay at sentencing factfinding hearings in front of juries. Indeed, scholars who have conducted these studies have argued in favor of liberalizing the hearsay rules at trial as well.

Scholars have reached varying conclusions as to jurors’ capacity to filter out irrelevant evidence. On the one hand, jurors should generally be fairly good at identifying what information bears on a particular issue: similar cognitive processes are again routine in daily life. On the other hand, jurors are susceptible to “cognitive overload,” a problem we discuss in detail in Part IV; here, we note simply that reducing jurors’ cognitive burdens is one reason to impose rules, like the relevance rule, that reduce the quantity of information with which they are bombarded.

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63 See Michael J. Saks, What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997) (“Although far fewer studies have been conducted using judges [than using juries], few if any of them suggest judges are better able to base their decisions squarely on legally admissible information.”).

64 See, e.g., Peter Miene et al., Juror Decision Making and the Evaluation of Hearsay Evidence, 76 MINN. L. REV. 683 (1992), Margaret Bull Kovera et al., Jurors’ Perceptions of Eyewitness and Hearsay Evidence, 76 MINN. L. REV. 703 (1992), Stephan A. Landsman & Richard F. Rakos, 15 LAW & PSYCHOL. REV. 65 (1991); Friedman, supra, at 976. But see Seigel, supra, at 1032-34 (criticizing these studies).

65 The relevance rule does apply at judicial sentencing in some systems, and in others it is likely functionally applied, since judges are free to consider whatever evidence they wish and will not likely choose to hear evidence they themselves consider irrelevant. It is not necessarily obvious, however, that state legislatures would choose to apply the relevance rule at jury sentencing: it is not constitutionally required, and states might well decide that it should be the fact-finder’s responsibility to decide what evidence is relevant—thus, the rule would apply at judicial sentencing (because there the fact-finder herself is the gatekeeper) but not at jury sentencing.

66 For a seminal work advocating deference to the jury’s ability to determine factual relevance, see Edmund M. Morgan, Functions of Judge and Jury in the Determination of Preliminary Questions of Fact, 43 HARV. L. REV. 165, 165 (1929); see also JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898).

67 Posner, supra.
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Moreover, juries’ assessments of relevance may be distorted by overreliance on the “expert” opinion of the judge; they may assume (unless, at least, they are expressly told that the judge has no power to exclude irrelevant testimony) that all evidence presented to them is relevant in some way, and will thus not trust their own contrary judgments.\(^68\) In addition, the introduction of irrelevant evidence imposes costs on the judicial system and on the parties.\(^69\) Those cost concerns may be especially relevant in the post-Blakely context, as policymakers search for ways to minimize the inevitable costs of increased jury fact-finding.\(^70\) Because inclusion of irrelevant evidence by definition does not contribute to rational jury decision making (even if it does not significantly harm it),\(^71\) and also does not seem to contribute to the other social and cultural purposes of jury trials,\(^72\) we therefore believe there is little to be gained, and something to be lost, by eliminating the relevance rule at sentencing-related jury proceedings.

Juries may be quite susceptible to emotional appeals, some of which might be unduly prejudicial.\(^73\) For this reason one might justifiably exclude evidence that carries a potential for prejudice substantially outweighing its probative value in sentencing-related jury proceedings. Application of this rule might have the notable impact of excluding victim impact evidence, for instance. But it bears noting that different objectives might lead us to different conclusions about the relative susceptibility of judges and juries to “prejudice.” Perhaps we trust a group of lay people

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\(^68\) Callen, supra, at 1275-76.

\(^69\) Posner, supra. These costs may disproportionately burden criminal defendants, who generally have fewer resources to acquire evidence. Cf. Callen, supra, at 1296.

\(^70\) See infra Section II.C.

\(^71\) The premise of this point is that judges do not erroneously exclude relevant evidence, no doubt overly optimistic. But the low threshold for “relevance” minimizes erroneous exclusion. See Callen, supra, at 1256.

\(^72\) The empowerment of jurors to make all relevance determinations might, in theory, increase their sense of satisfaction with the trial process, but we doubt it; cognitive fatigue and excess complexity generally tends to decrease morale. See infra Part III.

drawn from the community to make findings that are “fair” or that reflect the community’s values more than we trust a judge to do the same. 74 Moreover, when juries make sentencing judgment calls, perhaps we want them to some degree to be influenced by emotions (although not by certain kinds of emotional appeals, such as appeals to racial prejudice). 75 Accordingly, whether rules designed to minimize “prejudice” should apply (or, at least, how judges should apply them) might also turn on what sort of determination is at issue: one for which factual “accuracy” is prized, or one for which we trust the jury’s moral judgments.

The determination of certain sentencing facts may well necessitate some relaxation of the rules of evidence in order to avoid substantial new costs; for instance, if Blakely is extended to include defendant’s criminal history, 76 jury review of presentence reports could be far less costly than live testimony on past crimes. Other factors, like drug quantity, are fairly similar to other kinds of factual determinations juries regularly make, and do not demand analogous relaxation. 77

One set of rules that will may have to be modified, at least if proceedings are bifurcated, are the restrictions on introduction of character evidence—specifically, the total bar on “other crimes, wrongs, or acts” being introduced to show criminal propensity. 78 Criminal history is routinely introduced for exactly that purpose at sentencing 79—it is greater criminal propensity that justifies increasing recidivists’ sentences—and even if Blakely is not extended to require jury determination of past criminal history, other bad-act evidence will be important to enable juries to determine a defendant’s “relevant conduct” and perhaps to find such factors as racial bias. Although such evidence may run a significant risk of prejudicing the jury, 80 its exclusion in such circumstances can better be accomplished by applying the state equivalent of Rule 403 case-by-case; indeed, the character evidence rule has been
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described as a legislative determination that certain evidence is per se substantially more prejudicial than probative.  

There is another practical reason judges are not constrained by rules of evidence: they are the ones who decide what evidence reaches the jury, and they cannot keep information from themselves.  

This “gatekeeper” problem may mean that judges’ and juries’ relative capacities are less important than juries’ absolute capacities: if both judges and juries are susceptible to improper influence, rules of evidence allow us to control that influence in the jury setting.  Arguably, then, they should apply to jury proceedings even if there is no practical way to apply them in judicial proceedings.  

Relative capacities—and possibilities of improvement through evidentiary limitations—might well influence the threshold question whether to entrust certain decisions to judges or juries; if judges are far more capable of weighing certain evidence than juries are, that argues in their favor, while if both have similar incapacities but the information can be kept from the jury, that argues in favor of jury proceedings.  

Legislatures will also have to consider whether evidentiary restrictions should be applied equally to both parties.  The rules of evidence applicable at criminal trials already include numerous asymmetries that protect defendants’ rights.  

We think there is a good prudential argument that many of the rules (especially hearsay and character evidence restrictions) should not apply to the defendant’s introduction of mitigating evidence.  Determinate sentencing systems minimize the individualization of sentencing to an oft-criticized degree; one way to soften their frequent harshness is to permit the defendant broad leeway in introducing mitigating evidence.  Defendants have that leeway now in judicial proceedings, and it would be unfortunate if Blakely paved the way for further erosion of the sentencing system’s accommodation of individual differences.  In the alternative, instead of adopting

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81 See Michelson v. United States, 335 U.S. 469, 476 (1948) (“The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”); 1A HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 58.2 (1983).

82 See Bibas, supra, at 1177.


84 See Saks, supra, at 28.

85 See, e.g., Fed. R. Evid. 405 (character evidence); Fed. R. Evid. 609 (varying balancing test for determining admissibility of prior convictions for impeachment).

86 See, e.g., STITH & CABRANES, supra.
asymmetric rules—which might be politically unpopular—states that choose to commit mitigating factors to the jury might choose to drop certain rules entirely.

Together, we think these factors point to a strong argument that many of the rules of evidence ought to apply at post-Blakely sentencing-related jury hearings. The strongest cases for relaxing major rules pertain to the rule against hearsay and the limitations on prior bad act evidence. Some other differences between sentencing and trial proceedings can be accounted for not by dropping rules of evidence but simply by applying them differently, with an understanding that concepts like “probative value” and “prejudice” are context-specific.

C. The Relevance Problem: An Argument For Bifurcation

Even if the rules of evidence do apply in full at jury proceedings related to sentencing, a great deal of evidence that would previously have been excluded at trial is nearly certain to be admitted. Much evidence that is irrelevant to, or much more prejudicial than probative of, guilt on the underlying offense is highly probative for sentencing purposes, such as “prior bad act” evidence. Such evidence might well distort jury decision making as to guilt—yet excluding it from a unitary proceeding would deprive the jury of essential sentencing-related evidence. This dilemma argues compellingly for bifurcation of proceedings.

It is simply very difficult to see how this “relevance problem” can be resolved without bifurcation. One possibility is to instruct jurors to use certain evidence for sentencing but not guilt purposes. But limiting instructions are notoriously ineffective; indeed, studies show that they may be counterproductive because they draw jurors’ attention to the evidence that they are supposed to be ignoring. For this reason, courts have held, in ineffective assistance of counsel cases, that it is reasonable for defense counsel to decline to request a limiting instruction because the instruction would call attention to unfavorable evidence. Nor do balancing tests along the lines of Federal Rule 403 solve the problem. Such balancing might exclude victim impact statements, for instance—perhaps a salutary effect—because of their exceptional potential for prejudice and minimal probative value. But evidence that

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88 Ot advantages of bifurcation that are discussed in subsequent parts of this essay.
89 Lillquist, supra, at 681-82; Posner, supra, at 1520; see also Roselle L. Wissler & Michael J. Saks, On the Inefficacy of Limiting Instructions: Why Jurors Use Prior Conviction Evidence to Decide on Guilt, 9 LAW & HUMAN BEHAV. 37 (1985); Joel D. Lieberman & Jamie Amdt, Understanding the Limits of Limiting Instructions, 6 PSYCHOL. PUB. POL’Y & L. 677, 685-91 (2000), But see 1 WEINSTEIN’S FED. EVID. 105.03(1) (arguing limiting instructions are effective).
90 See Lillquist, supra, at 682 n.257 (collecting cases).
might prejudice the jury in determining guilt is often highly probative of the proper sentence, and would therefore not likely be excluded under balancing rules that usually put a heavy burden on the party opposing admission. Exclusion would also risk compromising the accuracy and fairness of the sentencing determination.

This relevance problem might be mitigated if defendants are permitted to stipulate to certain facts they don’t want the jury to hear, and if the Supreme Court declines to require past criminal convictions to be proven to the jury. But some problems would no doubt remain: inevitably, under a “real offense” sentencing scheme, a great deal of uncharged conduct, evidence of which would no doubt prejudice the jury at the guilt phase, is critical to the sentence.

Bifurcation solves this problem by permitting evidence relevant to sentencing to be admitted at sentencing-related proceedings and excluded from trial. Moreover, bifurcation is at least a partial solution to the problem, cited by Justice O’Connor her Blakely dissent, that some relevant evidence is not available until after trial, for example, evidence of defendants’ contempt or perjury. It also resolves Justice Breyer’s concern that defendants would be placed in a strategic bind at unitary proceedings, because contesting sentencing factors might be perceived as an admission of guilt.

Requiring a separate sentencing proceeding in front of a jury may carry costs in time and resources. In Kansas, however, which has already adopted a bifurcated proceeding, the sentencing phase of bifurcated proceedings has averaged just an hour in length, and has only been necessary in twenty cases per year. In many other states, bifurcation might be similarly minimally costly. Moreover, much of the same evidence would also be introduced in a unitary trial, and so to a considerable degree the cost problem is inherent in post-Blakely jury fact-finding regardless

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92 Lillquist, supra, at 684.
93 Id. at 691; Nancy J. King & Rosevelt L. Noble, Felony Jury Sentencing in Practice: A Three-State Study, 57 VAND. L. REV. 885. Most states that employ jury sentencing in noncapital cases (Arkansas, Virginia, Texas, and Kentucky) bifurcate the proceedings, but Missouri and Oklahoma do not. In Missouri, lack of bifurcation has resulted in juries issuing sentences without knowing about defendant’s criminal history or other relevant aggravating factors; frustration with this system has led the state to abandon jury sentencing in most cases. Randall R. Jackson, Missouri’s Jury Sentencing Law: A Relic the Legislature Should Lay to Rest, 55 J. Mo. B. 14, 14-15 (1999).
94 See supra note 5.
95 124 S.Ct. at 2546.
96 Apprendi, 530 U.S. at 557-58 (Breyer, J., dissenting).
97 See Jackson, supra, at 15 (arguing that jury sentencing should simply be abolished); Lillquist, supra, at 689; Jacqueline E. Ross, Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The Apprendi Debate, 12 Fed. Sent. R. 197 (2000).
98 See Iontcheva Turner, supra, at __.
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of whether proceedings are bifurcated. There might also be ways to minimize the cost problem. For example, courts could permit “sentence bargaining,” bargaining regarding disputed sentencing facts, or waiver of jury fact-finding after conviction.

Even if bifurcation remains costlier than unitary proceedings, however, we remain convinced that it is the best approach for court systems that are shifting sentencing fact-finding responsibilities from judges to juries. Ultimately, bifurcation is probably the only way out of the evidence-admission dilemma we have posed here. If the cost problem cannot be solved, society may simply have to accept that the right to jury trial recognized in Apprendi carries inevitable costs in terms of resources and efficiency, but that we value it for different reasons. As Justice Scalia wrote in Apprendi, the Sixth Amendment jury trial guarantee “has never been efficient; but it has always been free.”

III. FRAMING SENTENCING-RELATED QUESTIONS

The answers jurors and other individuals reach are heavily influenced by the way questions are posed to them. Overly numerous or poorly phrased or ordered questions and answer choices can exacerbate various kinds of cognitive biases. Blakely will increase the number and change the type of questions presented to jurors, which will make understanding these biases, and shaping questions to avoid them, particularly important.

A. Anchoring and Scale Problems

Individuals and groups reach erratic and arbitrary conclusions when they are asked to provide some measure of the seriousness of wrongdoing, but are not provided a bounded scale and/or relevant points of comparison. These problems will likely manifest themselves in post-Blakely sentencing proceedings when juries are asked questions that are open-ended or that otherwise lack benchmarks for comparison, or provide misleading benchmarks.

99 Where defendants are acquitted, bifurcation would save costs by making sentencing unnecessary. See Vidmar, supra, at 871 (civil trial bifurcation makes damages proceedings unnecessary, saving costs). Because criminal acquittals are rare, this effect would be fairly minor.

100 Apprendi, 530 U.S. at 498; see also Blakely, 124 S.Ct. at 2543; United States v. Barnett, 376 U.S. 681, 755 (1964) (Goldberg, J., dissenting) (“It may be true that a judge can dispose of a . . . criminal charge, more expeditiously and more cheaply than a jury. But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom . . . .”).

101 To some degree, these problems will also affect judges, although, as we discuss further below, there is reason to believe judges’ greater experience alleviates some of these biases. In any event, as we have noted, we are principally concerned with improving jury functioning, not with comparing judges to juries.
In general, people make judgments based on adjusting from a base anchor; if the anchor is absent or poorly chosen, it may distort the judgment. For instance, mock juries reach remarkably consistent results (even across demographic categories) when they are asked to rank different scenarios of wrongdoing, relative to one another, in terms of the degree of outragefulness of the behavior. But when asked to attach dollar values to the degree of wrongdoingness, this agreement dissolves entirely, and awards chosen for the same set of facts are widely divergent. Because jurors were given an open-ended dollar scale of zero to infinity without any points of comparison along that scale, they were forced to choose numbers relatively arbitrarily. Likewise, when given a range but no relevant points of comparison, people also reach quite arbitrary results, often picking a point around the middle of the range.

Second, in choosing an anchor, juries tend to be highly susceptible to suggestion. For instance, if a civil plaintiff’s attorney asks for a higher amount, mock juries tend to give a higher amount, even when the facts are otherwise identical. Similar ordering effects can affect criminal jury verdicts: mock juries “tend to lean toward the verdict options with which their consideration of verdicts began,” thus convicting of more serious offenses if they considered a more serious offense first. Sometimes responses to suggestion may be unexpected; jurors told not to focus on a particular factor may in fact be drawn to focus on it.

102 See Ruback & Wroblewski, supra.
103 See Daniel Kahneman et al., Shared Outrage, Erratic Awards in PUNITIVE DAMAGES: HOW JURIES DECIDE 34-36 (Sunstein et al. eds., 2002) (concluding that “[j]udgments of intent to punish . . . evidently rest on a bedrock of moral intuitions that are broadly shared in society”); see also Sunstein et al., supra; Cass R. Sunstein et al., Predictably Incoherent Judgments, 54 STAN. L. REV. 1153, 1157-59 (2002).
105 Sunstein et al., supra, at 2078. Giving a range, e.g., by setting a fixed cap on punitive damages, may actually increase average awards if the cap is high, because the cap serves as an anchor. See Valerie P. Hans & Stephanie Albertson, Empirical Research and Civil Jury Reform, 78 NOTRE DAME L. REV. 1497, 1520-21 (2003).
106 Sunstein et al., supra, at 2109 & n.44 (citing studies); see Saks, supra, at 47-48; Vidmar, supra, at 886 (this effect disappears where the attorney’s request is so high as to be viewed as plainly unreasonable); Vidmar, supra, at 31-32 (presence of a countervailing anchor presented by the defense reduces this bias).
107 Saks, supra, at 34 (citing Jeff Greenberg et al., Considering the Harshest Verdict First: Biasing Effects on Mock Juror Verdicts, 12 PERSONALITY & SOC. PSYCHOL. BULL. 41 (1986)). Saks argues that these ordering effects result from the harsher offense serving as an anchor. Id.
108 For instance, one study found that instructing jurors not to increase the size of their verdict in order to punish and deter the defendant increased verdict size; references to punishment and deterrence apparently suggested that the defendant’s conduct was especially blameworthy.
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Although mock jury studies may not adequately replicate the decision-making processes of real-world jurors, anchoring and ordering effects are also found in non-jury-related studies, providing support for the notion that they play an important role in human cognition in a variety of contexts. For individuals asked to make a numerical estimate, the mere mention of a number influences the estimate even when that number has little or nothing to do with the question that has been posed. Contingent valuation studies show people value things, like environmental resources, differently depending on the order of the questions asked, while other studies show that auditors’ assessments vary based on the order of evidence they receive. And individuals’ susceptibility to suggestion extends beyond the situations we have focused on in this section, those requiring quantitative judgments. Rather, suggestive phrasing sharply influences individuals’ answers to all kinds of questions—for instance, public policy questions posed on polls, or personal choices about a course of action in their own lives.

Studies of jury sentencing states demonstrate that some similar problems have emerged in the criminal sentencing context. Jury sentences are significantly more erratic than judicial sentences. One explanation is jurors’ lack of experience—jurors essentially consider each case in a vacuum, while judges can use previous cases as points of comparison. Harshness, as well as unpredictability, may be a


109 See generally Vidmar, supra.


111 See Cass R. Sunstein, *Which Risks First?*, 1997 U. Chi. Legal F. 101, 108 (“When asked for their willingness to pay to preserve visibility in the Grand Canyon, people offer a number five times higher when this is the first question than when it is the third question.”).

112 See Sunita S. Ahlawat, *Order Effects in Memory for Evidence in Individual Versus Group Decision Making in Auditing*, 12 J. BEHAV. DEC. MAKING 71, 71-72, (1999) (reviewing studies). Interestingly, these ordering effects appear to be reduced by group deliberation processes, and that experience may in fact *magnify* these effects, suggesting that in terms of the “recency bias” in evidence processing, if not in question-ordering, juries may have an advantage over judges. *Id.* at 73-74, 84-85.


114 Sunstein, *supra*, at 18 (“When people [considering undergoing a risky medical procedure] are told, ‘Of those who have this procedure, 90 percent are alive after five years,’ they are far more likely to agree to the procedure than if they are told, ‘Of those who have this procedure, 10 percent are dead after five years.’”).

115 See King & Noble, *supra*.

116 This problem is exacerbated by rules of evidence that “blindfold” sentencing juries in most states from considering useful information including typical sentencing ranges. *See*
function of inexperience, as jurors may “overreact” to routine offenses. In addition to their experience advantage, furthermore, judges are also permitted to consider sentencing statistics (where available) as well as the sentences given to co-conspirators in the same case; such information is kept from juries.

Blakely does not require that juries issue sentences; most likely, juries will instead make particular findings of fact that will then be “translated” into a sentence by a judge applying sentencing guidelines. Juries will thus not have to translate punitive intent into a quantified form of punishment, but are nonetheless likely to experience anchoring and adjustment problems. Jurors asked whether to characterize a particular offense as aggravated will likely have little experience evaluating other instances of the same offense. To most law-abiding citizens, for instance, almost any homicide case, taken in isolation, might seem “excessively brutal” or “deliberately cruel.” Thus, juries are likely to be arbitrary, and perhaps overly severe, in their assessments of aggravating factors if no points of comparison are provided.

Likewise, juries that are asked to make quantitative judgments regarding sentencing factors—for instance, judgments of drug quantity—may not face the same forms of anchoring and adjustment problems that juries in punitive damage cases do. Drug quantity determinations are questions of historical fact, not normative judgments; and presumably, the parties will have introduced some evidence as to quantity, such that the jury’s job is less of a “stab in the dark.” But in cases in which jurors simply have no idea what the proper finding is—for instance, if they do not remember or did not understand the relevant testimony—they will likely be quite influenced by the ranges they are given, tending to pick a point arbitrarily.

Iontcheva, supra, at 366 (arguing that this lack of information partially explains wide variation in jury sentences); Ronald Wright, Rules for Sentencing Revolutions, 108 YALE L.J. 1355 (1999); King & Noble, supra (arguing that lack of information causes Virginia jurors to give harsher sentences than judges do). An Arkansas judge has observed that jurors there, who serve for six months, tend to impose more predictable sentences as they gain experience. King & Noble, supra. See also Jeffrey J. Rachlinski & Forest Jourden, The Cognitive Components of Punishment, 88 CORNELL L. REV. 457 (2003) (demonstrating that provision of points of comparison significantly affects mock juries’ sentences of imprisonment).

117 King & Noble, supra. That fact is often used as leverage by prosecutors in plea bargaining, since in some circumstances entering into a plea bargain is the only way to get a judicial sentence. Id.

118 See, e.g., United States v. Nelson, 918 F.2d 1268, 1273-75 (6th Cir. 1990) (holding that judges may depart downward under the Federal Guidelines in order to achieve proportionality among co-conspirators); Iontcheva, supra, at 370 (some courts provide judges with sentencing statistics); but see Ruback & Wroblewski, supra (arguing that judicial sentencing is affected by cognitive biases including anchoring and adjustment problems).

119 Kahneman et al, supra, at 31.
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around the middle of the range. This may be more likely where juries are faced with difficult quantitative determinations, such as loss in a securities fraud case.120

On the bright side, juries do perform consistently when asked to rank the relative seriousness of different instances of wrongdoing. Juror performance at Blakely proceedings thus might well be improved by providing jurors a set of sample circumstances to which to compare a given case. For instance, if a defendant is convicted of conspiracy to distribute cocaine, and the question is his role in the conspiracy, the jury could be provided with a few short descriptions of fictional cases that exemplify the relative degree of culpability for different members of a drug conspiracy. So long as the descriptions are concise and not overly numerous, they are not likely to contribute substantially to information overload, but will instead help the jury to understand the characterizations it is asked to make.121

B. Tendency to Pick the Middle Option

Individuals and groups tend, when presented with three or more options, to pick the middle option more than we would expect if they were acting rationally.122 Mock juries presented with the option of convicting on a lesser-included offense quite frequently take that option, generating a “compromise effect.”123 First, con-

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120 See Booker, 125 S.Ct. at 762 (Breyer, J.).
121 Sunstein suggests that in the punitive damages context this approach is not realistic, because either just a few examples will be provided and the choice among them will be arbitrary, or too many examples will be provided and jurors will suffer cognitive overload. See Sunstein, Predictably Incoherent Judgments, supra, at 1181-82. We expect that such problems would be less serious in post-Blakely proceedings, because jurors need only compare defendant’s conduct to other instances of the same statutory offense. Because they are not the ones that issue the ultimate sentence (unlike punitive damages juries), they are not responsible for achieving coherence across offense categories; the legislature or sentencing commission is. So the only examples necessary would be examples of the same offense committed in different ways. Sunstein also argues, see id., that the selection of comparison cases could be manipulated to bias the jury in a particular direction, a genuine concern that, we believe, could be alleviated if the examples chosen to illustrate particular sentencing factors are standardized, perhaps by the state sentencing commission, rather than left for parties or judges to decide in particular cases. Although fashioning such examples would be a significant task, under state guidelines schemes, which normally do not involve an inordinate number of different sentencing factors, preparing standard forms seems like a realistic possibility. Still, it might be difficult to anticipate all the possible variations that specific cases could pose, so judges could be given discretion to adjust the examples in cases in which the standard forms are clearly inadequate.

122 This effect may be amplified by compromises among disagreeing jurors during deliberation, although deliberation also sometimes induces polarizing effects. See infra Part V.

123 See Neil Vidmar, Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors, 22 J. Personality & Soc. Psychol. 211, 212-14 (1972); Lillquist, supra, at 654-60; Mark Kelman et al., Context-Dependence in Legal Decisionmaking, 25 J. Legal Stud. 287, 288 (1996); Daniel A. Farber, Toward a New Legal Realism, 68 U. CHI. L. REV. 279, 286-
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viction on some offense becomes more likely; that is, the defendant’s odds of a total acquittal decline. That, of course, could be the outcome of completely rational decision making. For instance, if the evidence in a certain case is sufficient to support a manslaughter conviction but not a murder conviction, a rational jury presented with only a murder charge will acquit, while a rational jury that is also presented the option of convicting on manslaughter will do so. Second, however, conviction of the greater offense becomes less likely—and that result lacks a similar rational explanation. If the evidence supports a murder conviction, juries ought to issue a murder conviction regardless of whether the manslaughter conviction is available. The fact that they do so less often suggests that juries are acting in at least one of two irrational ways: either the absence of a manslaughter option is convincing juries to convict on murder charges even when the evidence only supports a manslaughter conviction; or the presence of that option is causing them to doubt the sufficiency of the murder evidence and to pick the middle option instead.

Similarly, when a greater offense is added to the options presented to mock juries, the chance of an acquittal on all charges decreases. That outcome also is irrational. If a defendant is charged only with manslaughter and, in the jury’s assessment, the evidence does not support the charge, the defendant should be acquitted. That picture does not change if the defendant is also charged with murder; the evidence still supports neither offense. In Lillquist’s terminology, the addition of the greater offense creates a “decoy effect”: the presence of a third option C that increases the range of choices available distorts the choice between options A and B by making B (which is closer to C, the “decoy”) seem like it must be a better choice than the outlier, A. Similar decoy and compromise effects have been demonstrated in mock jury sentencing, as well as in other contexts.

87 (2001); Rachlinski & Jourden, supra, at 462.
124 See Lillquist, supra, at 655-659; Vidmar, supra, at 215.
125 See Lillquist; supra, at 657-58; see also Kelman et al., supra, at 290-95 (showing same effect when a third, more severe offense option is added to two existing options).
126 Lillquist, supra, at 654. An understanding of jurors’ tendency to pick the middle option is the very reason that defense lawyers often request lesser-included-offense instructions. See id. at 663. If juries behaved rationally, such instructions could only harm the defendant: a jury would convict of the greater offense regardless of the instruction if the evidence supported it, and otherwise would acquit entirely absent the instruction.
127 See Kelman et al., supra, at 296-97 (finding that addition of sentencing option C that was similar to B made subjects more likely to choose B than A, apparently because it made B, being closer to another option, appear more reasonable).
After *Blakely*, juries will be presented with more options beyond the traditional binary guilty/not-guilty choice, creating the likelihood of decoy and compromise effects. Because (unlike before *Blakely*) the same actor will decide both guilt and sentencing factors, these effects may now infect threshold guilt determinations even when there is only one charge. Several specific policy issues are presented.

First, should proceedings be bifurcated, such that the initial decision regarding guilt is still simply a binary decision? We have argued for greater attention to the benefits of bifurcation in Part II, and note that decoy and compromise effects provide another reason for endorsing it. In a unitary proceeding, if a jury is asked both whether a defendant committed an underlying offense in the first place, and whether that offense was aggravated by the presence of one or more sentencing factors, the mere asking of the sentencing-related question may irrationally increase the likelihood of conviction on the underlying offense.

Second, if proceedings are not bifurcated, should sentencing factors nonetheless be presented to jurors as separate questions in the same proceeding, or should they simply be incorporated in the charge just like other elements of the offense, presenting a binary choice? Under the former approach, a jury could decide that a defendant possessed some amount of cocaine, for instance, and hence merited conviction for cocaine possession, and then proceed to answer the question how much he possessed. Under the latter approach, if a defendant were charged solely with possessing 50g of cocaine, and the jury found that he possessed 49g, he would be acquitted entirely. Conviction for a lesser amount would only be an option if a lesser-included offense option was also provided. The choice between these two approaches could be decided systematically as a policy (or constitutional) matter, or it could be left to the parties to argue for particular ways of framing the question in otherwise “surprising” fact that civil juries are more likely to hold a defendant liable in a unitary trial than in the liability phase of a bifurcated proceeding—but that juries in the damage phase of bifurcated proceedings tend to issue larger judgments than do juries in unitary trials. Saks, *supra*, at 33-34; Vidmar, *supra*, at 872-73. A unitary civil trial essentially presents three options to the jury (no liability, liability with low damages, and liability with high damages), while bifurcated proceedings present two separate, simpler choices on liability and damages; in the unitary trial, juries tend to pick the middle option.

Although judges presented with multiple sentencing options may also be subject to decoy and compromise effects, these effects at least do not taint the guilt determination as well where the two determinations are made by different actors.

The *Blakely* line does not settle whether facts that must be proven to the jury must also be included in the indictment. In *Apprendi*, although avoiding the question, the Supreme Court suggested that there may be no such requirement in state cases, because the right to a grand jury indictment has never been applied against the states. 530 U.S. at 477 n.3.
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individual cases—much the way the decision whether to include a lesser-included offense instruction is approached today.

Third, unless the all-or-nothing “elements” approach described above is adopted, some form of “special verdict form” will probably have to be submitted to the jury, regardless of whether proceedings are bifurcated.\textsuperscript{132} How should the questions on these forms be formulated? Because of the decoy effect, prosecutors would have a strong interest in adding options to the form that suggest that the offense is more aggravated than they can reasonably prove, while defendants would want as many mitigated options as possible.\textsuperscript{133} We believe it is important to prevent options from being included on special verdict forms that are unsupported by the evidence. For this reason, the use of standard forms that list several possible ranges of drug quantities (or that list several analogous possibilities for other sentencing factors), although administratively convenient, carries dangers. It is not enough to say that judges will throw out jury conclusions if the evidence does not support them, for the power of the “decoy effect” is \textit{not} that it convinces jurors to pick the decoy, but rather that it distorts their choices among the other options.\textsuperscript{134}

Thus, if a multiple choice special verdict form is provided, the answer choices for each question should be limited to the range of options for which the parties have argued (and, for the upper end of the range, for which the state has introduced minimally sufficient evidence). This will require tailoring by the judge, perhaps based on competing submissions of questions and answers by the parties, at the end of the trial. One alternative approach would be to allow jurors to fill in blanks as to quantitative assessments, rather than providing choices that could distort jury decision making. This approach carries the risk that in cases where jurors do not understand or remember the relevant evidence, they would be left completely at sea and pick a number out of thin air (or by simply following the figure alleged in the indictment). But it is not necessarily better to have the jury choosing from multiple

\textsuperscript{132} Such forms have in fact been in use in many districts since \textit{Blakely} was decided, and in Kansas (and possible other states) before that. Indeed, special verdict forms were sometimes used even before \textit{Apprendi} at judges’ discretion, but in most circuits these have been deemed only advisory. See Colleen Murphy, \textit{Jury Factfinding of Offense-Related Sentencing Factors}, FED. SENT. R. 41 (1990).

\textsuperscript{133} For example, suppose defendant testifies that the quantity of drugs at issue was 30g, while prosecution offers witnesses that testify that quantity was 60g. Either 30g or 60g or an amount near those two options might be a rational outcome depending on credibility judgments; 15g and 100g are not rational outcomes, but the defense and prosecution, respectively, would presumably want those choices on the form.

\textsuperscript{134} For example, in the hypothetical above, the reason the prosecutor wants a 100g option is not because he wants a 100g finding (perhaps because he knows the judge would throw out such a result), but because he thinks the option will convince or otherwise cause the jurors to pick the 60g option more often than they otherwise would. Furthermore, judges cannot correct jury mistakes in defendants’ favor.
choice options in that circumstance, and in any event the defendant would enjoy some protection from wholly arbitrary outcomes: jury findings unsupported by the evidence would be thrown out by the judge, and sentences based on figures higher than that alleged in the indictment may be constitutionally barred.

IV. REDUCING COMPLEXITY AND IMPROVING PERFORMANCE

Perhaps the most significant and widely raised argument against shifting sentencing fact-finding to juries is the problem of complexity: sentencing guidelines schemes simply involve so many factors and possible outcomes that juries are likely to be overwhelmed with their new tasks. As Justice Breyer characterized it in his Apprendi dissent:

There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury. As the Sentencing Guidelines state the matter,

“[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.”

As we have noted, although state guidelines are less complex than the federal guidelines, that is not saying much—state sentencing schemes still involve numerous and diverse sentencing factors. This complexity is compounded by the fact that the determination of certain individual sentencing factors is likely to be particularly multifaceted and difficult. Two examples include the calculation of loss from economic crimes and the determination of a defendant’s role in a conspiracy; the latter task has often required sentencing courts to hold “mini-trials” with presentation of physical evidence and witness testimony just to determine the portion of a conspiracy for which a conspirator should be held responsible.\textsuperscript{136}

Complexity raises serious problems post-Blakely. Complicated structures and excessive information can cripple decision making. And the shift from judges to juries magnifies the problems caused by guidelines’ existing complexity for two reasons. First, the predominant “passive jury” model robs jurors of the tools they need to process information and maintain effort levels. Second, overloaded jurors are more likely to give up and rely on others, creating a vicious cycle in which they fall even farther behind—a problem that has to date been ignored by jury reform literature but will demand attention post-Blakely. An essential aspect of post-Blakely

\textsuperscript{135}Apprendi, 530 U.S. at 556-57 (Breyer, J., dissenting).
\textsuperscript{136}Ruback & Wroblewski, supra, at 751.
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jury reform—in fact, an aspect so important that it should be a prerequisite to any legislative decision to shift sentencing fact-finding responsibility to the jury—is to devise means both to reduce the complexity of juries’ tasks and to give juries the best possible tools for managing complexity.

A. Sentencing Complexity and Cognitive Overload

One of Blakely’s most obvious effects is that it multiplies the tasks facing criminal juries: in addition to their pre-existing guilt determination responsibility, they will be required to apply a laundry list of sentencing factors including many different types of questions, some of which will be quite difficult and evidence-intensive. This increase in responsibility will increase the cognitive burdens on jurors in two ways: it will make their ultimate decision-making (and deliberation) process structurally complex because they must balance multiple discrete tasks at once, and it will greatly increase the amount of evidence they are expected to absorb and process during courtroom proceedings.

The structural complexity problem,137 in particular, is a new problem in the criminal setting, except perhaps in the very most complex multi-defendant, multi-charge trials (which themselves will grow exponentially more complex post-Blakely). Even civil juries in antitrust or other highly technical cases, while they may be forced to process a great deal of information,138 still usually only face two distinct questions (liability and damages, occasionally with differentiated types of damages), and such complex cases are not very common. It is safe to say that neither the criminal nor civil jury system in the United States has ever before seen the kind of across-the-board complexity—that is, in which ordinary cases present a large number of questions—that Blakely brings. The magnitude of this effect will depend on whether states shift all sentencing fact-finding to the jury, or instead only aggravating factors; whether juries are required to hear criminal history evidence; and whether Congress eventually decides to shift application of the far more complicated federal guidelines to juries, but under any of these scenarios, the effect will be significant.

Even if juries’ information processing and decision skills remained constant as complexity and information burdens increased, we would expect the overall reliability of their outcomes to decrease. The unreliability of jury decision making in-

137 See Vidmar, supra, at 871.
138 We are more concerned here, because they are more relevant and newer problems post-Blakely, with “structural complexity” and the problem of magnitude of information provided to jurors than with the oft-noted difficulties posed by technical subject matter and competing expert testimony, although these of course remain significant problems. See, e.g., Friedman, supra; In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). But see Vidmar, supra, at 857-66 (observing that empirical evidence does not consistently demonstrate these difficulties); Hans & Albertson, supra, at 1510-11.
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Increases exponentially with the number of different questions presented. But jurors’ skills will not remain constant. “[C]omplex structures reduce performance on complex tasks” as a general matter. Specifically, increased difficulty and complexity of tasks, especially when combined with a significant onslaught of information, can trigger “cognitive overload,” a state that severely impairs cognitive processes. Jurors, like all individuals, are subject to this effect. Cognitive overload has a neurological basis: assigning too many tasks to the cognitive processing portions of the brain means that the brain will perform some tasks through impulse rather than cognition. Thus, the brain is more likely to rely on preconceived or subconscious notions than to think problems through.

In particular, post-Blakely cognitive overload is likely to increase jurors’ reliance on load-reducing information “structures,” like cognitive schemas, which can hamper juror performance at collecting and processing information. In order to deal with limitless information and inherent human limitations, individuals form stories with the data they gather, and then view additional evidence through the lens of these cognitive structures. Although helpful in many contexts, these structures can bias jury outcomes by skewing memory and the perception of evidentiary relevancy. Schemas can be established early, and conflicting, subsequent information will be down-weighted, ignored, explained away, cognitively rearranged, or forgotten because it does not square with the existing story. Individuals also forget evidence once they have acquired the schema-relevant “gist” of information, and will “fill gaps” by inadvertently making up information.

139 See, e.g., Lillquist, supra, at 673 (describing “conjunction effects”). Taken alone, this problem is not new post-Blakely; it affects jury findings at the guilt stage and judicial sentencing.
140 Ruback & Wroblewski, supra.
141 See David Kirsh, A Few Thoughts on Cognitive Overload, 30 INTELLECTICA No. 1, at 19 (2000).
142 Posner, supra, at 1523-24; Callen, supra, at 21.
144 Id. at 59-60. Such failures could systematically tilt sentencing fact-finding against defendants. Combining multiple defendants or charges into a single trial empirically increases each defendant’s chance of conviction on every charge, perhaps because “the evidence tends to cumulate in jurors’ minds or to spill over from some issues to others.” Saks, supra, at 32; see id. at 33.
146 Id. at 1131-32.
147 Id. at 1139-43. People organize facts in ways that are consistent with their experience and background more generally, id. at 1143, such that diverse jurors will reach diverse interpretations of the same facts.
148 Id. at 1159.
Cognitive overload risks undermining jurors’ motivation and satisfaction, as they become more and more frustrated with information processing challenges. Organizational dynamics research, for instance, finds that “complex structures generally lower worker morale and motivation, both of which impact a system’s effectiveness.” In addition to its effects on outcomes, this frustration may undercut jury service’s role in building civic responsibility and participatory democracy. The perception that jurors are being left at sea could also undermine the credibility of particular verdicts and of the criminal justice system.

B. Juries’ Weaknesses: Passivity and Free-Riding

Cognitive overload is a risk to which all humans are subject, judges included. An important question, then, is whether Blakely simply shifts a problem inherent to complex sentencing schemes from one decision maker to another. One of the reasons why the answer to this question is “no” is that the pre- and post-Blakely distributions of complexity are not symmetrical—before Blakely, the division of fact-finding responsibility between judges and juries greatly reduced the intricacy of the trial jury’s task, and to some degree reduced the burden on the sentencing judge, responsible for presiding but not deciding at the guilt stage. But the chief reason is that judges and juries are very different kinds of decision makers: several factors reduce jurors’ ability to withstand cognitive burdens, at least unless sentencing fact-finding is structured to maximize the advantages of group decision making.

Judges preside over courtroom proceedings, which means that, even in an adversary system, they have considerable control over what and how information is presented to them. They can ask lawyers and witnesses clarifying questions and take notes. In contrast, American jurors have traditionally carried out their information acquisition tasks passively; they listen, watch, and read, but almost never participate actively by asking questions of witnesses, judges, or lawyers. Even if a juror anticipates a difficult deliberation, she is generally unable to discuss the case.

149 Ruback & Wroblewski, supra; see also Kirsh, supra, at 20 (workplace complexity causes “tension with colleagues, loss of job satisfaction, and strained personal relationships”).
150 Ruback & Wroblewski, supra.
151 Judges have other advantages: they are more experienced, can rely on clerks, and may be more motivated because they face the prospect of appellate reprimand.
with fellow jurors, even if just to ask questions or clarify confusions, until deliberation begins, and she may even be prohibited from taking notes. Jurors are also generally left uninformed: although they enter a courtroom with a basic idea of their ultimate goal—to decide whether someone committed a crime or whether certain sentencing factors apply—judges usually give jurors very little guidance on how precisely they should make the most of what they see and hear. These problems undermine the jury’s ability to process information efficiently and accurately.

Juries also differ in an important way from most groups organized to accomplish a common task: they do not coordinate their gathering and processing of information. In contrast, teams and committees, for instance, are typically quite structured, benefiting from division of labor, coordination, and sometimes leadership. This difference may well be justified—jurors play an important role as “peers” and as fellow citizens in a democracy, not solely as information processing cogs. And the lack of coordination is less worrisome in an adversarial setting in which defendants and prosecutors compete by investigating, sifting, and presenting what is relevant in a way that is supposedly comprehensible to each juror. Still,

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155 See Phoebe C. Ellsworth, One Inspiring Jury, 101 MICH. L. REV. 1387, 1389-90 (2003) [hereinafter, Ellsworth, Inspiring] (Jurors “may be given a brief lecture by the judge, or shown an orientation videotape, [that contains] a combination of solemn reminders of the vital importance of the jury in a democratic society, earnest exhortations to take their responsibility seriously,…and occasionally jurors will be told a little about the law, such as the distinction between civil and criminal cases. Usually this is all the advance information they get.”).

156 See B. Michael Dann, From the Bench: Free the Jury, 1 LITIG. Fall 1996, at 6 (noting that passive juries, for example, result in “juror confusion, impairment of opportunities for learning, distraction, and boredom”).

157 Juries do select a foreman, but this might not happen until deliberations begin; and juries differ in how they structure their deliberations. See Phoebe C. Ellsworth, Are Twelve Heads Better Than One?, 52 L. & Contemp. Probs. 205, 214-215 (1989).


159 See, e.g., Gerken, supra, at 1099, 1153 & n.142-48 (2005); Toni M. Massaro, Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures, 64 N.C. L. REV. 501, 547-560 (1986).

160 However, adversarial competition alone is insufficient to ensure that juries can acquire and process all of the information they need. See Paul Milgrom & John Roberts, Relying on the Information of Interested Parties, 17 RAND J. ECON. 18, 18 (1986).
lack of organization has significant drawbacks in complex cases involving many separate multiple-choice questions: even if critically needed, juror coordination is simply not available to ensure that vital information is gathered.

Post-Blakely jurors will, however, likely suffer from one of the major disadvantages facing groups relative to individuals: the free rider problem. As jurors face increased cognitive burdens in the aftermath of Blakely, they are likely to reduce their per-issue effort levels, opting to rely more on their fellow jurors to acquire information. The underlying dynamic of free-riding is straightforward: in groups faced with a collective responsibility, individual members cannot capture the full benefits of their efforts, and so they work less hard. If a juror’s labors are driven by a desire to see the correct outcome in a particular case, he will invest in obtaining information only if his efforts can be translated directly into the verdict and sentence. But a juror knows that he will not (in fact, cannot) make decisions without the input of his peers (through some rule of vote aggregation), so individual efforts will be dampened at least somewhat by the group setting of jury fact-finding.  

Historically, juror free-riding in criminal trials has probably been fairly minor, and it has thus been virtually ignored by the jury reform literature. This is likely to change. Blakely, by increasing the procedural and substantive complexity of criminal proceedings, substantially raises jurors’ cognitive costs while only fractionally increasing the benefits of ferreting out the right answer. More tasks and more complexity will lead to reduced juror effort, or at least reduced per-task effort. Blakely might make little difference if jurors had endless time and physical and cognitive energy, but humans have limits, and adding each additional task generates incrementally larger costs. Post-Blakely jurors may therefore see free-riding as not merely a shortcut but a necessity. Moreover, deciding sentencing facts accurately, unlike correctly determining guilt, may seem less important to jurors and therefore provide less “benefit.” Thus, as the complexity of jurors’ tasks increase after Blakely, effort levels may deteriorate considerably.

161 Assuming the jurisdiction requires unanimity, as almost all do, see Ellsworth, Inspiring, supra, at 1388, a juror’s incentive to acquire information may be greater if he believes himself to be in the minority (since he is more likely to alter the outcome).
162 See SUNSTEIN ET AL., supra, at vii (2002) (describing jurors’ “moral seriousness” and the fact that they “almost never engage in selfish or strategic behavior”).
163 We have found just one theoretical piece addressing the issue. See Kaushik Mukhopadhyaya, Jury Size and the Free Rider Problem, 19 J.L. & POL. 24, 24 (2003).
164 Blakely would be less problematic if there were substantial overlap in a juror’s tasks—for example, if mastering one factual issue meant that the juror had already learned 80 percent of what he needed to answer the next question. But sentencing facts are often quite distinct, see supra Section IA, and so substantial additional effort will likely be required for each one.
165 So far as accuracy in punishment is concerned, the correct determination of sentencing facts is actually overwhelmingly important, both to the offender and society.
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Jurors’ motivations may be more complex than just increasing accuracy; individuals are also driven by a need to impress their peers. That stimulus may partially remedy free-rider effects, because jurors may see individual benefits from personally acquiring and accurately processing information. But juror passivity during hearings and trials undercuts that effect. Jurors do not know one another prior to being empanelled, and therefore the only way for them to build an excellent reputation or earn the respect of their peers is by sending signals, such as appearing prepared and knowledgeable. Passive jury settings make signaling one’s effort or skills (by, for instance, asking knowledgeable questions) during courtroom proceedings difficult. As a consequence, jurors remain uncertain during trial and sentencing hearings about the quality of their collection and processing of information, a feeling that can dramatically reduce the incentive to work. Moreover, if a juror believes that he is behind or has made mistakes, but is unable to discover otherwise or “catch up” by clarifying points he missed, he may give up altogether.

The new burdens imposed on jurors by Blakely threaten to generate exactly this sort of effect en masse. As many jurors fall farther behind due to cognitive overload or become unsure about what is important given all of the questions they are expected to answer, they may throw up their hands and expend minimal effort—accepting that they will be unable to impress their peers in deliberation and that they should instead depend on others. Or, where presented with multiple fact-finding tasks, jurors may decide their best chance of impressing their peers (and contributing to the accuracy of results) is by focusing on just one or two of the sentencing factors and ignoring the others—a reasonable approach, but one that, if the jury is uncoordinated, risks all jurors ignoring the same issues, likely the ones that are the most difficult to determine.

166 See generally Alvin Zander, The Psychology of Group Processes, 30 ANN. REV. PSYCHOL. 417, 428-430 (1979). Or, for instance, if jurors were motivated by a feeling of satisfaction with participation in the democratic process, see supra Section III.C, increased cognitive burdens and structural complexity post-Blakely might deeply undercut this motivation, causing an even more severe free-rider problem.


C. Structural Simplification and Active Jury Approach

We propose attacking the serious problem of cognitive overload from two angles: structuring post-Blakely sentencing fact-finding proceedings to reduce complexity, and providing the jury with the tools it needs to manage that complexity. Structurally, an important first step is bifurcation of proceedings, which will essentially eliminate Blakely’s complexity effects at the guilt stage. Complexity will remain a problem during the punishment phase because multiple sentencing factors are likely to be at issue, but unitary proceedings may worsen the problem by forcing the jury to take on all the factual questions relevant to a defendant’s culpability at once.\footnote{See Murphy, supra (arguing for bifurcation to avoid “jury confusion”); see also Lillquist, supra (arguing for bifurcation in states with jury sentencing on similar grounds); cf. Vidmar, supra, at 871 (describing bifurcation as a “procedural device intended to reduce trial complexity”).}

Furthermore, if proceedings are bifurcated, jurors will enter the sentencing stage having already deliberated on guilt, and may have developed at least some sense of community, which may offset juror frustration and incentives to shirk.\footnote{See Armin Falk, Simon Gächter & Judit Kovács, Intrinsic Motivation and Extrinsic Incentives in a Repeated Game of Incomplete Contracts, 20 J. ECON. PSYCHOL. 251 (1999).}

Cognitive burdens can also be allayed by ensuring that each task is approached discretely. One reason complexity spurs cognitive overload is that multitasking—shifting constantly from one task to another—triggers frustration and fatigue.\footnote{Kirsh, supra, at 31-33.}

That frustration is almost inevitable if post-Blakely sentencing proceedings are structured to parallel criminal trials—e.g., the state produces a series of witnesses, each of whom testifies on different sentencing factors and then is cross-examined on each of those issues, and then the defense produces its own series of witnesses, repeating the process. But there is no reason sentencing proceedings must follow this pattern. If sentencing can be detached from the finding of guilt, then there is no reason each fact cannot be detached from one another. We do not recommend separate deliberation for each fact (as would be necessary to avoid multi-tasking completely), because it would probably frustrate jurors and would certainly increase costs, but sequential introduction of evidence on each sentencing factor is an idea that is, at least, worth experimentation.

Further structural simplification could be achieved through changes to the guidelines schemes themselves. Although a real exploration of substantive sentencing reform is beyond the scope of this paper, we raise one possibility: condensing the consideration of separate sentencing factors into a single jury determination. Balancing a range of aggravating and mitigating factors, juries ultimately could simply characterize the offense overall as being “aggravated, mitigated, or ordinary,” or they could rank the offense somewhere on a scale of wrongfulness, where the midpoint is a “typical” example of the same offense.\footnote{See Ruback & Wroblewski, supra, at 769-74 (proposing similar simplification in the ju-}

Consolidation would
help reduce structural complexity, even though the substantive difficulty of balancing or ranking the underlying factors would not change, and thus presents an alternative solution to the multi-tasking problem—rather than sequencing, tasks could be consolidated to eliminate the interruptions of moving from factor to factor.\footnote{Cf. Kirsh, \textit{supra}, at 32 ("task collapsing" may reduce workplace complexity).}

Our second set of proposals are designed to improve jurors’ information processing capacity (overcoming complexity and reducing reliance on cognitive schema) and permit signaling to counteract collective action problems. These ideas complement reforms targeted at reducing complexity: jurors’ responses to complexity can be improved,\footnote{See Christine Jolls & Cass R. Sunstein, \textit{Debiasing Through Law} 15 (Harvard Law Olin Discussion Paper 495, September 2004).} even though free-riding and information structure biases can never be completely eliminated. At the outset, in order to jolt jurors off their cognitive crutches and to increase juror effort levels, judges should give jurors a sense of individual responsibility or accountability for the acquisition of information prior to jury’s taking evidence. Judges should address jurors as individuals, not as members of a group, so as to deemphasize the possibilities of relying on one’s teammates.\footnote{To some extent, judges already do this by saying things like, “The people and the defendant are entitled to the individual opinion of each juror,” but send mixed messages later with, “Each of you must decide the case by yourself, but should do so only after discussing the evidence and instructions with other jurors.” See Ellsworth, \textit{Inspiring}, \textit{supra}, at 1390 (quoting the California Instructions, CALJIC Nos. 17.40, 17.41, 17.42 (6th ed. 1996)).} Judicial instructions to jurors should use the cognitive power of “role schemas,” which can lead jurors to behave differently if they view their position and goals differently—as, for instance, an individual fact-finder (similar to a judge) responsible for accurately determining all the facts.\footnote{Chen & Hanson, \textit{supra}, at 1137, 1183, 1197.}

Jury instructions often fail to achieve their goals, but carefully crafted, clear and plain language can improve their effectiveness.\footnote{See, e.g., Judith L. Ritter, \textit{Dissecting the Presumption that Jurors Understand Instructions}, 69 Missouri L. Rev. 163, 197-201 (2004) (reviewing studies); Phoebe C Ellsworth & Alan Reifman, \textit{Jury Comprehension and Public Policy: Perceived Problems and Proposed Solutions}, 6 Psychol. Pub. Pol'y & L. 788, 802-03 (2000) (describing empirical evidence that certain types of pre-instructions typically do no good); Friedman, \textit{supra}, at 191, 197; see also \textit{supra} note 89 (discussing failures of limiting instructions).} That goal is easier to achieve in the context of debiasing instructions, which do not seek to teach jurors abstract legal concepts.\footnote{For instance, a judge could instruct a jury along these lines: “People tend naturally to look for stories that explain the information they receive, and then to use the stories to fill in gaps in the information. And the attorneys are doing their best to create a story for you, one that can obscure facts, unless you work hard to remain critical. You must do everything you can to each}
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done, but instructions can hardly hurt, and if properly crafted they may have another benefit: encouraging jurors to look for information categorization and processing mistakes made by others—and, importantly, to realize that jurors will be similarly searching for mistakes.180 Instructing jurors that they should expect other jurors to use different facts to defend competing positions in deliberation may induce every juror to be more accurate and informed, both because they will be more cognizant of schema-induced complacency and because differences of opinion can, in certain circumstances, provide a competitive spur to diligence and concentration.181

Blakely also significantly strengthens the arguments many scholars have long made for a shift to an “active jury” model, including juror note-taking, question-asking, and discussions during breaks—anything that helps jurors to process information will lighten the burden of evaluating numerous sentencing factors.182 We do not reiterate these well-developed arguments. Instead, we focus on an important advantage heretofore ignored (to our knowledge) by active jury advocates: certain types of “activity” enable jurors to communicate with or signal to (and hence monitor) each other during the presentation of evidence.183 Thus, in addition to amplifying jurors’ ability to acquire information, the active jury model can help ensure that

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180 See Chen & Hanson, supra, at 1233-35.
181 Cf. Kfir Eliaz, Debraj Ray & Ronny Razin, Group Decision-Making in the Shadow of Disagreement (Working Paper May 2004); Milton Harris & Artur Raviv, Differences of Opinion Make a Horse Race, 6 REV. FIN. STUD. 473 (1993). If jurors believe they will have to justify their factual positions to fellow jurors, and jurors are unaware of the details of likely criticism, they will preemptively self-criticize and potentially change positions if they cannot answer an argument. See Chen & Hanson, supra, at 1233-35.
182 See, e.g., B. Michael Dann, “Learning Lessons” and “Speaking Rights”: Creating Educated and Democratic Juries, 68 IND. L.J. 1229 (1993); Douglas G. Smith, Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform, 48 ALA. L. REV. 441, 443-45 (1997); Shai Seidman Diamond & Neil Vidmar, Jury Room Ruminations on Forbidden Topics, 87 VA. L. REV. 1857 (2001); Valerie P. Hans, Inside the Black Box: Comment on Diamond and Vidmar, 87 VA. L. REV. 1917 (2001). But see Jury Trial Innovations 139-40 (G. Thomas Munsterman et al. eds., 1997); 1 Wayne R. LaFave, Criminal Procedure § 1.4(c) (2d ed. 1999). Some aspects of the active jury approach have been recently tested in Arizona, where the state Supreme Court has sanctioned jury discussion during trials and permitted discussions and deliberations in some civil trials to be videotaped for analysis by scholars. See Diamond & Vidmar, supra, at 1869-74.
183 In fact, communication has been considered a major argument for the passive jury, since asking questions or communication can be considered improper early deliberation. See Kara Lundy, Note, Juror Questioning of Witnesses: Questioning the United States Criminal Justice System, 85 MINN. L. REV. 2024-27 (2001); Ellsworth & Reifman, supra, at 802-03.
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jurors have the right incentives to do so. Juror signals during hearings and trials can induce more effort and reduce cognitive bias.

For example, question-asking by jurors will increase juror accountability and force jurors to question their take on the evidence presented. Allowing juror questions would be a good first step: voluntary questions will reveal disagreements among jurors, thereby dispelling any belief that consensus at deliberation will be straightforward. And the option to ask questions might be treated as an opportunity to distinguish oneself. But requiring that jurors ask questions may bring even greater benefits. Consider a rule in which every juror is required to submit a question—without the input of other jurors—about each factual dispute the jury will determine. If authorship were revealed, jurors would recognize that asking an obvious or irrelevant question would expose their free-riding. The drawbacks of juror embarrassment or fear of embarrassment (which could cause juror frustration and thus harm performance, and undermine jury legitimacy) might well outweigh this benefit. However, even requiring anonymous questions would be useful. Questions asked by a juror would provide the entire jury with a window into that juror’s thinking. Jurors may consider the motivation for each question, and, in so doing, think more critically about their approaches to factual issues.

Blakely also makes two other reforms to the passive jury model more attractive: allowing juror note-taking and juror discussions during trial or hearings. Note-taking helps to facilitate memory, ever more important post-Blakely as jurors’ tasks become more complex. Judges should affirmatively suggest that jurors take notes, advising that good notes can be useful in deliberation. Note-taking will increase effort by serving as an imperfect, though constant (unlike question-asking), signal during the presentation of evidence. If taking good notes becomes a symbol of a being a “quality” juror, then jurors will write things down, and this may reduce the number of misremembered facts, improve attention, and help to overcome overload or reduced effort. Similarly, allowing juror conversations during breaks in

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184 A possible drawback is question-asking might lead to a group story being (perhaps tacitly) agreed to early, or, in the case of lack of consensus, a failure to examine evidence unless it bears on the disagreement between jurors. What evidence exists, however, does not support this concern. See Shari Seidman Diamond et al., Juror Discussions During Civil Trials: Studying an Arizona Innovation, 45 ARIZ. L. REV. 1, 74-75 (2003). Moreover, juror discussion of cases happens regardless, and jurors often talk about less useful or potentially more biasing subjects such as procedure and the law. Terry Carter, ABA Committee Vets and Revises Proposals for Jury Standards, ABA JOURNAL, Dec. 2004, at 63 (quoting Louraine C. Arkfeld).


186 Note-taking is also likely to eliminate the biases introduced by the ordering of evidence—individuals are known to overvalue more recently acquired information—although group deliberation already alleviates this problem. See Ahlawat, supra, at 71.

187 And unlike question-asking as a signal, note-taking carries no negative “embarrassment”
proceedings will facilitate signaling. If judges tell jurors to discuss factual ambiguities and confusions during the presentation of evidence, and jurors anticipate being evaluated by their peers during breaks, they will work harder. They will also succumb to fewer cognitive mistakes if they are directed to anticipate others’ questions and be self-critical as to their own factual theories.

Finally, post-Blakely, it is also worth considering whether juries should be better organized, for example, by facilitating juror coordination—dividing up tasks—prior to hearing evidence. To our knowledge, no attention has been given to plausibility or desirability of pre-hearing juror coordination. Small groups in other contexts avoid strategies of total redundancy (everyone doing the same thing). Redundancy may reduce error, but it also reduces effort and accountability. Fewer, but more devoted jurors might well increase effort and the cognitive resources devoted to each sentencing issue. Implementing such an idea would be complicated, in part because a jury would need structures to assess work quality. This proposal also faces serious constitutional objections, because each element arguably might not be determined by a jury of adequate size. Even so, some criminal defendants might prefer a jury that divided tasks in a way that improved its information-processing capacity, and so we propose allowing judges to permit such coordination upon the parties’ agreement. Such coordination would be easier in the sentencing stage of bifurcated proceedings because jurors would already have familiarized themselves with their collective information-gathering strengths and weaknesses. Moreover, a brand-new, separate sentencing stage of jury proceedings provides a good opportunity to experiment with changes that might seem too radical at the trial stage, where procedures are bound up with centuries of tradition.

V. POST-BLAKELY DELIBERATION

In addition to the reduced effort and the amplified cognitive biases that will affect each juror’s individual assessment of sentencing facts, post-Blakely offenders will also confront distortions in their sentences that result from the group deliberation process. Groups that deliberate before voting often reach dramatically different outcomes than one would expect based on aggregating members’ individual, pre-deliberation sentiments. Deliberation may improve decision making through in-

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188 Juror deliberation is much more complicated than we suggest here; we treat it separately in greater detail in Part V.

189 Chen & Hanson, supra, at 1233-35.

190 See Jack B. Soll, Intuitive Theories of Information: Beliefs About the Value of Redundancy, 38 COG. PSYCH. 317, 319 (1999) (“Although a redundant measurement has value, non-redundant sources dominate due to the lower expected correlation in errors.”).

form sharing, memory and bias correction, and consensus building, but deliberation can also generate several perverse consequences, such as groupthink, polarization, or information cascades. The Blakely revolution marks an ideal time to consider improvements to this process. Not only does the shift from judges to juries at sentencing mean a shift from individual to deliberative decision making, but the juries of the future will be answering more, and more difficult, factual questions. If nothing changes, post-Blakely complexities are likely to significantly exacerbate deliberative biases (as well as reduce the benefits to which traditional advocates of deliberation point), but all is not lost: structural reforms may significantly moderate the problems introduced by Blakely.

A. How Blakely Magnifies the Biases of Deliberation

Cass Sunstein has described two types of biases that infect the outcomes produced by deliberating groups. The first are “informational influences, by which members fail to disclose what they know because of deference to the information announced by others.” Information problems of this sort result during deliberation because individuals do not all reveal everything they know (or think they know) simultaneously. Instead, jurors reveal small amounts of information or opinion over time; during that process, jurors are influenced by those who speak before them. A juror who (correctly) knows a particular fact might (incorrectly) decide she is either wrong or that the fact is irrelevant, and thus might never share it, instead agreeing with those who have already spoken—further perpetuating a false consensus that will influence subsequent jurors. The second set of biases are “social pressures, which lead people to silence themselves in order not to face reputational sanctions.” Social pressures aggravate the informational influences by limiting dissent even further; even if an individual identifies a mistake in the group’s thinking, he may not dissent to save face.

Deliberation can thus cause juries to “propagate individual errors; emphasize shared information at the expense of unshared information; fall victim to cascade effects; and tend to end up in more extreme positions in line with the predeliberation

192 Compare Mary E. Pritchard & Janice M. Keenan, Does Jury Deliberation Really Improve Jurors’ Memories?, 16 APPL. COGNIT. PSYCHOL. 589 (2002); Ellsworth, Twelve Heads supra, at 206, with IRVING JANIS, GROUPTHINK (2d ed. 1980). There are also significant advantages to group decision making without deliberation (e.g., information markets), see JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004), but elimination of deliberation in the criminal jury seems exceedingly unlikely and probably ill-advised. See Kim Taylor-Thompson, Empty Votes in Jury Deliberations, 113 HARV. L. REV. 1261 (2000).
194 Id. at 4.
196 Sunstein, Group Judgments, supra, at 4.
tendencies of their members.” Merely by shifting sentencing decision making from judges to juries, Blakely of course raises the possibilities of deliberation (and other group effects) biasing sentencing outcomes; we do not have much new to offer on that general subject, however, so we do not rehash those ideas here. But Blakely’s likely consequences must be assessed in light of fairly complicated determinate sentencing systems in a very specific deliberative environment. In such a context, Blakely appears likely to magnify deliberative biases in a number of important ways and beyond what we might otherwise expect.

Post-Blakely cognitive overload and associated reduction in effort will result in jurors not only having less information about each issue at their disposal, but likely being less confident in their individual pre-deliberation conclusions. Greater uncertainty may reduce individual jurors’ willingness to dissent from the group, and dissent is a key ingredient for self-correction when a group is heading in the wrong direction. A probable consequence is exacerbation of information cascades. Sunstein, for example, notes that in a group where most members are suffering from cognitive biases—such as framing, conjunction, and anchoring effects—individuals who might be able to steer the group back on path must “have to have a high degree of confidence to do so.” Post-Blakely overload thus seems likely to dampen dissent.

Blakely will also magnify another deliberation bias, the common knowledge effect—deliberating groups tend to focus on information that is held by all group members, rather than that held by only one member or a few. In part, this is because it is more likely that information held by several people will emerge (or will

197 Id. at 3-4. See also Cass R. Sunstein, David Schkade & Lisa Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 VA. L. REV. 301 (2004) (applying this idea to appellate judges).
199 See Shinji Teraji, Herd Behavior and the Quality of Opinions, 32 J. SOCIO-ECON. 661 (2003); Dale Griffin & Amos Tversky, The Weighing of Evidence and the Determinants of Confidence, 24 COG. PSYCHOL. 411 (1992). Some jurors may recognize that everyone else is similarly less informed. Nonetheless, it is likely that the number of individuals in the group positioned to dissent will drop, which is enough to magnify cascade effects.
200 Sunstein, Group Judgments, supra, at 16, 20, 40.
202 Sunstein, Group Judgments, supra, at 20.
be reiterated more frequently) than information held by a single person.\footnote{Information held by fewer persons may also be disproportionately downweighted.} How does \textit{Blakely} aggravate this bias? Studies that analyze the common knowledge effect usually distribute some set of information to everyone and other “hidden” knowledge to only a few.\footnote{Garold Strasser & William Titus, \textit{Pooling of Unshared Information in Group Decision Making: Biased Information Sampling During Discussion}, 48 J. PERSONALITY & SOC. PSYCHOL. 1467 (1985); Garold Strasser & William Titus, \textit{Hidden Profiles: A Brief History}, 14 PSYCH. INQUIRY 304 (2003) [hereinafter, Strasser & Titus, \textit{Hidden Profiles}].} The initial distribution is held fixed. But a clear implication of these studies (and the statistical and social hypotheses underlying them) is that if each piece of hidden information were held by even fewer people, the common knowledge effect would be stronger.

To illustrate, recall that in Part IV we noted that, without coordination of some sort, jurors who are overwhelmed with information are likely to respond by ignoring certain questions or types of data, particularly if they are complicated or otherwise difficult to process. Jurors’ responses to these challenges are likely to be correlated—\textit{i.e.}, people will avoid the same confusing evidence and focus on the same easier-to-understand information.\footnote{See supra Section IV.B. Reducing these correlations is one argument in favor of diverse juries, or role assignment among jurors, discussed both above in Part IV and below.} In extreme cases, \textit{every} juror might miss a crucial piece of data, meaning that the jury would not have sufficient information even absent deliberative biases. But in less extreme cases, hidden information may just be more hidden; for instance, a single juror instead of a few will notice a piece of evidence.\footnote{This effect may be similar to enlarging the group, which increases the focus on common knowledge to the detriment of hidden knowledge. \textit{See} Garold Stasser et al., \textit{Information Sampling in Structured and Unstructured Discussions of Three and Six Person Groups} 57 J. PERSONALITY AND SOCIAL PSYCHOL 67 (1989). If so, additional concern is warranted, because larger groups tend to be more confident in their ultimate decisions, regardless of accuracy. \textit{Id.} at 72.} The jury will have this information in an important sense, but because fewer jurors will be personally aware of it, juries will be even more likely to ignore it. Put differently, common knowledge will be even more dominant. Social influences magnify this change: it is harder, in the face of reputational costs, for a single juror to stand on a piece of information than it is for a few jurors.\footnote{See Felix C. Brodbeck et al., \textit{The Dissemination of Critical, Unshared Information in Decision-Making Groups: The Effects of Pre-Discussion Dissent}, 32 EURO. J. SOC. PSYCHOL. 35 (2001); Ellsworth, \textit{Inspiring, supra}, at 1397 (“A minority of two is many times stronger than a minority of one.”).}

\textit{Blakely} not only increases the bulk of information that jurors must process, but also requires that juries answer multiple questions with multiple answers. As we discussed in Part III, with multiple answer choices, jurors will tend to pick middle options. This \textit{individual} tendency may be compounded, in a deliberating jury, by compromises that \textit{groups} make between their members in order to reach a single,
unified answer. Post-Blakely, sentencing facts may be determined by group negotiation in two different ways. First, jurors might compromise within a particular question—with three options for a particular fact, if there is substantial disagreement, they may agree to pick the middle option, even if few or no jurors actually believes that such a choice is correct. Second, jurors might “trade” across facts. A jury with one or two holdouts who wish to acquit a defendant may be persuaded to convict, for example, in exchange for findings on sentencing facts that minimize the defendant’s exposure. Both effects will reduce sentencing accuracy, as compromise solutions may reflect no one’s view of the actual facts of the case.

Moreover, deliberation over multiple sentencing factors at once will likely exacerbate inaccuracies that stem from status differences. Many scholars have documented the relationship between social status and individual behavior in the jury setting. Occupation, age, gender, and race all play an important role in jury deliberation: those in low-status (i.e., less powerful) groups typically participate less and are less willing to “correct” a forming consensus, even if they believe that decision to be incorrect. This bias is disturbing in itself, but in multi-question proceedings post-Blakely, it will likely be worse: if a low-status person is willing to offer “hidden” information at odds with a building consensus, she may only be willing to do it once. Sunstein explains:

[L]ow-status members of groups are “increasingly reluctant over the course of discussion to repeat unique information” Those in a group who are inexperienced, or are thought to be low on the hierarchy, are particularly loathe to emphasize their privately held information as discussion proceeds.

Thus, over time, status biases harden. With only one fact to find, the loss of accuracy might be negligible if people can share what they know quickly and early, even

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209 These deliberative effects might reduce the likelihood of hung juries, though there is not much room for improvement on that score. See Saks, supra, at 39-40 (observing that the hung jury “problem” has been overstated: “the rate of hung juries has been tiny [a few percent], and consistently so for decades”). The compromise approach may also be seen as a form of jury nullification: the deliberate choice of an outcome not supported by the application of the law to the facts, in order to satisfy jurors’ sense of justice.

210 Admittedly, it is tough to distinguish juries from judges in this tendency to compromise, except that judges are perhaps better situated to “compromise” toward accuracy because of their experience and their understanding of how the finding of facts will translate into sentences. Judges also do not suffer from common knowledge effects or group polarization; after all, the judge has, at least in theory, cognitive access to all the information relevant to his task at one time.

211 Sunstein, Group Judgments, supra, at 26.

212 See, e.g., Taylor-Thompson, supra, at 1281-1308.

213 Sunstein, Group Judgments, supra, at 26.

214 Id. (quoting Strasser & Titus, Hidden Profiles, supra, at 305).
if they refuse to press that information in later discussions. But low-status individuals suffer group disapproval for offering “hidden” information, information that is helpful in ensuring the group is getting the right answer. And if jurors are once bitten, twice shy in the context of a single question, it seems plausible that they will be even less likely to dissent from the majority over the seventh fact.215

*Blakely*’s requirements are also likely to worsen group polarization, another well known problem in group decision making. Polarization, which is driven principally by informational cascades and reputational pressures, occurs when “members of a deliberating group end up in a more extreme position in line with their tendencies before deliberation begins.”216 Importantly, polarization does not always produce the wrong answer; but it does introduce randomness and thus increases variance.217 Polarization can affect both factual and value judgments.218

Polarization will be amplified post-*Blakely* because certain sentencing factors will ask jurors to choose an answer along a range, while the sentencing scheme taken as a whole inherently offers a range of possible conclusions. Before *Blakely*, jury polarization effects were principally documented in the context of damages or punitive damages calculations in civil trials;219 in criminal trials where a binary choices rather than a range of choices were presented, polarization is likely important only in increasing confidence levels.220 Polarization tends to affect groups that agree at the outset; assuming all the jurors agree that a defendant is guilty, if the jury is not involved in sentencing, there is no consequence to an increased certainty of guilt or motivation to punish. However, for example, a post-*Blakely* jury that, through deliberation, becomes more convinced of guilt may add a finding of “deliberate cruelty.” *Blakely* also opens the door to greater variance and reduced accuracy in another way. Polarization stems in part from reinforcement of confidence, but confidence is not issue-specific, and so just as low-status perception can become more problematic over time, an overconfident juror who succeeds in convincing

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215 This problem becomes even more worrisome if low status groups—as a result of their different backgrounds and experiences and thus more unique perspective—are more likely to acquire hidden information.

216 Sunstein, *Group Judgments*, supra, at 32 (citing ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 203-26 (1985)).


218 Id.; see also SUNSTEIN ET AL., supra.

219 See generally, e.g., SUNSTEIN ET AL., supra.

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others as to the first sentencing factor may push even harder in deliberation over the second, and so forth.\(^{221}\)

Occasionally, two of the effects of\(^{221}\) Blakely we have discussed—compromise and polarization effects—may offset one another. But that prospect does not obviate either problem; polarization may occur in some cases and compromise in others, leading to inaccurate results in both kinds of cases. Even if the effects perfectly cancelled one another so that average outcome across a wide range of cases was unaffected by the two biases taken together, that fact would be cold comfort if juries were getting a large number of individual cases wrong.

B. Improving Post-Blakely Deliberation Outcomes

Groups often outperform individual experts in correctly answering factual questions so long as each group member contributes independently and group membership is reasonably diverse.\(^{222}\) Add deliberation, however, and the accuracy and reliability of group decision making becomes much less certain.\(^{223}\) Informational and social pressures can push juries away from the right answers, even when juries are asked only to decide questions of innocence and guilt. But Blakely’s requirement that juries decide sentencing facts, at least in a world of determinate sentencing, will significantly dampen dissent and intensify group polarization, thereby decreasing accuracy and amplifying sentence variance. Viable reform options capable of insulating the jury from Blakely-based deliberative failures do exist, however, and legislatures should consider them along with other changes made necessary or attractive by Blakely.\(^{224}\)

One major goal of deliberation is to induce jurors to share all the information they know. Simple instructions to this effect could have a great deal of influence; jurors respect and attempt to follow jury instructions, and that if clearly worded, instructions can be effective.\(^{225}\) Therefore, when appropriate, judges should explain to juries that they are to answer factual questions that have a correct answer—that is, in those circumstances in which juries are, in fact, being asked simply to establish a fact (e.g., drug quantity, whether defendant used a gun) rather than to pass the kinds


\(^{222}\) See generally Surowiecki, supra.

\(^{223}\) See Sunstein, Group Judgments, supra, at 18-33.

\(^{224}\) One possible reform that we do not discuss is changing the size of juries. Larger and more diverse juries increase the range of perspectives on information and make division of labor and sub-grouping easier. But larger groups can exacerbate the biases of common knowledge and foster free-riding. There is also a cost obstacle to this reform, as well as the likelihood that, assuming unanimity remains required, hung juries would more frequently result.

\(^{225}\) See Reid Hastie, Experimental Evidence of Group Accuracy, in INFORMATION POOLING AND GROUP DECISION MAKING (Bernard Grofman & Guillermo Owen et al. eds. 1983); see also supra note 178 and accompanying text.
of normative judgments that are often bound up in sentencing “fact-finding.” Groups perform better at sharing information, working as a team, and avoiding deliberative biases if members believe that the group has acquired sufficient information to determine the answer, that getting the right answer is the goal, and that accomplishing it is only a matter of time.

Jurors should also be asked to record their thoughts and beliefs—some of which will be hidden information—prior to deliberation. These private, pre-deliberation diaries can serve as “anchors” for each juror, reducing the likelihood of polarization. Jurors should also be directed to submit their predeliberation opinions anonymously to the group. If jurors share their initial opinions regarding, for example, a defendant’s degree of culpability before any deliberation takes place—and they do this simultaneously, rather than revealing their opinions sequentially—the jury will receive a snapshot of one another’s views that is not influenced by informational or reputational pressures. Information sharing (perhaps in the form of a pre-vote) should occur in an iterated setting. Iteration can be used to generate feedback loops, allowing jurors to assess and respond to what other jurors believe is important, thereby prompting each to offer information not deemed relevant on the first go-around. Eventually, incorporating technology and deliberation-enhancing “devices” (already used in business settings) may succeed at reducing status problems and encouraging participation on an equal footing.

As we noted in Part IV, despite the potential constitutional problems, reformers should consider the possibility of asking judges to direct juries to assign certain roles (perhaps particular factual questions) to individuals or sub-groups of the jury prior to hearing evidence (or to allowing the parties to agree to such structure). Superimposing juror roles (either self-selected or randomly assigned) over the existing jury social structures during the deliberation process would have important implications,

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227 Id. at 432-33.
228 A drawback of public pre-deliberation voting is that jurors may find it hard to retreat from positions to which they have publicly committed themselves. For this reason, recording one’s thoughts in notes or anonymously voting seem to be superior options.
230 See Sunstein, Group Judgments, supra at 37.
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not all of them necessarily beneficial.\textsuperscript{232} One reasonably likely consequence is that assigning roles would create an “expert,” making the group less susceptible to social pressures and informational influences.\textsuperscript{233} Whether such reforms would constitute an improvement will turn on whether experts or expert subgroups, having been assigned to particular factual tasks, are more likely to be right as a consequence of increased focus and reduced deliberation-induced bias.

In a similar vein, where possible, juries should be encouraged—again, through simply worded judicial instructions or suggestions—toward internal healthy competition.\textsuperscript{234} One approach, other than using roles, would be the use of devil’s advocates,\textsuperscript{236} though jurors are less likely to heed criticism that is not truly believed by its defender.\textsuperscript{237} A possible solution to this shortcoming is to use “secret” roles within the jury to conceal whether criticism is sincere. A second option is to assign tasks to individuals or subgroups, and then assign “discussants” directed to be critical of the factual opinions expressed. More generally, anticipated criticism (without knowledge of any specifics) will force jurors to keep open minds.\textsuperscript{238} Factual accuracy might even be enhanced by more radical reforms: for instance, dividing juries for deliberation purposes into two groups that initially do not communicate. The smaller groupings might more effectively unearth hidden information, and arguably, group division might improve performance if jurors perceive a benefit (social validation, or simply ending deliberations earlier) from arriving at the same answer as the other group.\textsuperscript{239}


\textsuperscript{234} Because jury deliberations take place in secret, there may be no practical way to ensure that any given jury actually follows particular structural suggestions.

\textsuperscript{235} See supra Part IV.

\textsuperscript{236} See Sunstein, \textit{Group Judgments}, supra at 39 (“Those assuming the role of devil’s advocate will not incur the reputational pressure that comes from rejecting the dominant position within the group; they have been requested to do precisely that. And because they are asked to take a contrary position, they are freed from the informational influences that can lead to self-silencing.”).

\textsuperscript{237} See id. at 40.

\textsuperscript{238} See Chen & Hanson, supra, at 1233-35.

\textsuperscript{239} Cf. Sunstein, \textit{Group Judgments}, supra at 40-41.
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Bifurcating factual deliberations, so that each fact is deliberated and decided sequentially, may reduce “vote trading” among jurors. The reason tracks the intuition of the Prisoner’s Dilemma: if a juror has to vote now for a concession later, he may anticipate defection—i.e., a holdout may be unwilling to vote (against his conscience) to convict if he is not confident that other jurors will really offer sentencing leniency after another stage of the proceedings has passed. Further, to the extent bifurcation minimizes cognitive overload, it will reduce the extent to which *Blakely* exacerbates deliberative biases, especially at the threshold guilt stage. A further restructuring possibility would divide jury deliberation, perhaps on each factual question, into two distinct phases. The first stage should have a fixed minimum length, and should focus on information revelation and disagreement to elicit hidden information, with jurors expressly encouraged to avoid pressuring one another toward consensus.

We recognize that some of these ideas amount to a sharp break with tradition, and courts or legislatures may be reluctant to implement them at the trial stage for this reason. Again, however, we note that there is no traditional form for separate jury hearings designed to find facts related to sentencing, and so the creation of these new proceedings may provide a window to experiment with new deliberation structures. Nonetheless, many of the reforms suggested above are perfectly consistent with existing jury practice. At the very least, this research suggests that a requirement of pre-deliberation voting and/or individual recording of thoughts, arguments, and evidence should be explored.

**CONCLUSION**

*Blakely* significantly complicates the criminal jury’s task, and in so doing, it raises a number of new problems and exacerbates some longstanding ones. Policymakers should not underestimate the significance of these effects, for the new duties *Blakely* imposes seriously threaten the jury’s functioning—that is, unless solutions are found. The stakes are tremendous: tens or even hundreds of thousands of individuals’ liberty each year, as well as the credibility and fairness of the justice system as a whole. None of these consequences should turn on the performance of a jury that has not been equipped to the greatest degree possible with the tools, structures, and procedures that will help it to do its job right.

By demanding that states essentially reinvent the criminal sentencing process, *Blakely* has provided a window to test reform proposals, many of which have long been suggested in the trial context as well but have encountered resistance there. This opportunity may be short-lived, for practices may become entrenched over time. Because each state with binding guidelines will likely respond to *Blakely* in somewhat different ways, the coming few years will provide a good chance to test and compare different approaches. In responding to *Blakely*, states should remain flexible and open to policy reforms during this period of flux, learning from the suc-
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cesses and failures of other approaches. States have long been described as democracy’s laboratories, and now is the time to be willing to experiment.

We hope, therefore, that some states adopt completely different approaches than the ones we suggest. That said, if we were designing a post-\textit{Blakely} jury fact-finding sentencing system for a state that wished to retain mandatory guidelines, it would have a few essential features:

- Proceedings should be bifurcated, which would solve the evidentiary "relevance problem," mitigate compromise and decoy effects, eliminate new complexities at the trial stage and reduce them at the sentencing stage, and provide an opportunity to experiment with procedural reforms that might prove too great a break with tradition at the trial phase.

- At the sentencing phase, certain rules of evidence should apply—most notably, the relevance rule and the exclusion of overly prejudicial evidence—but hearsay should be unrestricted unless it interferes with the defendant’s constitutional confrontation rights, special restrictions on prior bad act evidence should be lifted, and restrictions should not apply to the extent they interfere substantially with the defendant’s ability to introduce mitigating evidence.

- During sentencing proceedings, jurors should be permitted to take notes and discuss the case during breaks, and perhaps required to submit anonymous questions to the judge. Judges should issue pre-instructions designed to alert jurors to the risks of reliance on heuristics, and be permitted to experiment, upon the parties’ agreement, with allowing jurors to coordinate information-gathering responsibilities, and with structuring the proceedings sequentially on a per-issue basis.

- Special verdict forms submitted to the jury should contain carefully selected answer choices excluding potentially distorting options not supported by the evidence. Where jurors are asked to make a qualitative or comparative judgment, judges should provide them with a set of concise relevant comparisons, standardized by a sentencing commission for each sentencing factor and major category of underlying offense.

- Judges should advise jurors, before commencing deliberations, of certain procedures that can improve the quality of deliberations. Jurors should be directed to write down their impressions and share them anonymously, and to consider seriously a few well thought-out ways of internally organizing discussions. Sentencing facts might also be deliberated and voted on sequentially, in order to reduce compromise effects.

Many will probably disagree with our specific proposals, but we think it is difficult to gainsay our central point: after \textit{Blakely}, juries will face diverse and complex
tasks that they are in many cases ill-equipped to handle. Ensuring jury competence to carry out these tasks is absolutely critical, and so it is essential that legislatures wishing to maintain determinate sentencing think creatively about structures and procedures that might improve juries’ capacities. In that creative spirit, we have raised some ideas that have never been tried before in any context, much less in jury sentencing fact-finding proceedings—although some of our ideas are straightforward, relatively conservative, and low-cost. There is, of course, no substitute for careful observation of how such ideas actually play out in practice. The post-
Blakely revolution will provide us the opportunity to find out.