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Function Over Form: Reviving the Criminal jury's Historical Role as a Sentencing Body

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FUNCTION OVER FORM: REVIVING THE CRIMINAL JURY'S HISTORICAL ROLE AS A SENTENCING BODY

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This Article argues that the Supreme Court, as evinced by its recent spate of criminal jury decisions, has abandoned the criminal jury known to the Founders and, in so doing, has severely eroded the protections intended to inhere in the Sixth Amendment jury trial right. It then proposes one potential solution to this problem.

According to the Supreme Court, this recent line of cases has been motivated by the need to preserve the "ancient guarantee" articulated in the Sixth Amendment under a new set of legal circumstances. Unfortunately, the Court misinterprets the ancient guarantee that it is ostensibly attempting to preserve by focusing exclusively on the criminal jury's formal aspects and ignoring its long-standing historical function as a quasi-sentencing body. The author argues that both the criminal jury known to the Founders and its English antecedent were, at heart, sentencing bodies and that this sentencing function was essential to the Sixth Amendment protections promised to criminal defendants. By recasting the jury in the mold of simple fact-finder, the modern Court has hindered the jury's ability to interpose a body of citizens between the government and the accused, leaving the accused without adequate protection against prosecutorial overreaching and the various other forms of government oppression with which the Founders were concerned. The article concludes with an argument that this evisceration of the Sixth Amendment could be remedied, at least in large part, by informing juries of the sentencing consequences of their actions. This solution would not only serve to reinforce the various protections that the jury system was intended to confer upon criminal defendants, but would create a trial dynamic which more closely adheres to the archetype endorsed by the Founders.

"The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small,

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preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree."[1]

—Learned Hand

"[T]he present-day jury is only a shadow of its former self."[2]

—Akhil Amar

INTRODUCTION

The Supreme Court insists that the criminal jury is a purely fact-finding body.[3] The Supreme Court is wrong. In reality, the criminal jury is not, has never been, and likely never will be a mere fact-finder.[4] The Supreme Court's protestations to the contrary smack of a fascination with semantics and a knowing disregard for the jury's time-tested function as sentencing gatekeeper.

The origins of this controversy can be traced to the courts of seventeenth and eighteenth century England. Formally speaking, English juries were fact-finding bodies. They heard evidence, made judgments based on the evidence, and then yielded to the judge for the defendant's formal sentencing.[5] But functionally speaking, the jury was a quasi-sentencing body. Because few criminal trials involved real disputes regarding the guilt or innocence of the accused, the primary function of these trials was to decide the appropriate sanction.[6] At heart, the trials were sentencing proceedings and the jury played a central role in the sentencing decision. Instead of merely determining the guilt or innocence of the defendant, the jury would pass judgment on the fairness of the punishment involved.[7] When faced with an unduly harsh sanction, the jury would act as a sentencing mitigator, either by entering a compromise verdict in which the defendant was convicted of a

1. United States *ex rel.* McCann v. Adams, 126 F.2d 774, 775–76 (2d Cir. 1942).

2. AKHIL REED AMAR, THE BILL OF RIGHTS 97 (1998).

3. *See* Shannon v. United States, 512 U.S. 573, 579 (1994) (explaining that the jury's province is fact-finding and the judge's is finding the law).

4. Prior to 1670, the criminal jury was technically a pure fact-finder, or at least something reasonably akin to one. But its role has not since been limited exclusively to fact-finding, nor will it be, unless the protections guaranteeing jurors immunity from punishment are removed. *See infra* notes 55–58 and accompanying text. The American jury has formally operated as a fact-finder since 1835, though practically speaking it has functioned as a sentencing body since its inception.

5. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 31, 54–55 (1983).

6. *Id.*

7. *See* discussion *infra* Part I.A.

lesser charge or by acquitting the defendant outright.[8] As a result, a defendant could only be sentenced if both judge and jury signed off on the punishment.

The disconnect between form and function attendant to the jury's early role as sentencer gave rise to the confusion visible today in the Supreme Court's criminal jury doctrine. Because English juries were not specifically endowed with sentencing powers, they had to rely on fact-finding as a means of accomplishing their sentencing ends. Incapable of formally sentencing defendants, juries would pass judgment on defendants' sentences through the manipulation of their factual findings.[9] If the defendant's crime qualified for a sentence that struck the jury as unfairly disproportionate, it would tailor its factual findings (e.g., lowering the amount of money in question or changing the site of the crime) in order to reduce the defendant's sentence.[10] Thus, the English jury can be formally described as a fact-finder, but practically speaking, it acted as a quasi-sentencing institution.

The version of the jury adopted by the Founders largely mirrored the English archetype, but included a few structural modifications. While the division of labor between judge and jury remained the same,[11] the American version added the general verdict and endowed jurors with law-finding powers.[12] Both modifications improved the jury's ability to render verdicts contrary to the evidence—the general verdict by obscuring the factual basis undergirding the decision, and the law-finding powers by allowing the jury to directly modify the applicable law. As such, these modifications served to further institutionalize and enhance the jury's role as a sentencing body—a role that the jury of this period was not hesitant to play.[13]

The adoption of a hybrid jury—one concerned with both fact-finding and sentencing—reflected the Founders' vision that the jury should serve as a bulwark against government oppression and a check against an unresponsive central government.[14] By placing sentencing authority in the hands of this local and popular institution, the Founders ensured that individuals deemed unfit for

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8. *See infra* notes 38–42 and accompanying text.
9. *See* discussion *infra* Part I.A.
10. Langbein, *supra* note 5, at 3.
11. *Id.* at 2.
12. *See generally* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994); Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 590–91 (1939).
13. *See* discussion *infra* pp. 106–108.
14. *See* discussion *infra* Part I.B.

punishment (or for the degree of punishment intended by the State) would not be sanctioned by the State (or to the extent desired by the State).[15] Always skeptical of centralized governments and their potential for abuse, the Founders were loath to deprive a defendant of his most basic liberties without first interposing a body of his peers, with their moral values and judgments, between him and the State.[16]

The current Court continues to pay lip service to the Founders' vision of the jury as a safeguard against government abuse.[17] But in trying, as a doctrinal matter, to redefine the jury as merely a fact-finding body, the Court has undermined the structural protections afforded to defendants by the jury requirement and cheapened the promise embodied in the Sixth Amendment. The Court may have maintained formal continuity with the past, but it has utterly disregarded functional continuity. This failing is manifest in the Court's recent jury decisions between *Apprendi*[18] and *Booker*.[19] Putatively motivated by a desire to save the jury from judicial aggrandizement and restore its traditional role, the *Apprendi* line of cases actually functions to reinforce the jury's role as fact-finder and prevent its possession of more expansive powers.[20]

Limiting the jury to solely fact-finding is problematic for two independent reasons. First, it is historically revisionist and undercuts the protections that the Founders intended to confer on criminal defendants through the Sixth Amendment. Second, the Court's position is irreconcilably, and problematically, inconsistent with its other pronouncements respecting the jury. Recent Court cases repeatedly describe the jury as a fact-finder and work to prohibit the jury from considering the consequences of its actions, but at the same time the Court has consistently upheld the structural protections that allow the jury to render verdicts against the evidence.[21]

The result is a jury that is neither a capable sentencer *nor* a capable fact-finder. Juries are psychologically inclined to consider more than just the facts presented and the Court has protected their right to acquit against the evidence. As such, juries will inevitably act as sentence mitigators in some circumstances, which

15. *Id.*
16. *Id.*
17. *See infra* notes 135 & 162 and accompanying text.
18. Apprendi v. New Jersey, 530 U.S. 466 (2000).
19. United States v. Booker, 543 U.S. 220 (2005).
20. *See infra* notes 162–174 and accompanying text.
21. *See* discussion *infra* Part III.

diminishes their value as rational fact-finders.[22] And because the Court does not want the jury to consider information extrinsic to its fact-finding role, judges deny juries access to information necessary to perform their sentence-mitigation function, thus making them arbitrary and irrational sentencers.

The simplest solution to the Court's jury conundrum is to allow defendants to inform juries of the sentencing consequences of their actions.[23] By providing juries with relevant sentencing information, the Court can kill two birds with one stone. First, the Court could restore the historical protection afforded to defendants by the Sixth Amendment. Armed with sentencing information, the jury could successfully defend the accused both against arbitrary or oppressive prosecutions and against potentially unresponsive legislatures. Unduly harsh sentences could be averted through acquittals or compromise verdicts, and prosecutors, hesitant to lose convictions, would be more likely to charge defendants in a manner consistent with the community's standards of decency. Second, the Court could resolve the contradiction at the core of its jury doctrine. Allowing the jury to consider sentencing information would enable it to more capably perform its job as sentence mitigator without undermining its role as a fact-finder.[24] And, as an additional benefit, legislatures and courts would receive objective indicia of the community's sentiments regarding disproportionate punishments, allowing them to more fully honor their commitments to the Eighth Amendment prohibition of excessive punishment.

This Article proceeds in five Parts. Part I examines the historical foundations of the modern jury, highlighting the relevant features of both the early American jury and its English antecedent. Part II discusses the modern Court's jury jurisprudence up to *Apprendi*, making note of its often conflicting understanding of the jury's appropriate role. Part III then considers the new jury cases, demonstrating the ways in which these cases achieve some measure of formal continuity with the past, but fail to capture the essence of the Sixth Amendment jury right. This Part concludes with an argument regarding the fundamental contradiction inherent in the Court's jury doctrine and the problems that stem from this contradiction. Part IV argues that an easy, partial resolution to the

22. In other words, any time a jury behaves as a sentence-mitigator, its verdict is not a reflection of the facts governing the defendant's technical guilt or innocence.

23. Or at least to allow defendants to request that the Court inform the jury of the sentencing ramifications.

24. Informing juries of sentencing consequences is unlikely to increase the extent of jury nullification substantially. *See* discussion *infra* Part IV.B.i.

Court's jury dilemma can be accomplished by informing juries of the sentencing consequences of their decisions prior to jury deliberations.

I. ROLE OF THE JURY

A. English Juries

In form, the English jury decided only questions of guilt or innocence,[25] but in practice, very few criminal trials of the time were actual inquiries into the guilt or innocence of the accused.[26] On the contrary, the vast majority of cases involved defendants who had been caught red-handed or lacked any semblance of a credible defense.[27] The primary function of the jury trial, other than to formalize the defendant's incontestable guilt, was to determine the punishment. These trials were sentencing proceedings, first and foremost, and the jury played a central role.[28]

Because English law defined felonies as crimes punishable by death,[29] the jury's only opportunity to spare the life of most defendants was to return a verdict of not guilty. The defense counsel's main responsibility in such proceedings was to paint a sympathetic portrait of the defendant or his crime to convince the jury to return a verdict that spared the defendant's life.[30] This changed in 1717, when Parliament enacted legislation that revolutionized criminal punishment by making certain crimes "clergyable," or subject to the privilege of clergy.[31] Originally, the privilege of clergy was a means by which clerics accused of crimes were released to the ecclesiastical court and spared trial in secular court.[32] But over time the privilege was secularized and extended to an increasing num-

25. THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800 365 (1985).

26. Langbein, *supra* note 5, at 41.

27. *Id.*

28. *See id.*; Green, *supra* note 25, at 379 (explaining that the main role of the jury was not to serve as a bulwark against tyranny, but as a sentencing mitigator); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 783 (1993); *see also* Green, *supra* note 25, at 282 ("Assessment of guilt by the jury . . . was frequently made into a test, in the most general sense, of the defendant's just deserts.").

29. English law provided that "every Person attainted of Felony . . . shall lose his Life, and be hanged between Heaven and Earth, as unworthy of both." MICHAEL DALTON, THE COUNTREY JUSTICE 403 (London 1682). At the time, approximately 230 different crimes were punishable by death. *See* Kristin K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1256 (1995).

30. *See* Langbein, *supra* note 5, at 41.

31. *Id.* at 40.

32. *See id.* at 37–41.

ber of defendants. By the end of the Middle Ages it had been extended to all individuals who could prove their literacy to the presiding judge,[33] and in 1576 the role of ecclesiastical courts was completely eliminated by the legislature.[34] Clergy was thus completely divorced from its original function and transformed into nothing more than a license for literate males to commit one felony without fear of punishment, other than a little thumb branding.

The legislature eventually decided that this development was unacceptable and began to place limits on the application of the clergy privilege. Common law already excluded treason, highway robbery, and arson of a house from this privilege, and the list was soon expanded to include most major crimes.[35] Further developments extended the benefit of clergy to women, removed the literacy requirement, and, lastly, replaced branding of the thumb with the sentence of transportation: seven years indentured servitude in the colonies.[36] In its final form, the importance of clergy to English law could be stated quite simply: Major crimes such as treason and arson still carried the death penalty, but "[t]ransportation replaced death as the sanction for grand larceny and other clergyable felonies committed by first offenders."[37]

The practical import of this development was that English juries were given two means of mitigating the harsh sentences prescribed by the law. For non-clergyable crimes such as murder, the jury could mitigate punishment only by finding the defendant not guilty.[38] But in cases where a jury finding of aggravating factors would turn a clergyable offense into a non-clergyable one, the jury could mitigate punishment by finding the defendant guilty of the simple, clergyable felony, but refusing to find the aggravating factors.[39] For instance, a defendant convicted of robbing forty shillings or more from a home would be unable to invoke the privilege and faced an automatic death sentence. To avoid the imposition of such a harsh punishment, juries routinely "undercharged" the defendant

33. Limits were placed on the privilege and defendants could only invoke it one time. To ensure that repeat offenders did not abuse the privilege, previous claimants were branded on the thumb. *Id.* at 37.

34. *Id.* at 37–38.

35. All murder, rape, piracy, highway robbery, burglary, church robbery, abduction with intent to marry, horse-theft, and pickpocketing in excess of a shilling were made non-clergyable offenses in the late sixteenth century. *Id.* at 38.

36. *Id.* at 39.

37. *Id.*

38. *Id.* at 39–41.

39. *Id.* at 41.

and found him guilty of stealing goods valued at only thirty-nine shillings.[40]

Jurors were unashamed of using their powers of mitigation and frequently returned partial verdicts with a less serious charge,[41] even when the crime "involv[ed] thefts of money, in which downvaluing became transparent fiction."[42] While critics accused the jury system of ad hoc justice[43]—a claim no doubt aggravated by juries' willingness to blatantly disregard the facts—in reality, jury mitigation was far from random. Instead, jury mitigation functioned akin to an Eighth Amendment proportionality review, with jurors exercising more leniency toward those accused of lesser offenses. Incidences of partial verdicts correlated strongly with the type of crime involved, and, to a lesser extent, with the character of the accused. For instance, partial verdicts were extremely common in situations where pickpocketing was charged capitally, but very rare for the more serious offense of highway robbery.[44] And while juries regularly returned partial verdicts for normally law-abiding citizens, they rarely did for professionals and gang members.[45]

The historical prominence of jury mitigation further supports the theory that jurors did not issue partial verdicts randomly, but instead were conducting a form of proportionality review. For instance, jury mitigation peaked in the eighteenth century, when the privilege of clergy was extended to all citizens, yet most crimes were still punishable by death.[46] But the legislature and courts eventually responded to the systematic nullification of capital sentencing laws by implementing a series of doctrinal and institutional changes which incorporated the public's sense that criminal pun-

40. *Id.* (discussing the recurrent verdicts of thirty-nine shilling robberies).

41. *Id.* at 52. In Langbein's study, the jury returned such a partial verdict in 39 out of 171 cases. *Id.*

42. *Id.* at 54. Though the blatant manipulation of facts to achieve a consensus on the just result may seem like little more than a quaint historical anomaly, it has an interesting analogy in the contemporary legal system. In the current American system of mandatory, or at least semi-mandatory, sentencing, prosecutors and defense counsel often rely upon fact bargaining and guideline factor bargaining in plea negotiations. *See* David Yellen, *Probation Officers Look at Plea Bargaining, and Do Not Like What They See*, 8 FED. SENT'G REP. 339, 339–341 (1996). A study from 1992 found evidence of prosecutorial manipulation of the Sentencing Guidelines in eleven to twenty-five percent of cases. Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 526–34 (1992). A more recent analysis suggests that this number has only increased. *See* Joseph S. Hall, *Rule 11(e)(1)(C) and the Sentencing Guidelines: Bargaining Outside the Heartland?*, 87 IOWA L. REV. 587, 609 (2002).

43. *See* GREEN, *supra* note 25, at 268.

44. Langbein, *supra* note 5, at 42, 53.

45. *Id.* at 54.

46. *See* GREEN, *supra* note 25, at 288.

ishments were too severe into the legal system.[47] Between 1830 and 1840 capital punishment was replaced with non-capital sanctions for most offenses and, as a result, the frequency of jury-based mitigation receded substantially.[48] Thereafter, "[i]n the popular mind, and in reality, the jury would usually adhere to the letter of the law."[49]

Ironically, the jury's success as a petit legislative body paved the way for its evolution into the fact-finding body it (largely) is today. By forcing the legislature to enact a code of criminal sanctions more in line with the community's evolving standards of decency, the jury changed the day-to-day character of its work. Though still endowed with sentence-mitigating powers, the jury no longer needed to exercise those powers on a routine basis. And by abstaining from its sentencing function, the jury altered the public and legal perceptions of its appropriate role, facilitating the modern doctrinal cabining of the jury's function to fact-finding. Consequently, the jury's power as sentencing mitigator is more likely to remain dormant today, even if the standards of decency manifest in criminal legislation begin to lag behind the community's standards, much as they did in eighteenth and nineteenth century England. Moreover, good evidence suggests that such a lag might exist today,[50] but the jury as popularly conceived is no longer capable of addressing the problem in an efficient fashion.[51]

B. American Juries

Although the role of American juries was substantially influenced by eighteenth century British practices,[52] the colonists did not adopt Anglo practices wholesale. The colonists expressed approval of the

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47. *Id.*

48. *Id.* at 288, 356.

49. *Id.* at 356.

50. *See* Atkins v. Virginia, 536 U.S. 304 (2003); Roper v. Simmons, 543 U.S. 551 (2004). In both cases, the Supreme Court found that the criminal sanctions meted out to particular classes of defendants (mentally retarded and juveniles, respectively) were disproportional and violated the mandate of the Eighth Amendment. Though the Court does not apply the same level of scrutiny to non-capital cases and hence, both of these examples are taken from the capital context, there is little reason to believe that non-capital cases do not suffer from similar disproportionality issues.

51. Modern juries are not wholly incapable of performing this function. Though they do retain the sentencing powers of their forebears, they no longer possess the information necessary to exercise their power coherently, or consistently, when faced with large-scale legislative failure. *See* discussion *infra* pp. 128–129. As discussed later, informing juries of sentencing consequences would begin to solve this problem.

52. *See* Langbein, *supra* note 5, at 2.

functional role played by the English jury, but changed a number of its formal characteristics. For example, they decided to rely solely on general verdicts[53] in criminal cases and endowed juries with the power to determine not only the facts of a case, but also the law.[54] To some degree, these changes may be ascribed to American political philosophy's affinity for popular sovereignty. But much of the discrepancy may be chalked up to simple differences in the evolutionary paths followed by each institution. While the English jury evolved from a pure fact-finding body into a sentence-mitigating body in a series of historical fits and starts, the American experience was unencumbered by such historical traditions and Americans were able to build their system largely from scratch.

The English jury's role as sentencing mitigator evolved in response to several historical factors. The evolution of the doctrine of clergy played an important role, but the real catalyst was William Penn's trial in 1670.[55] During the trial, the jury voiced its disapproval for state-sponsored religious persecution by refusing to convict Penn of unlawful assembly despite clear evidence of his guilt.[56] The presiding judge fined each of the jurors forty marks and sent them to Newgate Prison until they agreed to pay their fines.[57] But on appeal, Justice Vaughan refused to punish the jurors for their blatant disregard of the law and reversed their conviction, setting the precedent that jurors could not be sanctioned even when their verdict clearly disregarded the letter of the law.[58] Consequently, the English jury's formally inelegant role, in which jurors had to act as sentencing mitigators through the blatant manipulation of factual findings, can be explained by the historical convergence of three factors: protection from government sanction (Justice Vaughn's ruling); doctrinal evolutions that expanded the jury's powers of mitigation (the privilege of clergy); and the

53. At the time of the Founding juries were entitled to find general verdicts determining the defendant's guilt or innocence and were not required to return specific findings of fact. *See* Edmund M. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575, 591 (1922); *see also* GEORGE B. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 49 (1905); Alschuler & Deiss, *supra* note 12, at 912–13.

54. *See* discussion *infra* pp. 106–107.

55. *See* Simon Stern, *Between Local Knowledge and Local Politics: Debating Rationales for Jury Nullification After* Bushell's Case, 111 YALE L.J. 1815, 1817–19, 1822 (2002) ("Bushell's Case arose out of an earlier case involving the prosecution of William Penn and William Mead for preaching to other Quakers in public.").

56. *See* Bushell's Case, 124 Eng. Rep. 1006 (C.P. 1670).

57. *See* Stern, *supra* note 55, at 1823.

58. *Bushell's Case*, 124 Eng. Rep. at 1010.

existence of unpopular, disproportionate sentencing laws (capital punishment for all felonies).

Therefore, when creating their own legal institutions, the colonists endorsed the roles played by the English jury—namely, mitigator of unduly harsh sentences and populist check on a potentially unresponsive central government—but cast aside its inelegant form. In so doing, the colonists helped to insulate the process of jury-based mitigation from criticism. In England, the blatant manipulation of facts by criminal juries led critics to target the jury's function as mitigator.[59] But in the United States, such tensions were minimized through reliance on the general verdict and by granting the jury the power to determine the law. Endowed with such powers, the American jury had no need to rely on the legal fiction of fact manipulation to accomplish proportionality review.

Knowledge of early colonial practices is quite limited, but the available evidence suggests that trials in the colonies were notable for the presence of robust jury powers and an impotent judiciary. In Connecticut, New Hampshire, and Rhode Island, colonial judges exercised very little control in either civil or criminal trials.[60] And in Rhode Island, judges held office "not for the purpose of deciding causes, for the jury decided all questions of law and fact; but merely to preserve order, and see that the parties had a fair chance with the jury."[61] Practices in the other New England colonies reflected a similar division of labor.[62]

In the post-revolutionary period, legal practices became more well-defined and the jury adopted three primary roles: fact-finder,[63] bulwark against injustice,[64] and legislature, or petit legislature.

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59. *See* GREEN, *supra* note 25, at 365.

60. Howe, *supra* note 12, at 590–91.

61. *Id.* at 591 (citation omitted).

62. *Id.*

63. In describing the jury as a fact-finder, I do not mean to imply that the jury's role is limited solely to finding facts. The jury is, and always has been, a body intended to both find the facts and apply them to the law. As the Court stated in *United States v. Gaudin*, "the jury's constitutional responsibility is not merely to determine the facts, but to apply the law to those facts and draw the ultimate conclusion of guilt or innocence." United States v. Gaudin, 515 U.S. 506, 514 (1995). By using the term "fact-finder," I intend to reference the jury's powers unrelated to nullification, leniency, or the more expansive power of law-finding, which are fundamentally grounded in and derived from its fact-finding responsibilities. It should be noted that nullification refers to the power to *not* apply the law, while law finding refers more expansively to the jury's power to determine the actual law.

64. The jury has been described as a "bulwark against tyranny," in which the government is assumed to be the source of the tyranny. *E.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 473 (1993) (O'Connor, J., dissenting). I agree that this is a function of the jury, but have expanded the terminology to "safeguard against injustice" to reflect the fact that, first and foremost, the jury is a protection against unjust results at trial. Such injustice may flow from

Because these functions are inextricably linked, it is conceptually helpful to group them together. The clearest way to do so is to think of the jury as performing two functions: fact-finder and petit legislature/sentence mitigator.[65] The task of safeguarding against injustice is then subsumed under each of these distinct functions. As fact-finder, the jury protects against factually inaccurate charges; as petit legislature, it protects against unjust, but factually accurate charges—accurate charges with unduly harsh penalties and charges levied under unpopular statutes passed by unresponsive legislative bodies.

It is hardly contentious to argue that one of the primary roles of the jury is to serve as protector against factually inaccurate charges. The Supreme Court asserted as much shortly after its creation[66] and has maintained the same position to this day.[67] As such, this Article will instead focus on the jury's political role as petit legislature, an equally important aspect of its historical function.

Though today the jury is ordinarily characterized as a narrow, legal institution, in the early days of the nation it was roundly regarded as a political institution. After visiting America, Alexis de Tocqueville described the jury as "first and foremost a political institution"[68] and "a form of popular sovereignty."[69] This sentiment was echoed by many in the colonies, and analogies between juries and legislatures abounded.[70] The Federal Farmer declared that

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wrongful government persecution, in which case the jury is serving not only, quite literally, as a bulwark against government tyranny, but also as a champion of justice, by protecting defendants against false charges that result from simple human error. In this case, I feel that "safeguard against injustice" is a more accurate descriptor of the jury's role.

65. I will tend to describe the jury as both a petit legislative or political body and as a sentencing, quasi-sentencing, or sentence-mitigating body throughout this Article, and I use the terms almost interchangeably. While the two terms (legislative/political vs. sentencing) are not synonymous, they generally serve the same purpose in this discussion. On a practical, elementary level the jury functions as a sort of sentencing body, though not in the same sense as the judge. Because it can only mitigate sentences, I use the terms "quasi-sentencing" or "sentence mitigating." But I view this function as essentially political, hence, the political/petit legislative labels. When the jury acts as sentencer, it is making a political or legislative judgment. At heart, the jury is arguing either that it does not support a law, does not support the application of the law to an individual, or does not support the sentence attached to a law. All of these assertions are micro-democratic legislative judgments.

66. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 7–8 (1794).

67. United States v. Booker, 543 U.S. 220, 239 (2005) (quoting Apprendi v. New Jersey, 530 U.S. 466, 477 (2000)).

68. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 313 (Arthur Goldhammer trans., The Library of America 2004) (1835).

69. *Id.* at 315.

70. *See* AMAR, *supra* note 2, at 94. I do not mean to suggest that the ubiquity of such references to the jury as a sort of legislative body meant that there was consensus on the exact form and function that such a petit legislature would take, or even that the eventual form that it did take was necessary to satisfy certain requirements of democratic political

"[i]t is essential in every free country, that common people should have a part and share of influence, in the judicial as well as in the legislative department."[71] Similarly, John Taylor of Caroline, a leading constitutional theorist of the early Republic, likened the jury to the "lower judicial bench" in a bicameral judiciary.[72] The Maryland Farmer echoed Taylor, describing the jury as "the democratic branch of the judiciary power,"[73] and the anti-Federalist John Hampden extended the metaphor, explaining that trial by jury was "the democratical balance in the Judicary power."[74]

The key role of juries, according to Akhil Amar, was to provide a local, popular counterweight against potential overreaching by the central government.[75] A dominant theme in early American political thought was a fear of oppression by the government, in all of its various manifestations. The political role of the jury was considered vital because the institution could serve as a check on abuses by each of these potential threats to liberty. Accordingly, juries were cited as a protection against all manner of threats to popular liberty, including those posed by: arbitrary ministers,[76] corrupt or deficient legislators,[77] prosecutors,[78] judges,[79] and the executive.[80] Because the jury could check such a wide range of potential threats to liberty, many Founders believed that popular representation in

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philosophy. For the purposes of this Article, I will use the term petit legislature (in connection with juries) to refer to the notion of a popular, democratic body within the judiciary, capable of checking abuses from government officials, be they legislators or prosecutors.

71. *Letter from the Federal Farmer* (Oct. 12, 1787), *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 214, 249 (Herbert J. Storing ed., 1981).

72. JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 209 (W. Stark ed., 1950) (1814).

73. *Essay by a Farmer*, MD. GAZETTE, Mar. 21, 1788, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 38 (emphasis omitted).

74. *Essay by Hampden*, MASS. CENTINEL, Jan. 26, 1788, *reprinted in* 4 THE COMPLETE ANTI-FEDERALIST, *supra* note 71, at 200.

75. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1183–86 (1991). However, this should not be considered the sole function played by the jury. The institution of trial by jury also serves as an important complement to the legislature because individuals view the law differently when faced with concrete circumstances as a juror than they do as a legislature. "As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case." Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV 33, 62 (2003). The jury also plays an important educative role in democratic society. *See* TOCQUEVILLE, *supra* note 68, at 316.

76. *See* Sauer, *supra* note 29, at 1247–48.

77. *Id.* at 1248.

78. *See* AMAR, *supra* note 2, at 84.

79. *Id.*

80. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 73–74 (1967).

the legal system through the vehicle of jury trials was "more necessary than representatives in the legislature."[81]

In order to ensure that it could provide a check against these various evils, the early American jury was endowed with (or retained) certain structural protections: most notably, immunity from legal sanction, the general verdict, and the ability to find the law. The general verdict provided a juror with what John Adams described as not only the right, but also the duty "to find the Verdict according to his own best Understanding, Judgment and Conscience, tho in Direct opposition to the Direction of the Court."[82] In short, the general verdict supplied the jury with the power to nullify—that is, refuse to apply—the law. And immunity from punishment ensured that juries could exercise this power as they saw fit, without fear of governmental reprisal.

The authority to find the law was even more empowering than the general verdict, as it was a power that far exceeded jury nullification. While jury nullification refers only to the jury's power to refrain from applying the law, the jury's law-finding powers actually enabled the jury to make substantive decisions regarding the proper interpretation and application of relevant law. Today, juries are routinely described as lacking the power to determine the law,[83] but early American juries were explicitly granted this power and routinely exercised it well into the nineteenth century.[84]

The Supreme Court recognized that the jury had a right to determine the law shortly after the founding of the country[85] in *Georgia v. Brailsford.* The Court reiterated the rule that:

> [O]n questions of fact, it is the province of the jury, [and] on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, *you have nevertheless a right to take upon yourselves to judge of both, and to determine the*

81. *E.g., Essay by a Farmer, supra* note 73, at 38.

82. John Adams, Diary Notes on the Right of Juries (Feb. 12, 1771), *in* 1 LEGAL PAPERS OF JOHN ADAMS 228, 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

83. In 1895, the Court specifically denied juries the power to find the law in the case of *Sparf v. United States,* 156 U.S. 51, 65 (1895). The *Sparf* Court declared that such a power was "not in accordance with the views of any other court . . . in this country or in England," and that *Georgia v. Brailsford,* an earlier Supreme Court case sanctioning just such a power, "[was] an anomaly," and may not have been correctly reported. *Id.* (quoting United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815)). However, the *Sparf* Court's position is substantially undermined by the fact that until 1835, the Supreme Court Justices sitting in circuit and other lower courts routinely issued instructions permitting juries to find the law. *See* Howe, *supra* note 12, at 589.

84. *See* Howe, *supra* note 12, at 589.

85. Hereinafter "the Founding."

> *law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court [sic] are the best judges of law. But still both objects are lawfully, within your power of decision.[86]

The *Brailsford* decision was not anomalous. Until 1835, "lower court judges and Justices of the Supreme Court, sitting on the Circuit courts, had time and again specifically instructed jurors that they were 'the judges of both the law and the fact in a criminal case, and [were] not bound by the opinion of the court . . . .' "[87]

The importance of the jury's checking power can be seen implicitly in the *Brailsford* excerpt above. While the *Brailsford* Court's discussion explains that courts are the best judges of the law, it notes that this right is nevertheless reserved to the jury as well. Because juries are less capable of making legal decisions than judges, this reservation of power to juries can not be intended to improve the court's performance as a law-finding institution. Instead, it must be explained as erecting a structural check on abuses of government power. The jury may be advised to defer to the superior legal knowledge of the Court, but it retains the right to find the law when a government entity—the legislature, prosecutor, or judge—acts in a manner inconsistent with the interests of justice, regardless of whether such action is inconsistent with the letter of the law.

Allowing juries to find, or at least nullify, the law also proved to be valuable in the legislative sphere. In a situation quite analogous to the English example discussed above, the jury's power to nullify forced the early American legislatures to bring criminal punishment in line with the standards of decency prevailing at the time.[88] Though less severe than British criminal codes of the period, early American criminal codes were still frequently draconian. At the time of the Revolution, the colonies imposed death sentences on all individuals convicted of a "considerable number of crimes . . . including at a minimum, murder, treason, piracy, arson, rape, robbery, burglary, and sodomy."[89] Almost immediately, colonial jurors expressed their dissatisfaction with the harshness of these penalties

86. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (emphasis added).

87. *See* Howe, *supra* note 12, at 589 (citation omitted). Howe proceeds to cite numerous instances of just such an instruction to substantiate his claim.

88. *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 289–90 (1976).

89. *Id.* at 289.

by refusing to return guilty verdicts.[90] The States responded by limiting the classes of crimes subject to capital punishment,[91] but this reform failed to provide a solution for the routine refusal of juries to convict murderers rather than automatically subject them to the death penalty.[92]

Several states, led by Pennsylvania, made another attempt to quell public dissatisfaction by limiting the imposition of the automatic death penalty to first degree murder.[93] Again, the reform failed to solve the problem as jurors continued to acquit guilty first degree murder defendants whom they found undeserving of the death penalty.[94] The obvious inadequacy of ex ante legislative determinations led to the next stage of reform: granting juries sentencing discretion in capital cases.[95] Like the British example, this dialogic exchange between jury and legislature reveals the valuable function played by early juries as a democratic sounding board for criminal legislation.

By refusing to convict defendants of crimes with punishments deemed disproportionate by current standards of decency, juries can engage legislatures in a dialogue in which both institutions work toward a system of punishment that is morally palatable to the population at large. Including juries in the dialogue surrounding criminal legislation is essential because they view the law in a valid, but fundamentally different way than either the legislature or the general populace.[96] Though both the legislature and general populace conduct some sort of proportionality review, be it implicit or explicit, when considering criminal legislation, neither can replicate the valuable perspective provided by the jury. Both focus unavoidably on the generalized threat posed by criminal behavior and lack the immediate, concrete perspective of the jury, without which it is impossible to assess the proportionality of the law as it functions in practice. By allowing the jury to involve itself in the functional vetting of legislation, the legislature will be able to make decisions regarding criminal legislation that are based upon the objective indicia of popular sentiment afforded by jury verdicts. This, in turn, will lead to legislation that bears the true imprimatur

90. *Id.* at 289–90.
91. *Id.*
92. *Id.* at 290.
93. *Id.*
94. *Id.* 290–91.
95. *Id.*
96. Though the repetition may become tedious, it is also worth noting that juries play an important checking function here, ensuring that legislatures remain responsive to the general public.

of democratic approval and which is fully congruent with the constitutional promise of proportionate punishment extended by the Eighth Amendment.[97]

C. Historical Paradigm

Historically, then, the jury's role has been akin to that of the lower house in a bicameral judiciary. And the jury's function in criminal trials included a sentencing aspect, or at least a quasi-sentencing aspect, though this differed substantially from the sentencing function fulfilled by the judge. Much of the descriptive confusion surrounding the role of the jury stems from the fact that the jury's role has two parts, one of which is more formally apparent than the other. The first component of the jury's function is its familiar role as fact-finder. Evidence is introduced during trial and the jury sifts through the evidence, decides what is relevant, and applies it to the law, thus determining whether the defendant is factually guilty. Most accounts of the criminal jury focus on this aspect,[98] but the jury plays a second important role that is frequently overlooked. If the jury believes the defendant to be factually innocent, its job is over. But if it finds the defendant to be factually guilty, the jury plays a second role by assessing whether its conviction of the defendant serves the greater interests of justice. This stage also involves two inquiries: whether the defendant's conduct truly fits within the intended scope of the crime[99] and, if so, whether the punishment established for the crime is proportionate to the offense and consistent with society's evolving standards of decency.[100]

Descriptions of the jury as representing community values and social norms, acting as a legislature or petit legislature, protecting

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97. *See* discussion *infra* pp. 144–145.

98. *See, e.g.*, Shannon v. United States, 512 U.S. 573, 579 (1994); United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997); United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983) (per curiam).

99. This is the inquiry Aristotle associated with moral equity. Understanding that universal law is necessarily overbroad, does a particular defendant's behavior fall within the intended substantive bounds of the statute? In other words, would the legislature really intend to punish this individual, or is the individual's punishment by the legislature essentially an accident inherent to reliance on ex ante, universal law-making? *See* ARISTOTLE, ETHICA NICHOMACHEA, *reprinted in* 9 THE WORKS OF ARISTOTLE TRANSLATED INTO ENGLISH 1136–37 (W.D. Ross trans., Clarendon Press 1925).

100. One can argue that the jury performs a third role by judging the moral value of the law itself, but I think this can be safely subsumed within the concept of proportionality analysis. If the jury believes a law to be morally wrong, then it is unlikely to find the punishment required by the law to be proportional to the defendant's actions.

the defendant from government oppression, nullifying the law, or extending lenity to defendants all refer to this function, either in whole or in part. The taxonomy may be confused, but each of these concepts is concerned with the same fundamental purpose: the avoidance of unjust convictions—be they the result of legislative overbreadth, overzealous prosecution, legislative unresponsiveness, discriminatory application of the law, or any other government shortcoming—through the individualized assessment of a defendant's culpability by a local jury of his peers. After the jury has fulfilled its role, the judge then takes the verdict rendered by the jury and sets the punishment within the range prescribed by the legislature (assuming that the legislature has not mandated a specific punishment for the crime, thus depriving the judge of his discretionary function).

In a very real sense, and consistent with the historical conception of the jury, the entire trial is concerned with the question of punishment, and sentencing is a two-step process. First, the jury performs a sentencing screening function, applying society's evolving standards of decency to weed out cases in which the potential punishment is disproportionate to the crime.[101] Afterwards, the judge performs a more fine-grained analysis, using his legal knowledge and training to select the appropriate punishment within the range assigned by statute. In the end, both judge and jury perform complementary roles that are well-suited to their core competencies. The jury ensures that the Court does not punish individuals whom the community does not believe to be morally culpable for their actions—a function well-suited to the common-sense judgment of the community. The judge then ensures that the convicted defendant receives the appropriate degree of punishment within the parameters set by statute–a task well-suited to the legal training and background of judges. The end result is that only those deemed morally culpable by the community are punished, and that those selected for punishment have an expert determine the appropriate sanction.

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101. I think this activity is accurately described as a sentencing function because the jury's consideration is not the guilt or innocence of the individual, but rather, the appropriate consequences that should be assigned to his action. This is functionally identical to sentencing. Admittedly, the jury has fewer sentencing tools at its disposal. If there are multiple counts, the jury has the option of arriving at a compromise verdict if it finds the full punishment disproportionate, but acquittal too lenient. Otherwise the jury has only two options: acquittal or conviction. As such, the jury would be an obviously imperfect sentencer on its own, but as the first screening stage of a two-step sentencing function, it has all of the tools necessary to perform its role.

Justice requires that the appropriate parties (and only the appropriate parties) are punished, but it also requires that they receive a punishment proportionate to their crime. Without either step justice would not be satisfied, and without either judge or jury, the other entity would be incapable of adequately sentencing a defendant. Judges are ill-equipped to reflect the values of the community and juries are ill-equipped to make fine-grained legal determinations. The structure of the jury system recognizes the value of this institutional symbiosis and allows for each party's strengths to cover the weaknesses of the other.

In a sense, this distribution of sentencing authority may also be inevitable. Because jurors who engage in nullification cannot be prosecuted,[102] and judges cannot overturn their verdicts or acquittals, jury sentencing is likely to be unavoidable. Studies suggest that jurors alter their verdicts based upon their prediction of the punishment faced by the defendant[103] and that nullification occurs even when jurors are instructed that they have a legal obligation to apply the law.[104] Consequently, jury sentencing may not only be an advantage of the Anglo-American criminal trial, it may also be a feature inherent in it.

II. THE MODERN JURY

The doctrinal conception of the modern jury bears little more than a passing resemblance to early English and American juries. Instead of emphasizing the jury's role as a petit legislature,[105] modern courts have scaled back the official powers of the jury, redefining it as an institution concerned solely with factual determinations and protection against government oppression.[106]

102. *See supra* note 58 and accompanying text.

103. *See* Barkow, *supra* note 75, at 81. Even mock jurors in studies are markedly impacted by their perception of consequences, despite knowing that no punishment will ever really occur. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 166 n.69 (1988).

104. Kalven & Zeisel's study found that twenty-one percent of juries nullified the law either consciously or subconsciously. *See* Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 173 (1994).

105. Though the English never used this term to describe the institution of the jury, it bears a substantial degree of functional similarity to the role played by the early American jury.

106. When modern courts speak of the jury's role as a bulwark against government oppression, they do not put the same expansive gloss on the terms as their historical counterparts. Instead, they typically intend to convey only the notion that the jury will protect the defendant against groundless charges. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 477 (2000) (describing the jury's role as a bulwark against oppression only in terms of its truth-seeking component).

Consistency is in; individualized determinations are out.[107] But despite attempts to redefine the jury as nothing more than an antiseptic fact-finder, structural vestiges of the jury's earlier role remain, complicating attempts at easy classification. Compounding the difficulties with easy classification, courts routinely vindicate these structural elements of the jury, but frequently do so while describing the jury as fact-finder or with vague language that obscures the rationale supporting their decision.[108] As such, it is not clear whether the courts have preserved these vestiges of the jury because of a concern for the jury's historical role or out of a more limited concern for preserving certain formal aspects of the jury.

A. The Jury as Fact-Finder

The party line typically hewn to by modern American courts is that the jury exists merely to find facts: juries make factual determinations and judges sentence, end of story.[109] As such, jurors are not told of the consequences of their decisions and, because the criminal code has become so complex, they have little chance of knowing what result will follow conviction. According to the Supreme Court, this is as it should be, for the basic division of labor between judge and jury requires that juries not consider the consequences of their verdict.[110] In the Court's opinion, "[t]he jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict."[111] Informing jurors of the consequences of their actions must be avoided because of the risk of distraction and confusion.[112]

In a similar vein, courts frown heavily on jury nullification. As the Second Circuit has explained, "the power of juries to 'nullify'

107. Ironically, while criminal courts have moved toward an emphasis on consistency instead of individualized determinations of the just result, capital sentencing doctrine has moved in the opposite direction. *See* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 (2004).

108. *See* discussion *infra* Part II.A–C.

109. *See* Shannon v. United States, 512 U.S. 573, 579 (1994).

110. *Id.*

111. *Id.* There is a narrow exception to this rule. In cases where it may be necessary to correct a misstatement regarding the consequences, jurors may, in fact, be informed of the actual consequences of their verdict.

112. *Id.*

. . . is just that—a power; it is by no means a right . . . ."[113] The D.C. Circuit denounced the practice even more emphatically:

> A jury has no more "*right*" to find a "guilty" defendant "not guilty" than it has to find a "not guilty" defendant "guilty," and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.[114]

In the jury nullification cases, at least, the courts have decided: fact-finding is the sole province of the jury.

B. The Jury as Protector Against Government Oppression

Courts speak less decisively of the fact-finding/sentencing dichotomy in their discussions of the jury as a defendant's protector against government oppression. While the Court clearly endorses the jury's performance of this role—after all, the Court has said on numerous occasions that the very purpose of the jury trial is to prevent oppression by the government[115]—it is not as clear *why* the Court endorses it. As discussed above, protection against government oppression can either be construed narrowly, to refer only to protection against factually inaccurate charges leveled by government officials, or broadly, to refer to any other form of injustice perpetrated by the government against a defendant.

Duncan v. Louisiana illustrates the uncertain, and perhaps inconsistent, position taken by the Court.[116] After explaining that the purpose of the jury trial is to protect against government oppression, the Court makes two statements that are vague at best, and implicitly contradictory at worst. First, the Court explains that the jury is "necessary to protect against unfounded criminal charges brought to eliminate enemies."[117] This rationale comports with the narrow construction of "protection against government oppression": the jury is needed to safeguard defendants by weeding out

113. United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997).

114. United States v. Washington, 705 F.2d 489, 494 (D.C. Cir. 1983).

115. *See, e.g.*, Williams v. Florida, 399 U.S. 78, 100 (1970); Duncan v. Louisiana, 391 U.S. 145, 155 (1968).

116. *Duncan*, 391 U.S. at 156.

117. *Id.*

factually groundless charges that may be asserted by one's enemies. But then the *Duncan* Court confuses the picture, stating that:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.[118]

The first part of this passage could conceivably be read to stand for either position. The Court could believe that the harms posed by corrupt or overzealous prosecutors and biased, eccentric judges are of a sort that would be totally eradicated by the jury in its fact-finding role.[119] But the second half of the passage seems to suggest that the important protective role played by the jury is not a fact-finding role at all, but a more subjective, justice-seeking function. There, the Court explains that a defendant is entitled to the more "sympathetic" judgment of the jury, perhaps suggesting an entitlement to a jury that is not purely rational and whose role exceeds that of narrow fact-finder.

Admittedly, the Court's intent is not entirely discernable. It seems that the Court is walking a tightrope. On the one hand, the Court wants to portray the jury as a fact-finding body.[120] On the other hand, the Court wants to remain faithful to the Founders' belief that the jury was an important protection against government oppression.[121] In attempting to accomplish both goals—or perhaps just straddling the two without clearly selecting either—the Court avoids discussion of the fact that the "jury system was meant to protect against unjust punishment perpetrated by government, not merely unjust conviction . . . ."[122] Explicit recognition of the full extent of this protective role would unavoidably conflict with the modern notion of jury as fact-finder, making it difficult for

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118. *Id.*

119. This is the position taken by the *Apprendi* Court, which asserted that the jury's role as guardian "against a spirit of oppression and tyranny on the part of rulers" and "the great bulwark of our civil liberties" is assured by juries ensuring the accuracy of all accusations against a defendant. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000). Quite subtly, the *Apprendi* Court intertwined the notions of the jury as fact-finder with the jury as protector against government oppression. Having done so, little conceptual space remained for the "bulwark" qua protector against all other manner of injustices perpetrated by the government. *Id.*

120. *See, e.g.*, Shannon v. United States, 512 U.S. 573, 579 (1994).

121. *See supra* note 118 and accompanying text.

122. United States v. Datcher, 830 F. Supp. 411, 416 (M.D. Tenn. 1993).

the Court to render decisions when the two dictates clash. Instead, the Court has attempted to redefine "protection from government oppression"—or at least equivocate as to its meaning—so that the two doctrines are compatible. But in so doing, the Court has undermined the role carved out for the jury by the Founders as popular protector against unjust government actions and unresponsive legislative bodies.

C. Jury as Legislature

Despite repeated assertions by the federal courts that the jury's role is limited to finding facts and applying those facts to the law, several Court doctrines serve to protect the jury's power to find verdicts contrary to the law and evidence.[123] Whether the solicitude shown by the Court for these doctrines is the result of tacit court approval of the jury's legislative role or simply a historical respect for certain formal structures, the result is the same: the jury's power to acquit against the evidence has been well protected.

This solicitude for a power often denigrated by the courts stands in contrast to the treatment courts give to civil juries. While courts ardently protect the criminal jury's ability to render verdicts against the evidence, civil juries have been increasingly limited to a fact-finding role by Supreme Court decisions.[124] For instance, in the civil context, a judge may either grant summary judgment or direct a verdict after the parties have finished presenting the evidence in the case, as long as the evidence is legally insufficient to provide a factual issue for jury resolution.[125] Moreover, if a judge in the civil context determines, after examining the jury's verdict, that no reasonable jury could have found the evidence necessary to render such a verdict, the judge may set aside the jury's determination by ordering a judgment notwithstanding the verdict.[126]

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123. *See* Sauer, *supra* note 29, at 1250–54.

124. *See* Murphy, *supra* note 28, at 761–77. Furthermore, the additional protections afforded the criminal jury may well be in line with the intentions of the Founders. While the Seventh Amendment—the amendment addressed to the civil jury—describes the role of the jury as a trier of facts, the word "fact" is never mentioned in the text of the Sixth Amendment. *Compare* U.S. CONST. amend. VII, *with* U.S. CONST. amend. VI.

125. *See* Galloway v. United States, 319 U.S. 372, 396 (1943) (issuing a directed verdict); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320–21 (1902) (granting summary judgment).

126. *See* FED. R. CIV. P. 50(b); Neely v. Martin K. Eby Constr. Co., 386 U.S. 317, 321–22 (1967) (upholding the judgment notwithstanding the verdict against a Seventh Amendment challenge).

The rules regarding inconsistent verdicts reveal a similar position. When a civil jury returns an inconsistent verdict on related counts, the judge has three options. He may issue a judgment notwithstanding the verdict, return the inconsistent verdicts to the jury for further consideration, or order a new trial.[127] A civil judge may also require the jury to return a special verdict in which it does not render a general verdict of liability, but instead issues answers to specific factual questions.[128] The reservation of such powers to judges in civil trials demonstrates that civil juries have no constitutionally protected power to make final decisions contrary to the evidence before them. Thus, in civil trials, juries really are limited to fact-finding. Juries find the facts, judges find the law, and when the jury fails to perform its role, the judge retains the power to override the jury's decision.

In contrast, the criminal jury's power to acquit is sacrosanct and cannot be disturbed. Unlike in the civil context, judges may not submit special verdicts to criminal juries.[129] Criminal juries do not decide narrow factual questions; they directly determine broader questions of guilt or innocence. Also, unlike civil trials, juries retain full control over the final verdict, at least when they decide to acquit. In criminal trials, absent express permission from the defendant, the verdict may be issued only by the jury.[130] No matter how overwhelming the evidence against a criminal defendant, the Supreme Court has held that the Sixth Amendment bars the judge from directing a verdict against him.[131] The Court has also held that the Sixth Amendment and the Double Jeopardy Clause forbid a court from reversing or setting aside a criminal jury's verdict of acquittal.[132] Similarly, judges in criminal trials are forbidden from

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127. *See* FED. R. CIV. P. 49(b); Gallick v. Balt. & Ohio R.R. Co., 372 U.S. 108, 119 (1963) (ordering a new trial where the jury gave inconsistent answers in its verdict).

128. *See* FED. R. CIV. P. 49(a).

129. *See* United States v. Wilson, 629 F.2d 439, 441–44 (6th Cir. 1980) (discussing the reasons for not using special verdict forms in criminal cases).

130. *See* Duncan v. Louisiana, 391 U.S. 145, 149–50 (1968).

131. *See* Rose v. Clark, 478 U.S. 570, 578 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572–73 (1977) ("[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelmingly the evidence may point in that direction.") (citations omitted); United Bhd. of Carpenters & Joiners of Am. v. United States, 330 U.S. 395, 408 (1947) ("[A] judge may not direct a verdict of guilty no matter how conclusive the evidence.").

132. *See* United States v. DiFrancesco, 449 U.S. 117, 129–30 (1980); Gregg v. Georgia, 428 U.S. 153, 199–200 n.50 (1976) (plurality opinion). "Although the prohibition on revisiting jury acquittals is most often enforced via the Double Jeopardy Clause, the finality of a jury acquittal can be viewed as originating in the Sixth Amendment." Sauer, *supra* note 29, at 1252 n.119; *see* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1033–34 & n.99 (1980) (arguing that the

ordering a new trial on the basis of an inconsistent verdict from the jury.[133] While inconsistent verdicts may be a sign that the jury failed to correctly follow the judge's instructions or was otherwise confused, courts nevertheless defend the integrity of these verdicts because "such inconsistencies often are a product of jury lenity."[134] Jury lenity, according to the Court, is worth protecting because it is part "of the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch."[135] As the First Circuit explained, underlying these rules "is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic."[136]

While it is clear that the Court's doctrine actively supports safeguarding the jury's ability to look at more than logic when making its decisions, the Court has taken inconsistent positions regarding its support for the jury actually engaging in such activity. On the one hand, jury nullification has been described not as a right, but rather, as a power of the jury that should not be exercised.[137] On the other hand, the Court protects inconsistent verdicts, despite the fact that they may be the result of jury error, because they "often are the product of jury lenity."[138] Jury lenity is the Court's euphemism for nullification—the power of the jury to disregard the evidence in the name of leniency. The Court's support for lenity, and description of it as an essential part of the jury's "historic function . . . as a check against arbitrary or oppressive exercises of power,"[139] suggest that the jury's role as protector of the accused is, in fact, not coterminous with its role as fact-finder.

An exercise of jury lenity, by definition, requires the jury to disregard the evidence and render a verdict that is in accordance not with the law but with the conscience of the community. Any such verdict requires a consideration of the consequences; the jury's exercise of lenity is a statement that it will not apply the law to the evidence before it because the defendant does not deserve the

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prerogative of the criminal jury to acquit against the evidence is grounded in the Sixth Amendment right to trial by jury).

133. *See* United States v. Powell, 469 U.S. 57, 65 (1984); Dunn v. United States, 284 U.S. 390, 393 (1932). Note that the defendant does have some protection against irrational jury behavior that harms him because guilty verdicts may be reviewed on appeal and will be overturned when the evidence from trial does not support the jury's verdict beyond a reasonable doubt. *See, e.g.*, United States v. Allen, 440 F.3d 449, 450 (8th Cir. 2006).

134. *Powell*, 469 U.S. at 65.

135. *Id.*

136. United States v. Spock, 416 F.2d 165, 182 (1st Cir. 1969).

137. *Powell*, 469 U.S. at 66.

138. *Id.* at 65.

139. *Id.*

consequences that will follow from a guilty verdict. The Court is left in a position where it has asserted both that juries' disregard for the consequences is a fundamental tenet of our legal system,[140] and that consideration of the consequences is necessary to fill the institution's historical role as bulwark against government oppression.[141] In short, the Court's intent is not easy to discern.

This uncertainty of intent is also reflected in the Court's jury composition jurisprudence. The Sixth Amendment requires a "jury of the State and district wherein the crime shall have been committed,"[142] and the Court has declared that "[t]he unmistakable import of this Court's opinions . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."[143] Taken on their own, this pair of mandates seems to advance the cause of the jury as impartial fact-finder only slightly.[144] The more substantial concern of each doctrine appears to be the establishment of an institution capable of fulfilling the Founders' vision of the jury qua legislature: a local, popular body capable of reflecting the moral sentiments of the community and protecting defendants against the risk of central tyranny.

But as with the structural protections discussed above, it is unclear whether the Court views these doctrines as protection for the jury as legislature or for the jury as fact-finder. Justice Frankfurter made the case for the latter position, arguing in dissent that:

> Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.[145]

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140. *See* Shannon v. United States, 512 U.S. 573, 579 (1994).

141. *See Powell*, 469 U.S. at 65.

142. U.S. CONST. amend. VI.

143. Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

144. After all, a jury's ability to correctly find the facts of a case depends little on whether the body is a local or non-local one. Similarly, a fair cross section is far less central to the creation of a fair fact-finder than it is to the creation of a fair purveyor of community norms. There are, however, other societal goals that also are advanced by guaranteeing a representative jury, including issues of equality and ensuring that everyone in society is exposed to the workings of the criminal justice system.

145. Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Seemingly in contrast, the *Taylor* Court approvingly cited the Committee Report of the House from the passage of the Federal Jury Selection and Service Act:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.[146]

While the *Taylor* passage does cite fear of bias, it defines bias as "a slanted view of the community." The fear of bias, then, is the fear of a jury that cannot adequately represent the views of the community, not a body that is incapable of finding the facts of the case. As with the Court's discussion of the various verdict-protection procedures above, the Court seems undecided as to how it ought to view the jury. While the Court often appears to harbor a preference for the vision of the jury as fact-finder and for a neat fact/law, judge/jury dichotomy,[147] it seems incapable of fully escaping the cognitive dissonance inherent in holding this belief while simultaneously protecting the jury that the Founders intended. This tension is also evident in the Court's recent sentencing cases, which are discussed in the following section.

III. THE NEW JURY CASES: *APPRENDI* THROUGH *BOOKER*

In a recent series of four cases, beginning with *Apprendi v. New Jersey*, the Supreme Court set out to reestablish the relationship between judge and jury in criminal trials. First, in *Apprendi*, the Court reconsidered the respective roles of judge and jury in determining facts that impact the sentences received by defendants.[148] While under the previous regime the judge often found facts which increased the penalty for a crime beyond the prescribed statutory

146. *Taylor*, 419 U.S. at 529 n.7. *See also* Holland v. Illinois, 493 U.S. 474, 513 (1990) (Stevens, J., dissenting) ("[A] randomly selected jury will not necessarily be 'impartial' in the strict sense of that term, because the jurors bring to the jury box prejudice and perspectives gained from their lifetimes of experience. But they will be impartial in the sense that they will reflect the range of the community's attitudes . . . .") (quoting J. VAN DYKE, JURY SELECTION PROCEDURES 18 (1977)). *See also* Jeffrey Abramson, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99–123 (1994) (explaining the evolution of the cross sectional ideal over time).

147. *See, e.g.*, Shannon v. United States, 512 U.S. 573, 579 (1994).

148. Apprendi v. New Jersey, 530 U.S. 466 (2000).

maximum, in *Apprendi* the Court held that the Sixth Amendment requires a jury to find any such fact beyond a reasonable doubt.[149] In *Ring v. Arizona* the Court extended the *Apprendi* rule to capital punishment, explaining that a judge, sitting without a jury, may not find an aggravating circumstance necessary to impose the death penalty.[150]

The jurisprudential impact of *Apprendi* continued to reverberate throughout the criminal justice system, next making its presence known in the (briefly) watershed case of *Blakely v. Washington.*[151] In *Blakely*, the Court considered the relevance of *Apprendi* to Washington State's mandatory Sentencing Guidelines, and held the Guidelines to be unconstitutional as applied.[152] While *Blakely* called into question the Federal Sentencing Guidelines, which mirrored Washington's, *United States v. Booker* delivered the coup de grâce. *Booker* declared that the Guidelines were unconstitutional as applied and struck the portion of the federal sentencing statute that made the Guidelines mandatory.[153]

Collectively, these decisions attempted to reestablish the traditional relationship between judge and jury. The opinions expressed fear that the jury had been robbed of its traditional role and they putatively worked to restore historical jury powers that had been more recently ceded to judges. However, a substantial disconnect emerged between the language of the opinions and their functional impact. While paying lip service to the historical vision of the jury championed by the Founders and their English forebears, the Court ignored the jury's traditional role as a petit legislative body and opted to reinforce the modern vision of the jury as an antiseptic fact-finder. The end result is a jury doctrine that bears only semantic similarities to its historical predecessor and prescribes a substantially different jury function.

In *Blakely*, the Court asserted that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury."[154] The

149. *See id.* at 476.

150. Ring v. Arizona, 536 U.S. 584, 609 (2002).

151. Blakely v. Washington, 542 U.S. 296 (2004).

152. *Id.* at 305.

153. *See* United States v. Booker, 543 U.S. 220 (2005).

154. *Blakely*, 542 U.S. at 308. Note that the Court's reference to "government" includes not only the executive and the legislature, but also the judiciary. In fact, the Court specifically noted that the Framers would not "have left definition of the scope of jury power up to judges'" discretionary judgment. *Id.* The irony of the Court's statement is that the opinion in *Blakely* does just what the Court said the government, including the Court itself, was forbidden to do: namely, change the role of the jury. *Cf.* Apodaca v. Oregon, 406 U.S. 404, 410

Framers feared "that the jury right could be lost not only by gross denial, but by erosion"[155] and that ceding control of the right to the government would only hasten this erosion. While the government does not have explicit control over the bounds of jury functioning, it does have the *de facto* power to alter the jury's role through its actions in other spheres. The catalyst for the *Apprendi* line of cases was just such an action—or, more accurately, a series of actions—by the government.

Concerned by the proliferation and variety of drug crimes and their frequent connection to firearms offenses, Congress passed new criminal legislation in the 1980s to increase the punishment for such crimes.[156] Congress chose to select certain aggravating facts that would "not only authorize[], or even mandate[], heavier sentences than would otherwise have been imposed, but increase[] the range of sentences possible for the underlying crime."[157] The new legislation increased the power of the judge and decreased both the power of the jury and the protections afforded to the criminal defendant. Because these penalty-enhancing sentencing facts were found by the judge and not the jury, the judge assumed responsibility for determining the upper limits of defendants' sentences, a task previously reserved for the jury. Defendants were also harmed, as they could now be subject to harsher sentences on the basis of facts that were not raised at trial or proven beyond a reasonable doubt.[158]

As sentencing enhancements grew, the jury was increasingly marginalized, thus diminishing the significance of its finding as to the underlying crime. With time, the enhancements became quite substantial.[159] Because "sentencing was no longer taking place in [its historical tradition], the Court was faced with the issue of preserving

(1972) (arguing that the Framers intentionally left the concept of the jury at least partially open to future debate and interpretation).

155. Apprendi v. New Jersey, 530 U.S. 466, 483 (2000) (quoting Jones v. United States, 526 U.S. 227, 247–48 (1999)).

156. *Booker*, 543 U.S. at 236.

157. *Id.*

158. *Id.*

159. *See, e.g.*, *Booker*, 543 U.S. at 236 (noting that the trial judge's finding increased respondent Booker's sentence from 262 months to life and respondent FanFan's sentence from seventy-eight to 235 months); Jones v. United States, 526 U.S. 227, 230–31 (1999) (noting that the trial judge's finding increased the maximum sentence from fifteen to twenty-five years); United States v. Hammoud, 381 F.3d 316, 361–62 (4th Cir. 2004) (en banc) (Motz, J., dissenting) (noting that the actual sentence increased from fifty-seven months to 155 years); United States v. Rodriguez, 73 F.3d 161, 162–63 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing en banc) (noting increase from an approximately eighteen to fifty-four month range to a life sentence).

an ancient guarantee under a new set of circumstances."[160] In the Court's understanding, the challenge before it was to find "an answer not motivated by Sixth Amendment formalism, but by the need to preserve Sixth Amendment substance."[161] Doing so meant finding a means to ensure that the jury continued to stand between the defendant and the power of government.[162] But rather than preserving the "ancient guarantee" intended by the Founders, the Court instead acted to protect only the jury's fact-finding function, while ignoring its historic functions as sentencing mitigator and popular check on the government.

The treatment of the criminal jury in the *Apprendi* line of cases is emblematic of the modern Court's treatment of the criminal jury:[163] vestiges of the institution's historical form are preserved, but on the whole, the discourse is marked by a mischaracterization of both the jury's historical and contemporary roles. Moreover, the vestiges of the past that are preserved are frequently in tension with the new mold in which the institution has been recast. The irony of the situation is that the Court's putative goal in these cases was to preserve Sixth Amendment substance and not merely Sixth Amendment formalism, while in reality the Court has retained little more than formal continuities and semantic similarities.

The Court began its mischaracterization of the jury in *Apprendi.* In its decision the Court stressed the importance of the jury finding every element of a crime, and remarked that "the historical foundation for our recognition of these principles extends down centuries into the common law."[164] This historical observation provided the foundation for the Court's attempt to preserve the substance of the Sixth Amendment jury right. As the Court noted, the distinction between an "element" of an offense and a "sentenc-

160. *Booker*, 543 U.S. at 237.

161. *Id.*

162. While the Court offered this explanation for its actions in *Booker*, it can just as easily serve as an introduction to the entire series of opinions issued by the Court between *Apprendi* and *Booker.* All four opinions were a response to the rising power of the judge and concomitant loss of power by the jury. Each opinion also asserted the power of the jury against a different doctrine or institution that functioned to perpetuate the imbalance in power. United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Ring v. Arizona, 536 U.S. 584 (2002); Apprendi v. New Jersey, 530 U.S. 466 (2000).

163. Arguably, it is somewhat worse because the Court not only misread the history of the jury, thus allowing it to describe the jury as a fact-finding body, but it also recharacterized the notion of the court as a protector of the defendant. According to the Court, the Founders intended for the institution of the jury to merely protect defendants against factually inaccurate charges, ignoring the more robust vision of the jury qua protector entertained by the Founders. *Booker*, 543 U.S. at 236–40; *Blakely*, 542 U.S. at 305–07; *Ring*, 536 U.S. at 609; *Apprendi*, 530 U.S. at 483–84.

164. Apprendi v. New Jersey, 530 U.S. 466, 477 (2000).

ing factor" was unknown to the Founders and, historically, the jury was expected to find all facts which constituted the offense.[165] Furthermore, the Court noted, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence . . . ."[166]

The Court is formally correct in its historical assessment.[167] The English jury and its early American counterpart did, in fact, find the "offense-related facts directly affecting punishment,"[168] and this fact-finding was no doubt an essential function of the jury. The Court's error is in equating this fact-finding function with the fact-finding function performed by the modern jury.[169] Though

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165. *Id.* at 478.

166. *Id.* at 479 (quoting John Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900 36, 36–37 (Antonio P. Schioppa ed. 1987)).

167. The Court's historical assessment, however, is more accurate in the English context than in the American one. While the English example is formally accurate, but functionally inaccurate, the American example is also plagued by a notable omission. The Court noted that the early American juries played a substantial role in determining punishment because they were responsible for finding all of the facts specific to the offense, but it failed to mention that this fact-finding function was only one of the jury's tools. *Apprendi*, 530 U.S. at 476–77. The jury was not only charged with finding all elements of the crime and relevant sentencing facts, it was also able to influence sentences through its power to nullify the law and its power to find the law. At the time of the Founding, the jury wielded both of these powers and was able to use both to check central tyranny. However, the Court managed to cite the historical prominence of one practice of evidence that it is fundamental to the jury right (fact-finding), while it shunted aside the historical existence of other practices (nullification, law-finding) with no explanation. *Id.* at 476–84. *See generally* United States v. Booker, 543 U.S. 220 (2005); Ring v. Arizona, 536 U.S. 584 (2002). In so doing, the Court substantially skewed its presentation of the jury's historic role.

168. *See* Murphy, *supra* note 28, at 790.

169. As a side note, I also believe the Court errs by claiming that it is performing a substantive, rather than a formal analysis of the jury by allowing it to find offense-related facts. Though the Court noted that English judges from the late eighteenth century had little control over sentencing, it stated that allowing judges to find sentence-enhancing facts deprives the jury of a substantive, fundamental responsibility. *Apprendi*, 530 U.S. at 479. This might make sense had the Court not found indeterminate sentencing to be entirely acceptable. The Court stated that the Sixth Amendment jury trial right is not implicated in a system where the legislature creates a vast sentencing range and allows the judge to choose, depending upon the existence of (likely uncharged) facts not found beyond a reasonable doubt, the sentence within that range. Rather, it stated that the jury trial right is implicated where the judge finds the same facts and uses them for the same purpose of increasing the punishment. In doing so, the Court revealed that it is hopelessly mired in formalistic reasoning. The function of the jury is the same in both systems. The only thing that changes is whether the judge determines the defendant's punishment within a statutory range set by Congress or whether the judge changes the statutory range for the offense by finding the same facts by the same standard of proof. The same result can be accomplished under both scenarios. The substantive function of the jury is unaffected either way. What is affected is how the legislature drafts criminal legislation.

formally analogous, the two practices are substantively quite different. In the modern system, the jury is unaware of the punishment awaiting a defendant and, for the most part, finds facts for the purpose of finding facts. In the eighteenth century jury systems familiar to the Founders, the jury also found facts, but the purpose of this fact-finding was inextricably linked to determining the resultant punishment. As John Langbein explains, "[t]hese trials were sentencing proceedings."[170] Criminal codes were much simpler, jurors were aware of the punishments for crimes, and the fact-finding process was less oriented toward determining the facts of a case[171] than toward allowing the jury to determine the punishment of the defendant. Because they knew the punishment applicable to a particular crime, juries manipulated the fact-finding process to arrive at what they considered a just result.[172]

While this process may be formally described as fact-finding, in substance the jury served as a check on the government's sentencing abilities. Much as the bicameral legislature could only pass laws with the support of both Houses, the state could only punish a defendant if both judge and jury were in agreement on the sentence.[173] If either entity thought the accused was undeserving of the stated punishment, they could, and often did,[174] set him free. Quite simply, defendants were spared when the jury did not find them to be morally culpable or believed the punishment required by the legislature was unjustly disproportionate to their crime. As such, the historical archetype relied upon by the Court in *Apprendi* is misleading at best, and intentionally disingenuous at worst. Though the jury role preserved by the Court may bear formal similarities to the jury known to the Founders, in function it is little more than a shadow of its former self and what it was intended to be.

In order to conceal the shortcomings of its historical analysis, the Court also appropriated the historical language used to justify jury trials, and did so in a similarly misleading fashion. In a bit of semiotic sleight of hand, the Court removed the language from its

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170. *See* Langbein, *supra* note 5, at 41.

171. In the eighteenth century English system, for example, felonies were punishable by only one of two sentences: death or transportation. *See supra* notes 25–40 and accompanying text.

172. *See supra* notes 38–45 and accompanying text.

173. The Court made another error of formalism in *Spaziano v. Florida*, 468 U.S. 447 (1984). In *Spaziano* the Court averred that the "Sixth Amendment never has been thought to guarantee" a jury right at sentencing. *Id.* at 459. While it is formally true that juries did not historically play a role in sentencing, in functional terms this is exactly what they did.

174. *See* discussion *supra* Part I.A–B (examining the death penalty in the English and American contexts).

historical context, gave it a new meaning consistent with the Court's modified understanding of the jury, and then used the original language to help justify its decisions. This process is especially evident in *Blakely* and *Booker*. For instance, *Blakely* pays lip-service to the importance of the jury trial, noting that the right "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[175] It is this control that allows the jury to serve as a protector against government oppression. But the Court further stated that "*Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended."[176]

Here again, the Court invoked the idea of Sixth Amendment substance trumping form, and then proceeded to arrive at a formally appealing, but functionally unacceptable result. The *Blakely* Court equated "control" with "control over factual determinations."[177] Then the Court reasoned that as long as the jury had control over factual determinations, it had the control necessary to protect the defendant from government oppression as intended by the Founders. This position is both logically and historically inaccurate. The jury system known to the Founders gave the jury control over not only fact-finding, but sentencing as well. Juries could determine sentences through manipulation of the offense-related facts, through refusal to apply the law, and through finding the law. These powers combined to give the jury the substantive control necessary to protect defendants against government oppression.[178] Consequently, the jury's roles as fact-finder and protector against government oppression cannot be viewed as coterminous. The jury both found the facts necessary for punishment and, in the process, acquitted defendants against whom the government made factually inaccurate charges. But it also determined whether the community found the defendant deserving of the prescribed punishment or whether the punishment was disproportionate and oppressive, given the specific facts of the defendant's case.[179] The

175. Blakely v. Washington, 542 U.S. 296, 306 (2004).

176. *Id.*

177. *Id.*

178. *See* discussion *supra* Part I.B.

179. Compare this function, again, to Aristotle's description of "moral equity." ARISTOTLE, *supra* note 99, at 1136–38. Here, the jury behaves in a manner quite consistent with

Court conflated these two ideas, thus allowing its newly modified version of the jury to appear consistent with the Founders' concerns that the jury retain popular control of the judiciary and protect defendants against government oppression.

The Court engaged in a similar sleight of hand in *Booker* while talking about the function of the jury. In *Booker*, the Court noted that the current sentencing scheme under the Guidelines is problematic because "the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact."[180] Again, there is a substantial disconnect between the Court's language and the realities of the modern jury. Common law juries "authorized" sentences in a very tangible way. Since the criminal code was substantially simpler, juries understood the connection between conviction and punishment and withheld conviction when they disagreed with the resulting punishment. In so doing, jury verdicts authorized the sentences defendants would receive.

In the modern legal system, no such authorization exists. The criminal code, with thousands of laws and an inestimable number of potential sanctions, defies the understanding of the modern jury. Juries may hazard a guess as to what punishment defendants will likely receive, but they have no real idea. As such, they lack the requisite information to "authorize" the sentence that results from their verdict. Modern juries can authorize conviction—a determination that involves merely applying the facts to the relevant law—but they are not placed in a position in which they can authorize sentences. By describing the jury's function as including the authorization of sentences, the Court inaccurately appropriates a historical function of the jury—one uniquely dependent upon the institutional arrangement that existed 200 years ago, but one that has since been attacked by the Court—and uses it to justify a current modification to the jury. By maintaining such semantic continuity—describing the jury as the protector of defendants against government oppression, as a guarantor of popular control of the judiciary, and as a body capable of authorizing sentences—the Court can obscure the fact that it has functionally changed the jury in ways inconsistent with the Founders' vision. Because the jury's form has remained substantially similar and the language used to describe it retains certain continuities, it is difficult to read-

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moral equity and not at all consistent with the jury's current role in advancing the cause of legal justice.

180. *See* United States v. Booker, 543 U.S. 220, 235 (2005) (quoting *Blakely*, 542 U.S. at 305).

ily discern the extent to which the function of the jury has been eviscerated over time. The Court only adds to this confusion by claiming to emphasize Sixth Amendment substance over Sixth Amendment form.

Two problems emerge from the jury doctrines announced in the *Apprendi* line of cases. First, the Court has ignored the jury's role as a sentencing body—albeit a sentencing body in fact-finder's clothing—and construed the jury as merely a fact-finding body. In so doing, the Court has continued to transform the jury into a body that is incompatible with the Founders' vision. The jury known to the Founders served an essential role in the Republic by placing a multi-purpose popular check on the central government: the jury operated as both protector of the people against government oppression and populist check against a potentially unresponsive central government.[181] The modern jury serves the first of these functions only in part, and the second not at all. Defendants are left with limited protection against governmental oppression and no defense at all against unrepresentative legislative enactments. Both shortcomings are difficult to square with the concern shown by the Founders for abuses by centralized government, and the emphasis on the jury as a local, populist check against that threat.

Providing an "equitable safety valve"[182] against government abuses makes sense for two additional reasons. "First, the potential deprivation of liberty is greatest in criminal cases. An inequitable or rigid application of an overbroad law . . . may result in the most extreme deprivations of liberty the state can exact—criminal punishment—even when punishment is morally inappropriate."[183] Second, the risk of this harm is actually quite substantial. Criminal laws, like all general laws, tend to be over-inclusive. Because legislators cannot foresee all potential circumstances in which the law will apply, it will almost inevitably be over-inclusive and punish individuals whom the legislature would not have intended to punish.[184] This threat is especially potent in the criminal law context "given the dynamics of crime and punishment in the political process."[185]

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181. *See* Amar, *supra* note 75, at 1182–83 ("[M]ost . . . provisions of Amendments V–VIII were centrally concerned with the 'agency' problem of government officials' attempting to rule in their own self-interest at the expense of their constituents' sentiments and liberty."). The jury, which is at the heart of the Bill of Rights, was an important protection against the central government's disregard for popular sentiment. *Id.* at 1183.

182. *See* Barkow, *supra* note 75, at 61.

183. *Id.*

184. *Id.*

185. *Id.*

The Court's current position vis-à-vis the jury is also problematic for an additional reason. Though the Court's modification of the jury has been described as recasting it in a purely fact-finding mold, this position requires some additional clarification. In reality, the Court has created an institution that is an awkward combination of fact-finder and sentencer—an institution that leans toward the fact-finding end of the spectrum. At the time of the Founding, the jury was consistently endowed with powers that made it a capable sentencing body: It knew the likely criminal sanctions, could choose not to apply the law, and could actively find the law.[186] A pure fact-finding body would be granted none of these features: It would operate in ignorance of the law, be denied the ability to find the law, and be structurally impeded from nullifying the law.

But the modern jury borrows incoherently from both camps. On the one hand, the jury is denied knowledge of the consequences of its actions or its power to nullify. Knowledge of its historical power to find the law is also withheld, consistent with the vision of jury qua fact-finder.[187] But the Court has also steadfastly protected the jury's ability to nullify the law by allowing it to render general verdicts, and render verdicts that are either insupportable by the evidence or internally inconsistent.[188] The result is a body that can and does engage in nullification, but does so without knowledge of the consequences of its actions. This state of affairs is problematic because jury nullification is, at heart, the jury's means of stating that the defendant's actions are not sufficiently immoral to merit the consequences established under the law. In other words, juries exercising this option are stating that, according to the community's standards of decency, the defendant's crime does not deserve the specific punishment a guilty verdict, or a complete guilty verdict (as opposed to a compromise, or inconsistent verdict) would entail.

Under the Court's current jury doctrine, this moral calculus is being applied without knowledge of one critical value: the severity of the punishment. As a result, the jury is incapable of asserting that the defendant's blameworthiness is undeserving of any particular punishment because the jury does not know what that punishment is. The best they can do is hazard a guess that, at least in most circumstances, is probably inaccurate. Consequently, the Court has created an institution that acts neither as an efficient

186. *See* discussion *supra* pp. 103–104.

187. *See, e.g.*, Shannon v. United States, 512 U.S. 573 (1994).

188. *See* discussion *supra* pp. 116–117.

fact-finder, because it will sometimes ignore its fact-finding responsibilities to engage in sentencing-oriented activities,[189] nor as a sentencing institution, because it lacks the requisite knowledge and power to make full, informed sentencing decisions. The end result is an institution that cannot provide the consistency afforded by a fact-finding body, or the community's individualized determination of justice afforded by a petit legislative body. Instead, it features the negative aspects of both systems: the inconsistent, ad hoc determinations of the petit legislative body, and the inattentiveness to unduly harsh and unjust punishments of the fact-finder.

IV. INFORMING JURIES OF SENTENCING CONSEQUENCES

A. The Doctrine

One easy means of minimizing the tension in the Court's criminal jury jurisprudence is to allow defendants to inform the jury of the consequences of a guilty sentence. Though providing jurors with this information would not serve as a cure-all for the Court's confused jurisprudence, it would function as a quick, and relatively painless, means of reducing the jurisprudential conflict. This minor change would improve a defendant's protection against governmental abuse of power, provide a check on unpopular criminal legislation, allow the courts to enforce the Eighth Amendment more diligently, and even assist the jury in its fact-finding role—all without requiring a systemic overhaul of the criminal jury system. In short, the tension in the Court's jury doctrines would be alleviated, the jury would function more similarly to the manner in which the Founders intended, and the jury would improve both its fact-finding and sentencing functions.

Federal courts have demonstrated a profound reluctance to allow juries to learn of the consequences of their verdicts beforehand. To date, only one federal court has allowed a defendant to inform the jury of mandatory sentences attendant to conviction—the Middle District of Tennessee, in *United States v. Datcher*.[190] Otherwise, federal

189. As a point of clarification, I am choosing to refer to nullification, law-finding, etc. as sentencing-oriented activities because, like sentencing, they are fundamentally related to questions of just punishment and are little concerned with questions of factual guilt or innocence.

190. United States v. Datcher, 830 F. Supp. 411 (M.D. Tenn. 1993). According to the *Datcher* court, two rights justified informing juries of the sentencing consequences of their actions: the jury's right to information relevant to its decision and the defendant's right to have the jury know. *Id.* at 415.

courts have uniformly denied defendants' requests.[191] The most recent denial of such a request came in *United States v. Pabon-Cruz*. *Pabon-Cruz* is interesting because it highlights the tension in the federal judiciary's position on the criminal jury's role extremely well.

Jorge Pabon-Cruz, an 18-year-old scholarship student at the University of Puerto Rico and first-time offender, was charged with and convicted of both advertising child pornography and distributing child pornography over the internet.[192] Contrary to what might be expected, the advertising offense carried a ten-year mandatory minimum sentence, while the distribution offense had no mandatory minimum.[193] Prior to trial, the Government asked the District Court, Judge Gerard Lynch presiding, to instruct the jurors that sentencing was not their concern, and moved to preclude any mention of the ten-year mandatory minimum.[194] Defense counsel, fearing that the jury would erroneously intuit that the advertising offense was the less serious charge, countered with a request that the Court not only inform the jury that the advertising offense was the more serious of the two, but also inform them that conviction carried with it a ten-year mandatory minimum sentence.[195] The Government then filed an additional request, asking to show the jury images that had been advertised and distributed by defendant.[196] Defense counsel, in turn, agreed to stipulate to the fact that the images constituted child pornography and attempted to bar the Government from submitting them to the jury.[197]

Before trial, Judge Lynch ruled that the Government could prepare a binder with fifteen of the pornographic images in question, but also stated that he was leaning toward informing the jury of the mandatory minimum sentence that Pabon-Cruz would face if convicted.[198] In Judge Lynch's mind, the two issues were interrelated:

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191. *See, e.g.*, United States v. Pabon-Cruz, 391 F.3d 86, 95 (2d Cir. 2004); United States v. Broxton, 926 F.2d 1180, 1183 (D.C. Cir. 1991); United States v. Parrish, 925 F.2d 1293, 1299 (10th Cir. 1991); United States v. McDonald, 933 F.2d 1519, 1526 (10th Cir. 1991); United States v. Delgado, 914 F.2d 1062, 1066–67 (8th Cir. 1990); United States v. Goodface, 835 F.2d 1233, 1237 (8th Cir. 1987); Chapman v. United States, 443 F.2d 917, 920 (10th Cir. 1971); United States v. Del Toro, 426 F.2d 181, 184 (5th Cir. 1970).

192. *See generally Pabon-Cruz*, 391 F.3d at 88–93 (recording a more in depth rendition of the facts).

193. *Id.* at 88.

194. *Id.* at 91–92.

195. *Id.* at 89.

196. *Id.*

197. *Id.*

198. *Id.* at 89–90.

> I must say, I find both sides a little bit inconsistent in that respect. The defense seems to want the jury to make some kind of a judgment about whether the penalty is appropriate for the conduct without letting the jury see what the conduct consists of. On the other hand, the government, which had the opportunity to have a fact finder who would be bound to apply the law and the evidence, chose a fact finder, I assume, because it wanted a judgment of the community, and yet doesn't want the community to know what it is actually judging about or what the consequences of its judgment are.[199]

Accordingly, he agreed both to allow the Government to submit images to the jury and to inform the jury of the mandatory minimum sentence involved.[200] In response to the Government's argument that such actions contradicted the relevant legal precedent, Judge Lynch responded that he had reviewed the precedents in question and decided to inform the jury of the minimum punishment, but to instruct them, in the normal fashion, that they must adhere to the law.[201] Judge Lynch would therefore allow the jury to make a more informed decision as to whether to nullify, but would not affirmatively encourage them to do so by lending his official imprimatur to the act.

The Government appealed Judge Lynch's decision to the Second Circuit, which agreed that the jury could not be informed of the consequences of its actions.[202] The Second Circuit noted that it believed *Shannon v. United States*,[203] in which the Supreme Court held that a defendant had no right to instruct the jury as to the meaning of a not guilty by reason of insanity verdict, was controlling.[204] Furthermore, the Second Circuit stated that it found the *Shannon* Court's dicta regarding the functional distinction between judge and jury to be persuasive.[205] In *Shannon*, the Court explained:

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199. *Id.* at 90. Judge Lynch's statement also highlights the fact that providing a jury with such information would more successfully assist the jury in its role as sentencer/transfuser of community norms because this information about the crime might otherwise be excluded due to its lack of value for the jury's fact-finding function. While I agree that this would be a helpful change to the jury trial doctrine, it involves changes beyond the scope of this Article. I do, however, think it may be a good idea and believe that one could admit evidence based upon its bearing on the moral culpability of defendants.

200. *Id.* at 91 (referencing the Government's motion for an emergency stay and a petition for a writ of mandamus both of which the court subsequently granted).

201. *Id.* at 90.

202. *Id.*

203. Shannon v. United States, 512 U.S. 573 (1994).

204. *Pabon-Cruz*, 391 F.3d at 94.

205. *Id.* at 94–95.

> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their fact-finding responsibilities, and creates a strong possibility of confusion.[206]

In sum, the Second Circuit reasoned that more information will lead to an increased likelihood of jury nullification, and that jury nullification is undesirable because it casts the jury in an inappropriate role that would hamper the performance of its proper, fact-finding role.

This dialogue between Judge Lynch and the Supreme Court/Second Circuit highlights the tension between the modern and traditional conceptions of the criminal jury. Both of Judge Lynch's decisions—to allow the Government to submit pornographic images to the jury and to inform the jury of the mandatory minimum sentence—are inconsistent with the conception of the jury as a pure fact-finder. Given the defendant's willingness to stipulate to the pornographic content of the images, revealing the content of the images could only assist the jury in its consideration of the defendant's moral culpability. The same holds true for his decision to inform the jury of the mandatory minimum sentence facing the defendant.

Judge Lynch's two decisions reveal a conception of the jury more in line with the jury as a local, petit legislature. By providing the jury with the full range of information, the jury is implicitly trusted to answer two questions. First, is the defendant factually guilty? Second, if the defendant is guilty, is the defendant's moral culpability proportional to the punishment sought by the State? In truth, the latter inquiry also involves two questions: whether the defendant's conduct truly fits within the intended scope of the crime,[207] and whether, if it does, the punishment established for the crime is proportionate to the offense and consistent with society's evolving standards of decency.

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206. *Shannon*, 512 U.S. at 579.

207. *See* discussion *supra* note 99.

Granting such power to the jury is in obvious tension with the Supreme Court's current doctrine—it is, after all, hard to deny that such behavior is separate from fact-finding. But, the Supreme Court's position relies on two suspect premises. First, it is not at all clear that informing jurors of the sentencing consequences of their decisions will lead to an increase in nullification, though it will certainly influence the jury's selection of cases in which it chooses to exercise its power, as will be discussed *infra*. Therefore, it is unlikely to erode the jury's focus on fact-finding or disrupt the jury's cognitive balance between fact-finder and sentencer. Second, the *Shannon* Court's reliance on formal analysis detracts from its functional and historical understanding of the jury. Contrary to the Court's position, informing the jury of the consequences of its actions is consistent with the jury's properly understood function, and likely to assist the jury in both its sentencing and fact-finding endeavors. Additionally, the Supreme Court underestimated or ignored the advantages likely to result from informing juries of the consequences of their verdicts.

B. The Effects

1. Jury Nullification

Part of the Second Circuit's stated rationale for denying sentencing information to the jury was a fear that providing jurors with such information would encourage jury nullification.[208] The assertion seems somewhat intuitive on its face, but is inconsistent with the available evidence.

In *United States v. Dougherty*,[209] the presiding judge refused to instruct the jury regarding its nullification powers. The D.C. Circuit upheld the district court's ruling, citing a fear of unjust acquittals,[210] but Chief Judge Bazelon dissented, arguing that the jury should be informed of its power to nullify and that internal restraints would limit the jury's willingness to acquit.[211] The available evidence supports Bazelon's position. As a note in the Yale Law Journal observed:

> Social psychological research indicates that the internal checks referred to by Chief Judge Bazelon are very real and

208. *Pabon-Cruz*, 391 F.3d at 94–95.
209. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).
210. *Id.* at 1135–36.
211. *Id.* at 1143–44.

> that, even where he knows of his power of nullification, a juror has a strong psychological need to see the case settled according to his sense of equity. This need should act as a restraint on the juror's feelings of sympathy for the defendant. In light of a judge's probable influence as an authority figure on the way the jurors perceive their own roles, an instruction which informed the jury of its power of nullification but at the same time conveyed the legal system's expectation that it follow the general law in reaching its verdict would likely retain the necessary tension in the jury's role.[212]

As members of the community, jurors internalize prevalent notions of justice and equitable relationships and "as jurors observing inequitable relationships, they are psychologically motivated to act according to those shared notions in reaching a verdict and apportioning rewards and punishments."[213] Consequently, jurors are unlikely to disregard the law and set guilty individuals free—typically an inequitable solution—even if instructed that such behavior is within their power.

Empirical studies also provide support for this position. In Maryland, the state constitution protects the jury's right to nullify the law.[214] Professor Gary Jacobsohn surveyed Maryland's judges to determine their views on the law's impact.[215] At the end of his study,

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212. Note, *Toward Principles of Jury Equity*, 83 YALE L.J. 1023, 1051–52 (1974) (footnotes omitted).

213. *Id.* at 1050. This theory of equity is strikingly similar to current theories of social norms that stress norm internalization. *See* GARY S. BECKER, ACCOUNTING FOR TASTES 225 (1996) ("Norms are those common values of a group which influence an individual's behavior through being internalized as preferences."); Robert Cooter, *The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1695 (1996). Internalization theories posit that individuals acquire a preference or taste for particular behaviors. This taste is then internalized and the individual pays a psychological price measured in guilt, shame, or other emotional discomfort for failure to conform. Robert Cooter, *The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1695 (1996). Social norms theory—particularly versions stressing norm internalization—are a very helpful way of viewing the behavior of the criminal jury. Nullification is, in effect, jurors prioritizing adherence to an established social norm over adherence to a legal rule to which they have a less substantial commitment. But social norms also frown on individuals committing morally blameworthy action and escaping without consequence, particularly when others are harmed. As such, social norms theory—much like the theory of equity—suggests that juries are unlikely to rampantly nullify the law, allowing guilty defendants to be set free.

214. Maryland's Constitution provides: "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction." MD. CONST., DECLARATION OF RIGHTS, art. XXIII. Indiana also allows juries to nullify the law. IND. CONST. art. I, § 19.

215. *See generally* Gary J. Jacobsohn, *The Right to Disagree: Judges, Juries, and the Administration of Criminal Justice in Maryland*, 1976 WASH. U. L.Q. 571, 577–79 (1976). *But see* Irwin A. Horowitz & Thomas E. Willging, *Changing Views of Jury Power: The Nullification Debate, 1787–*

Jacobsohn concluded that "the traditional deference to the judge's authority is not seriously, if at all, diminished by the advisory nature of judges' instructions in Maryland."[216] An old English historical example points in the same direction. Parliament passed Fox's Libel Act in 1792, allowing jurors the right to override the judge on matters of law, but only in circumstances in which they functioned to mitigate the harshness of the law.[217] Despite providing juries with an additional power to set guilty defendants free, the new law did not make it any more difficult for prosecutors to obtain convictions.[218]

As such, it seems unlikely that merely informing jurors of the consequences of their actions is likely to lead to a substantial increase in nullification. And if it actually did, a spike in nullification would suggest that many of the sanctions specified by the legislature were incongruous with the community's standards of decency. Prevalent jury dissents would thus serve as objective proof of legislative unresponsiveness to the democratic will and spur a collective re-examination of the oft-nullified legislation.

2. Benefits of Informing the Jury

Informing jurors of the sentencing consequences of their verdicts yields three primary benefits. First, as discussed above, it updates the role of the jury to counteract recent infringements on the jury trial right. Second, it assists the jury in its role as fact-finder by grounding the abstract language of "beyond a reasonable doubt." Third, it provides an important feedback loop for both the legislature and the judiciary concerning the proportionality of various criminal sanctions. This would help—or force—the legislature to remain more responsive to the popular will and the judiciary to use the objective data provided by juries to enforce the mandate of the Eighth Amendment.

As discussed above, informing juries of the sentencing consequences of their actions is consistent with the jury's traditional sentencing role, and permitting the release of this information to the jury would help to minimize the contradiction in the Supreme

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1988, 15 LAW & HUM. BEHAV. 165, 172–73 (1991) (suggesting that explicit nullification instructions may increase the likelihood of jury nullification).

216. Alan Scheflin & Jon Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 58–59.

217. *See id.*

218. *See* Joseph L. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481, 491–92 (1968).

Court's current criminal jury jurisprudence. Historically, the jury functioned as a sort of sentencing gatekeeper, removing defendants not believed to be morally culpable before official sentencing by the judge.[219] This gatekeeping function was essentially a proportionality test in which the jury weighed the moral culpability of the defendant against the severity of the punishment. Criminal laws are, at least in theory, likely to be reflective of the general will, and because justice-based social norms and psychological preferences for equitable results compel jurors to treat defendants equitably or justly, juries are more likely than not to authorize sentencing by the judge when they believe the defendant to be guilty. In most cases, the jury will exercise its power to nullify only if the defendant's technical guilt appears to be the result of the strict application of an overly broad statute, the legislature is unresponsive to the general will and criminalizes actions that are not generally deemed worthy of punishment, or the legislature punishes actions in a manner viewed as disproportionately harsh by the community.[220]

Because the jury's presumption will typically militate against the use of its nullification powers, when the jury does decide to exercise its powers, it should be considered a potent statement of community dissatisfaction with the government. But the value of this statement is dramatically undermined when juries are deprived of sentencing information. Nullification still occurs, but the value of nullification as a statement of popular discontent is muffled at best, and rendered incomprehensible at worst, by the lack of knowledge upon which the jury grounds its decision. In order for the jury's equitable pronouncements to have substantial value to other government figures, these pronouncements must rest on actual knowledge of the resulting punishments. Proportionality review requires knowledge of both punishment and culpability. If knowledge of punishment is withheld, the jury is forced to hazard (frequently uneducated) guesses as to the punishment. When this occurs, the jury cannot select the appropriate defendants for sentence-mitigation and nullification provides little in the way of useful feedback for legislatures and prosecutors. Consequently, providing juries with sentencing information will help them to perform one of their essential functions—a function that the government may be powerless to stop them from performing even if it so desired—and perform it more accurately.

Two particular changes in the law make the jury's checking function especially important today. First is the criminal law's dramatic

219. *See* discussion *supra* Part I.A–B.

220. *See, e.g.*, discussion *supra* Part IV.B.i.

increase in complexity. While eighteenth century England had only two punishments for felonies—death and transportation—nowadays, there are literally thousands of criminal laws[221] and a near-infinite range of potential penalties. As such, jury knowledge of legal punishment is dramatically more limited today than it was in the time of the Founders. Thus, informing juries of the sentencing consequences is markedly more important today than it was historically. At the time of the Founding, juries could perform their sentencing function competently without additional assistance, but in the modern world of complex, and frequently counterintuitive, criminal laws, jurors need to be provided with an accurate understanding of the legal sanctions that will result from their verdict.

Increases in the breadth of criminal sanctions also support providing the jury with sentencing information. As William Stuntz explained in a recent article, current institutional incentives are arranged such that criminal laws will tend to be overbroad.[222] Stuntz noted that legislatures are more likely to err toward drafting over-inclusive than under-inclusive laws because they expect that prosecutors will exercise discretion and will weed out cases that should not be prosecuted, even though they fall within the literal language of the law.[223]

Erring in favor of overbreadth also helps to reduce legislative exposure to criticism because prosecutors can criticize the legislature if their prosecutorial abilities are impeded by under-inclusive laws. Drafting over-inclusive laws limits this exposure and actually allows the legislature to blame prosecutors if they unfairly charge individuals under an over-inclusive law.[224] The prevalence of such overly broad laws increases the importance of the jury's checking function and makes it more essential that the jury understand the sentencing consequences of its verdict. The problem is not factual guilt or innocence—an issue well within the jury's fact-finding province—but actual moral culpability. Without knowledge of the sentencing consequences, the jury is less likely to understand the moral injustice of a conviction because it will be ignorant of the actual consequences of its verdict. Accordingly, the current predilection of legislators for over-inclusive laws provides

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221. Robert W. Gordon, *Imprudence and Partisanship: Starr's OIC and the Clinton-Lewinsky Affair*, 68 FORDHAM L. REV. 639, 721 (1999) (quoting RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 87 (1999)).

222. *See* William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 549 (2001).

223. *Id.*

224. *See* Barkow, *supra* note 75, at 62.

an additional argument in favor of informing juries of sentencing consequences.

The increased power wielded by prosecutors provides yet another rationale for providing the jury with sentencing information. Overreaching by "powerful and ambitious prosecutors" was a prominent concern for the Founders and the creation of a powerful criminal jury was their solution to this potentially vexing problem.[225] With the dramatic rise in modern prosecutorial power, the need for the checking function played by a robust jury is more acutely felt than ever before.

Historically, prosecutorial power was constrained by the more limited range of criminal statutes under which defendants could be charged, and by independent judicial sentencing.[226] But "[b]ecause the sentencing guidelines are largely 'charge-offense based,' the eventual sentencing outcome is determined primarily by the crime with which the prosecutor charges the defendant."[227] By making sentencing outcomes dependent upon charging decisions, the guidelines have the unintended effect of shifting control over criminal sentencing to the entity that controls charging—namely, the prosecutor.[228]

While the Founders were reluctant to provide any government official with too much discretion—be they judges or prosecutors—this shift of power from judges to prosecutors cannot be considered a benign transfer of power from one functionally similar government entity to another. Judges, like prosecutors, may have been distrusted by the Founders,[229] but the Founders had at least insulated judges from political pressure through the structural protections enumerated in Article III.[230] As such, the transfer of power

225. *See* AMAR, *supra* note 2, at 84.

226. *See* Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1474 (1993) (explaining the restraining influence of judicial sentencing on prosecutorial discretion).

227. *Id.* at 1475. While *Booker* technically changed the sentencing structure by making the guidelines advisory instead of mandatory, early evidence suggests a lack of functional change. *See* Memorandum from Linda Drazga Maxfield, Office of Policy Analysis, to Judge Hinojosa, Chair, U.S. Sentencing Comm'n 1–2 (Mar. 14, 2005). In the months following *Booker*, sixty-three percent of sentences fell within the Guideline range, two percent were slightly above the range and thirty-five percent were below the range. *Id.* These proportions are the same as the pre-*Booker* regime, suggesting that judges continue to implement the Guidelines in a functionally similar, if not identical, manner.

228. *See* Standen, *supra* note 226, at 1475.

229. *See* AMAR, *supra* note 2, at 84.

230. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.") Prosecutors obviously do not enjoy either the advantages of life tenure or the nondiminution of salary guarantee.

from judge to prosecutor has come at the expense of defendants' protection from the State. While judges may impose the occasional arbitrary or unjust sentence on a defendant, prosecutors are intended to act in opposition to defendants in an adversary system, which may lead to more arbitrary sentences. The aggrandizement of power by prosecutors means that they now occupy a comparably stronger position than they did previously, and defendants are left in a comparably weaker position. Not only can prosecutors charge individuals more aggressively and increase the time per conviction that defendants spend behind bars, but even more importantly, they have additional leverage in plea bargaining.

Because over ninety-five percent of all federal criminal prosecutions[231] (and a roughly similar number of state prosecutions)[232] conclude with a plea bargain, the real source of prosecutorial power, and the real opening for prosecutorial abuse, derives from the prosecutor's enhanced bargaining leverage. Prosecutors can now afford to threaten defendants with more oppressive punishments than under earlier sentencing regimes because the jury is ignorant of the sentencing consequences faced by defendants and the judge lacks the power to rein them in. By threatening more oppressive punishment if defendants risk trial, prosecutors can coerce defendants into accepting less favorable sentencing terms through plea bargaining. But informing the jury of the sentencing consequences would place a practical limit on the prosecutor's powers because truly disproportionate punishments would be rejected by the jury. Prosecutors who pursued an overly oppressive tack would be greeted with acquittals and compromise verdicts as jurors endeavored to align punishment with their sense of justice. Consequently, the balance of power between prosecutor and defendant would be partially restored to its historical equilibrium, an equilibrium maintained by the existence of a robust criminal jury.

The restoration of this equilibrium may prove especially beneficial to indigent defendants. Jeffrey Standen has argued that under the current sentencing regime, prosecutors are likely to discriminate against indigent defendants with regard to plea bargaining offers.[233] Standen likens prosecutors to the agents of a monopsonist (the government), explaining that as agents, the prosecutors share the monopsonist's incentive to price discriminate in plea bargaining negotiations.[234] Indigent defendants, with their typically

231. United States v. Booker, 543 U.S. 220, 274 (2005).

232. *See, e.g.*, Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1421 (2004).

233. *See* Standen, *supra* note 226, at 1484–85.

234. *See id.* at 1477–84.

inferior legal representatives, present an ideal target for such discrimination. According to Standen, inferior representation by attorneys with inferior resources "should result in an increased ability of the prosecutor to exert the monopsonist's market power over the poor, leading to price discrimination in plea concessions."[235] If, as intuition would suggest, Standen is correct, then providing the jury with sentencing information may provide an important structural protection for disadvantaged defendants who receive inadequate representation at trial. While hardly a substitute for effective assistance of counsel, alerting jurors to sentencing consequences should at least limit the bargaining power of prosecutors and, if cases go to trial, provide some minimum baseline of protection for defendants who might otherwise be prejudiced by ineffective counsel.

Alerting the jury to sentencing consequences would also help to protect defendants from unjust results due to failures of the democratic process. "Many of the founding generation . . . voiced concern that a large-scale representative democracy could fall prey to tyranny by an oligarchy composed of the wealthy and politically powerful."[236] The jury provided a check against such a result by allowing the people to maintain a modicum of direct power.[237] While it may be a stretch to describe the threats posed by an unrepresentative Congress as "tyrannical," it is hardly a stretch to dub Congress an "oligarchy composed of the wealthy and politically powerful." Tyranny may no longer be a realistic concern, but political marginalization certainly is.[238]

Congress, by and large, is comprised of wealthy, white males of a relatively advanced age. In the House of Representatives, 86% of Representatives are male, 85% are white (non-Hispanic), and 76% are fifty years or older.[239] The Senate reveals an even less representative profile. Eighty-six percent of Senators are men, 98% are white, and 87% are fifty years or older.[240] And modern campaign requirements almost guarantee that candidates for national office

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235. *Id.* at 1485.

236. Sauer, *supra* note 29, at 1249.

237. *Id.*

238. John McGinnis argues that other democratic shortcomings—most notably decentralized democracy's risks of rational apathy and the leverage of special interests—may be corrected by the jury. *See* John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 560 (2002). As McGinnis points out, none of these failings of decentralized democracy is present in the small, local institution of the jury. *Id.*

239. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT 2004–2005: THE NATIONAL DATA BOOK 250 (124th ed. 2005) [hereinafter STATISTICAL ABSTRACT].

240. *Id.*

come from affluent backgrounds. These demographic characteristics are not representative of the country and they are even less representative of the nation's criminal defendants.

Unlike Congressmen, who tend to be old, white, and wealthy, criminal defendants tend to be young, non-white, and poor. Prisons have been aptly described as the "nation['s] poorhouse,"[241] and the average convicted felon "is likely to be a member of the lowest social and economic groups in the country."[242] Almost half of all felons are twenty-four or younger[243] and half are non-white.[244] In 2001, black men were six times more likely to be imprisoned than white men, and Hispanic men were three times as likely to be imprisoned.[245] Over the course of their lifetime, black men are more than five times, and Hispanic men more than three times, as likely as white men to go to prison.[246]

In short, fears of democratic unresponsiveness are hardly chimerical in the context of criminal sentencing legislation. The demographic disparity between government and governed is vast, and the disparity between governor and prisoners is nearly incalculable. As a result, the caste from which most prisoners come is at substantial risk of political marginalization, and lacks obvious recourse within the democratic system.[247]

The Founders may not have foreseen this specific concern, but they were fully aware of the potential shortcomings of the democratic process,[248] and adopted institutional protections to militate against such problems. One such institutional response was the creation of a robust jury trial right. The jury functioned as the sort of micro-democratic political structure that the Founders believed

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241. JEFFREY REIMAN, ... AND THE POOR GET PRISON: ECONOMIC BIAS IN AMERICAN CRIMINAL JUSTICE 92 (1996) (quoting Ronald Goldfarb, *Prisons: The National Poorhouse*, THE NEW REPUBLIC, Nov. 1, 1969, at 15–17).

242. *Id.* at 91 (quoting U.S. GOVERNMENT PRINTING OFFICE, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY: A REPORT BY THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE 44 (1967)).

243. *See* Bureau of Justice Statistics: Criminal Offender Statistics, http://www.ojp.usdoj.gov/bjs/crimoff.htm (scroll down the page and select the "Spreadsheet" hyperlink under the phrase, "The number of violent crime arrests of juveniles (under age 18) and adults (age 18 or older), 1970–2002") (on file with the University of Michigan Journal of Law Reform).

244. *See* STATISTICAL ABSTRACT, *supra* note 239, at 250.

245. *See* Bureau of Justice Statistics, *supra* note 243.

246. *See id.*

247. This disconnect is only exacerbated by the role played by the Sentencing Commission. Because of the prevalent role in formulating the Sentencing Guidelines played by a non-democratic body, the citizenry has even less control over criminal sanctions today than in any previous historical period.

248. *See generally* AMAR, *supra* note 2.

necessary to ensure democratic accountability in an era of large-scale representative democracy. By placing substantive, if limited, political power in the hands of these local populist bodies, the Founders ensured that a legislature unresponsive to the wishes of the people was incapable of sanctioning criminal punishments deemed unacceptable by the general populace.

The need for micro-democratic political structures to ensure government responsiveness is even more acute at present than it was at the time of the Founding. The dramatic increase in the nation's size and heterogeneity make the risks of group marginalization even more pressing today. And the jury, as presently constituted, has been largely deprived of its ability to serve this checking function. Without knowledge of criminal punishments, the jury cannot effectively check the enactment of arbitrary, oppressive, or disproportionate punishments by the unresponsive central government. Consequently, the jury has been deprived of its capacity to check large-scale democracy precisely at the point that this power became most critical.

3. Miscellaneous Jury Advantages

Providing the jury with sentencing information also provides additional advantages unrelated to the jury's sentencing function: namely, it helps to ground the jury's understanding of reasonable doubt and it provides a useful feedback loop of public sentiment for other government actors.

According to the Supreme Court, "the right to have [a] jury verdict based on proof beyond a reasonable doubt" is a fundamental companion right to the Sixth Amendment jury trial right. But while the formal guarantee of "proof beyond a reasonable doubt" is clear, the substantive promise behind that assertion is hazier.[249] The standard assumption made by the public and the courts is that "beyond a reasonable doubt" demands a very high standard of proof before one is willing to convict.[250] But empirical research "has consistently shown that the jurors in criminal cases will often be satisfied with much less certainty than is conventionally assumed"[251] and that decisions about where to set the standards of proof are likely to vary from case to case.[252] Thus, while the Court believes the

249. Apprendi v. New Jersey, 530 U.S. 466, 478 (2000).

250. *See* Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 86–87 (2002).

251. *Id.* at 88.

252. *Id.* at 112.

"reasonable doubt" standard to be of constitutional magnitude, research suggests that jurors do not distinguish between the reasonable doubt and preponderance of the evidence standards and, as a result, jury verdicts are unaffected by the standards given to juries.[253] The phenomenon has a simple explanation: The words "beyond a reasonable doubt" have no fixed, quantitative meaning and jurors are not provided with an adequate context within which to ground their meaning of the terms, forcing them to attempt to do so on an ad hoc basis.[254]

The term "reasonable" itself is inherently relative. What is reasonable in one context may be unreasonable in another—the assessment is heavily context dependent. Accordingly, it makes very little conceptual sense to tell jurors that they must find a defendant's guilt beyond a reasonable doubt without providing them with the legal sanctions faced by the defendant. Sentencing information is necessary to provide juries with a concrete understanding of what is at stake and a factual foundation upon which to ground their understanding of "reasonableness." Juries' common conflation of the reasonable doubt standard with the preponderance of the evidence standard may very well be the result of courts' attempts to insulate juries' quasi-sentencing powers from their fact-finding powers.

By removing sentencing consequences from the jury's cognitive universe, the jury is left to render a decision of either pure guilt beyond a reasonable doubt or innocence. When jurors consider "reasonable doubt" only in the abstract, separate from the tangible consequences of their actions, they are likely to consider it a far less substantial constraint on their fact-finding decision than if they were affirmatively told that a guilty verdict would result in a substantial prison sentence. While it may seem reasonable in the abstract to convict a defendant when the jury is only sixty percent certain of his guilt, such a standard of proof may appear far less adequate to the same jurors when they are made aware of the twenty-year penalty that will result from their decision to convict. Quite simply, the constitutional guarantee of proof beyond a reasonable doubt is little more than a hollow promise unless the jury is provided with the sentencing information necessary to ground its understanding of the concept.

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253. *See* KASSIN & WRIGHTSMAN, *supra* note 103, at 155.

254. Additional explanations congruent with empirical research are that juries either do not pay attention to or they do not understand juror instructions. *See id.* at 148 (arguing that jurors do not understand juror instructions and that verdicts do not change based upon whether or not the jury is given instruction); Robinson, *supra* note 104, at 170–71 (arguing that juries commonly do not understand judge instructions).

Lastly, informing juries of sentencing consequences should prove beneficial by providing substance to the Eighth Amendment's prohibition against cruel and unusual punishment. Only three parties are potentially available to judge the proportionality of a criminal statute: the legislature, the judge, and the jury. The Supreme Court has noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."[255] The Court continued to explain that this reluctance to act upon judicial prerogative stemmed from a belief that the "Court's Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."[256] If the legislature has already enacted a law, thus signifying its obvious approval, and the courts refuse to get involved without objective indicia, then the Eighth Amendment is rendered functionally inapplicable to legislative enactments.[257] Given that the Court has categorized some legislative acts as unconstitutionally disproportionate,[258] this position is conceptually problematic. The Court is not arguing that legislative enactments are inherently in line with the Eighth Amendment. It follows that it must be arguing that while the legislature will pass laws that are unconstitutional, the Court is so ill-equipped to determine which laws are disproportionate that, rather than enter arbitrary judgments, it will opt to give a rubber stamp approval to all criminal sanctions short of the death penalty.[259]

Informing juries of the criminal sanctions resulting from guilty verdicts would provide the Court with objective proof of social disapproval, allowing it to more willingly enforce the Eighth Amendment's prohibition against excessive punishment. In *Woodson v. North Carolina* the Court stated that "jury determinations" are one of "two crucial indicators of evolving standards of

255. Rummel v. Estelle, 445 U.S. 263, 272 (1980).

256. *Id.* at 274–75 (quoting Coker v. Georgia, 433 U.S. 584 (1977)).

257. Death penalty trials provide an exception to this general rule because death penalty sentencing allows juries to explicitly involve themselves in the sentencing process, thus providing courts with the objective indicia of community sentiment that they require.

258. *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding the death penalty unconstitutional as applied to sixteen and seventeen-year-old defendants); Atkins v. Virginia, 536 U.S. 304 (2002) (ruling that death sentences are an excessive punishment for persons with mental retardation); Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty was a grossly disproportionate and excessive penalty for the crime of rape); Weems v. United States, 217 U.S. 349 (1910) (ruling that defendant's non-capital punishment for falsifying documents was grossly disproportionate under the Eighth Amendment).

259. For example, "three strikes" laws may be especially problematic.

decency respecting the imposition of punishment in our society."[260] The *Woodson* court approvingly cited to numerous instances where juries refused to convict rather than automatically sentence a defendant to death, noting that such "objective indicia" allowed it to judge the practice unconstitutional.[261]

Similarly, providing modern juries with sentencing information would allow them to reject sentences that are out of line with society's evolving standards of decency, thereby permitting the Court to set such enactments aside as unduly harsh and prohibited by the Eighth Amendment. Such feedback would also percolate back to legislators and prosecutors. Provided with this objective feedback from the populace, legislators would be less likely to enact laws that seemed acceptable in the abstract, but unconscionable in application, and prosecutors would be less likely to press charges they knew to be out of line with community standards. As a result, defendants would receive an increase in both formal and functional protection from oppressive criminal sanctions.

CONCLUSION

As the *Booker* Court implicitly recognized, Sixth Amendment form is of little value without Sixth Amendment substance.[262] Yet the Court's recent jurisprudence has consistently focused on the jury's formal elements—specifically its formal designation as fact-finder—to the exclusion of its substantive functions. The motivation for the Court's preoccupation with form may be a historical misconception. The Court may really believe that the jury was historically limited to its capacity as fact-finder, but it is more likely that the Court wants to promote consistency in criminal trials. If so, the Court's position is understandable, if ill-conceived, but its methods are far from acceptable.

The position that justice requires consistency is far from new[263] and is not without merit. Jury mitigation has been criticized as far back as eighteenth century England and there is certainly value inherent in a more predictable criminal justice system. The problem with the Supreme Court's attempts to achieve greater consistency through criminal jury modifications, if that is the Court's motivation, are twofold. First, by mischaracterizing the

260. Woodson v. North Carolina, 428 U.S. 280, 293 (1976).

261. *Id.* at 289–93.

262. United States v. Booker, 543 U.S. 220, 237 (2005).

263. The English jury was criticized by reformers as performing "ad hoc" jury mitigation. *See* GREEN, *supra* note 25, at 268.

jury's historic role and then relying on this mischaracterization rather than an argument regarding the value of consistency in the legal system, the Court either locates the constitutional source of its authority in the wrong place[264] or puts a constitutional imprimatur on a pragmatic, policy-oriented decision. Second, the Court fails to appreciate that its position does harm to the Founders' vision and that this harm to the jury qua sentencer is not offset by a related benefit to the jury qua fact-finder.

By claiming that the jury has historically served as a pure fact-finder and that the Sixth Amendment compels the Court to maintain substantive continuity between the jury known to the Founders and the modern jury, the Court effectively constitutionalizes its inaccurate historical rendering. In light of the historical evidence discussed in Parts I and II, this position is untenable. A more historically compatible position would require that the Court make one of two arguments. The Court could argue that the jury's historic function does not comprise a constitutional mandate, and that the Court is not bound by, or required to respect, the version of the jury known to the Founders. Alternately, the Court could argue that there is constitutional import in the jury's historical function, but that this constitutional value is in tension with another constitutional value—say, the right to due process of law.[265] Either position would be more honest and would allow for a more robust debate on the appropriate scope of the jury's role. But simply deriving a constitutional mandate from an inaccurate historical account does little to further debate or accurately define a right of constitutional import.

Perhaps more importantly, the Court's recasting of the jury as a fact-finder does little to vindicate the values of consistency that are typically associated with the position. For one thing, the jury still behaves as a sentencing mitigator in addition to its fact-finding activities. Even without sentencing information or court approval, juries have continued to act as sentencing mitigators because of the structural protections that exist to protect such behavior. Consequently, denying juries information regarding the consequences of their behavior does not ensure that juries are appropriately fo-

264. For instance, claiming that the jury form supported by the Court is constitutionally compelled because it is substantively similar to the jury known to the Framers, rather than making an argument that the consistency achieved by redefining the jury is compelled by due process of law.

265. Perhaps one could argue that due process of law requires the consistent application of the laws as written by the legislature and that, without consistency, there is no rule of law. Thus, while the Court's historical function has constitutional value, that value is trumped by the concerns attendant to the due process clause.

cused on their fact-finding chores; instead, it ensures that when they perform their inevitable function as sentencing mitigator, they do it poorly.

Unless the Court reverses course and begins to dismantle the structural protections that allow juries to find verdicts against the facts—the general verdict, permissibility of factually impossible and factually inconsistent verdicts, etc.—the jury will continue to behave as a sentencing mitigator. Consequently, the Court's half-hearted attempts to recast the jury as a fact-finder will serve only to hurt, rather than assist, the jury in its performance of its sentencing function. But such an undertaking, with all of its violence to the jury's historical protections, seems exceptionally unlikely.

As such, the Court should accept what it cannot change. The jury will continue to behave as a sentence-mitigating body and the Court is incapable of stopping it. Given this reality, the Court's best option is to accept the inevitable and at least provide the jury with the means necessary to perform its sentencing function capably. No harm will be done to the jury's fact-finding. Juries already act as sentencing mitigators and evidence suggests that access to relevant information is unlikely to increase their sentencing activities at the expense of their fact-finding responsibilities. As a result, the jury will be better able to perform its sentencing function. As a matter of simple, utilitarian calculus, the choice seems obvious. Informing juries of the sentencing consequences of their actions would not increase juror distraction, and it would allow juries to base their sentence-mitigation decisions on the real consequences of their verdicts. As a result, jury mitigation would lose its uninformed, ad hoc character, target more deserving defendants, and serve as a useful indicator of community disapproval for both prosecutors and legislators to learn from.

A more difficult question, and one outside the scope of this Article, involves the appropriate balance to strike between the jury qua sentencer and the jury qua fact-finder. Moving from the current, awkward balance struck by the Court to the position endorsed above provides obvious benefits with few obvious harms. The Court would continue to achieve the same performance from the jury in terms of its consistent application of the laws, but would also begin to promote the vision of the jury known to the Founders. But the Court could adopt a more extreme version of the position above. If the Court wanted to more completely reduce tension between the jury's sentencing role and its fact-finding role, it could also endorse a number of more substantive changes to the criminal trial. For example, allowing evidence that related to a defendant's moral

culpability, but was irrelevant to his factual guilt or innocence and allowing the court to inform the jury of its power to mitigate would work towards reducing this tension. Such developments would further allow the jury to conduct an individualized assessment of defendant's moral culpability and the extent to which he was deserving of punishment.[266] On the other hand, it would also lead to a more inconsistent application of the law by the jury and additional problems of implementation. The Court would need to decide which values were most consistent with the substance—not the form—of the Sixth Amendment. But first, the Court needs to address the question of what that substance is.

266. Presumably, the jury already takes a number of these factors into account when deliberating; the Court just refuses to explicitly endorse the practice or provide the jury with the full range of information relevant to its decision.