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## The Informed Jury

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# The Informed Jury

*Daniel Epps\**  
*William Ortman\*\**

*The right to a criminal jury trial is a constitutional disappointment. Cases almost never make it to a jury because of plea bargaining. In the few cases that do, the jury is relegated to a narrow factfinding role that denies it normative voice or the ability to serve as a meaningful check on excessive punishment.*

*One simple change could situate the jury where it belongs, at the center of the criminal process. The most important thing juries do in criminal cases is authorize state punishment. But today, when a jury returns a guilty verdict, it authorizes punishment without any idea of what is in store for the defendant. This principle of jury ignorance is a profound mistake. It is unmoored from history and the core function of the jury to authorize punishment. Worse, it exacerbates the criminal legal system's predilection for excessive severity.*

*This Article offers and defends a proposal to replace ignorant juries with informed ones by requiring juries to be told of the statutory minimum and maximum punishment in every case before being asked to return a conviction. Informed juries would change the dynamics of criminal justice for the better. In individual cases, punishment information would make juries more careful before convicting and would sometimes lead juries to refuse to convict where punishment would be excessive and unjust. But more importantly, informed juries would provide systemic benefits. Requiring informed juries would set in motion a political feedback loop that would counteract existing incentives for legislators and prosecutors to prefer severity. In addition to being good policy, there are powerful arguments that informed juries deserve to be recognized as part of the constitutional jury-trial right.*

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## INTRODUCTION

No institution in American law is more exalted in rhetoric, yet less revered in actual practice, than the criminal jury. We are told that the criminal jury is a “defense against arbitrary law enforcement,”<sup>1</sup> “an indispensable protection against the possibility of governmental oppression,”<sup>2</sup> and a “tangible implementation of the principle that the law comes from the people”;<sup>3</sup> perhaps even “the spinal column of American democracy.”<sup>4</sup> But this rhetoric is utterly detached from reality.<sup>5</sup> Only a tiny fraction of criminal cases see a trial, much less a jury trial.<sup>6</sup> While the Constitution guarantees defendants a jury, courts

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1. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

2. *Brown v. Louisiana*, 447 U.S. 323, 330 (1980).

3. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

4. *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., dissenting).

5. See John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial*, 15 HARV. J.L. & PUB. POL’Y 119, 119 (1992) (“While we are celebrating the Bill of Rights, we would do well to take note of that chapter of the Bill of Rights that has been a spectacular failure: the Framers’ effort to embed jury trial as the exclusive mode of proceeding in cases of serious crime.”).

6. On the disappearance of trials, see GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); SUJA A. THOMAS, *THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND*

permit prosecutors to coerce defendants, using the threat of severe punishment, into giving up this right and pleading guilty.<sup>7</sup> In the handful of cases that do actually go to trial, jurors often discover that their job is merely to answer narrow factual questions.<sup>8</sup> In short, twenty-first century criminal juries have vanishingly few opportunities to “check . . . governmental power”<sup>9</sup> and almost none to participate in the normative project of criminal justice.

This state of affairs is nothing less than a tragedy. The demise of the criminal jury has exacerbated major problems in our criminal legal system, and it is deeply inconsistent with our constitutional traditions. The American criminal jury could, and should, regain the importance rhetoric claims for it. This Article proposes a surprisingly simple change to the procedure of jury trials that would help restore the jury to its proper role at the heart of the criminal legal system. The proposal’s basic outline is simple: In every criminal case, the judge should disclose the defendant’s sentencing exposure to the jury for each count. That means that the judge would tell the jury the maximum sentence authorized by statute, whether there was a mandatory minimum, and whether the sentence would (or could) run consecutively with other sentences.<sup>10</sup>

There is good reason to expect that juries possessing that information would, at least on the margins, decide cases differently than juries without it. Theory, empirical studies, and especially historical evidence all support the idea that when juries know that a defendant may face excessive punishment if found guilty, they become

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JURIES (2016); William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); and Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 105 (2018) (“From 2006 to 2016, the overall number of criminal jury trials declined by 47%, and the jury trial rate declined by almost 40%.”). Of course, trials *do* occasionally take place. John Langbein memorably analogized criminal trials to hippopotami: “Can you find a hippopotamus in the Bronx? Yes, there’s one in the Bronx Zoo, but it has nothing to do with life in the Bronx.” Langbein, *supra* note 5, at 121.

7. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Conrad G. Brunk, *The Problem of Voluntariness and Coercion in the Negotiated Plea*, 13 LAW & SOC’Y REV. 527 (1979); John H. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3 (1978); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 979 (1992); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005); Stuntz, *supra* note 6, at 2553.

8. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 84 (2011) (describing contemporary juries as “mere lie detectors,” in contrast with Founding-era jurors who were “moral arbiters” with the job of deciding “*both* what the defendant did *and* whether his conduct merited punishment”); Josh Bowers, *Upside-Down Juries*, 111 NW. U. L. REV. 1655, 1663 (2017) (“Lay trial jurors are left with little work to do. And what little work remains is mostly formal application of fixed law to fact.”).

9. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 860 (2017).

10. The detailed version of the proposal is set forth in Part II.

less likely to convict.<sup>11</sup> Jury nullification is part of the story, as criminal juries may conclude that a punishment is too severe for even an obviously guilty defendant. But nullification is not the whole story.<sup>12</sup> Informed jurors also deploy a more demanding standard of proof when they know that harsh punishment is waiting for the defendant on the other side of a guilty verdict.<sup>13</sup> Even when they are not inclined to nullify, in other words, they take the government's burden to prove its case beyond a reasonable doubt more seriously.

Informed juries are thus more prone to acquit defendants than ignorant juries when they perceive the potential punishment to be excessive. That would certainly matter for individual cases, but why do we say that adopting informed juries would reinvigorate the jury as a criminal justice *institution*? There are two principal reasons.

The first is that our proposal would make juries catalysts of criminal law reform. Informing juries about punishment would enable a virtuous political feedback loop that could make our extraordinarily punitive criminal legal system less severe.<sup>14</sup> In a world with punishment-informed juries, legislators and prosecutors would want to avoid the acquittals that could occur when juries learned about harsh sentencing consequences. The only way they could do so would be by steering clear of harsh punishments in the first place. That means less overcharging by prosecutors. Even more importantly, it means that legislators would have an incentive to enact statutes that accord with common sense notions of justice. They would, that is, have good cause to avoid enacting mandatory minimums, excessively severe recidivism enhancements (e.g., “three strikes” laws), and statutory maximum sentences designed to scare defendants into guilty pleas. Informing the jury would thus go some ways towards restoring an equilibrium that our system lacks today. And because harsh criminal statutes and prosecutorial overcharging are the underpinning of our system of pleas, disrupting them would make plea bargaining—which accounts for the vast majority of criminal convictions—less coercive.<sup>15</sup>

The second principal reason why our proposal would reinvigorate the criminal jury is that it would enable juries to perform their core political function in criminal cases: authorizing state

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11. See *infra* Section I.B.1 (theory) and Section I.B.2 (empirical evidence).

12. See, e.g., *United States v. Datcher*, 830 F. Supp. 411, 412–13 (M.D. Tenn. 1993) (“This is an argument for the right of the jury to have that information necessary to decide whether a sentencing law should be nullified.”).

13. See *infra* Section I.B.1 (describing the confidence effect).

14. See *infra* Section III.A.

15. See *infra* notes 228–230 and accompanying text.

punishment.<sup>16</sup> Although many observers have recognized the truth of Alexis de Tocqueville's observation that the jury is a *political* institution, not merely a factfinding body, our system today has lost sight of that important part of the jury's role.<sup>17</sup> The jury cannot meaningfully exercise its political responsibility for adjudicating criminal cases—and authorizing punishment—unless it knows the entire range of legal consequences of a decision to convict.

Restoring the jury to its proper role in our democracy is particularly pressing at this moment in time. There is growing consensus that our system faces an ongoing crisis of mass incarceration in which millions of Americans languish in jail and prison, at great human cost and without any clear benefit to society.<sup>18</sup> Moreover, few who look at how our system works in practice can miss the deep racial disparities our machinery of punishment produces, in which the brunt of harm is borne by Black and Brown Americans.<sup>19</sup> Informed criminal juries cannot solve these problems completely, but we hope to show they could go some ways towards ameliorating them.<sup>20</sup>

To be sure, our proposal is very much contrary to existing law. Federal courts (including the Supreme Court) and nearly all state courts embrace what we call an “iron law” of jury ignorance.<sup>21</sup> But we are not the first to recognize that as a problem. Indeed, in recent years a number of federal district judges have chafed against it.<sup>22</sup> We hope to persuade our readers that the appellate courts that resisted their efforts, like the Supreme Court before them, got it wrong—and grievously so. Indeed, we hope to show that our judicial system has lost sight of the original promise of a jury guaranteed in our Constitution.

While other scholars have offered various proposals for providing juries some information about punishment,<sup>23</sup> our proposal

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16. See *infra* Section III.B.

17. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 521 (Henry Reeves trans., Floating Press 2009) (1840).

18. See *infra* notes 244–248 and accompanying text.

19. See *infra* notes 249–250 and accompanying text.

20. See *infra* notes 251–256 and accompanying text.

21. See *infra* Section I.A.

22. See *infra* notes 50–52 and accompanying text.

23. See Sarah Moss, *Pragmatic Encroachment and Legal Proof*, 31 PHIL. ISSUES 258 (2021); Jeffrey Bellin, *Is Punishment Relevant After All? A Prescription for Informing Juries of the Consequences of Conviction*, 90 B.U. L. REV. 2223 (2010); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91; Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343 (1983); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93 (2006); Kristen K. Sauer, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232 (1995).

goes further in several key respects. For one, no previous scholars have marshalled all the convincing theoretical, empirical, historical, and constitutional evidence and arguments into a compelling package that shows precisely why informed juries are important and needed. More specifically, though, previous proposals have focused mostly on informing juries of mandatory minimums and other provisions that limit judicial discretion.<sup>24</sup> That's a good start, but informing juries about the *full* statutory range of potential punishment—including mandatory minimums and statutory maximums—is most consistent with the basic premises of the criminal jury system. Further, while a few previous scholars have suggested the possibility of a political feedback effect in passing,<sup>25</sup> none has provided a detailed account of how that process would work. This Article provides that account.

The Article proceeds as follows. Part I lays the groundwork. First, in Section I.A., we describe the current law—i.e., the “iron law” of jury ignorance—in detail. The balance of Part I explains why the iron law matters for jury decisionmaking at the level of individual cases. That begins with theory, and, in Section I.B.1, we describe two mechanisms—the confidence effect and the nullification effect—that make juries relatively acquittal-prone in the face of too-harsh punishment. In Section I.B.2, we turn from theory to empirics. The best empirical support for the idea that informing the jury matters comes from the practice of Anglo-American juries in the eighteenth century, which we examine in depth. We also consider social-science evidence—in particular psychological experiments—as well as more recent real-world examples bearing on the question.

Part II sets forth the specifics of our proposal. We explain what punishment information jurors should know, when they should learn it, and who should provide it to them. Though informing juries would require novel procedures—in particular, it would mean judges giving a “punishment instruction”—it would not be particularly difficult or costly to administer, and we work through some of the mechanics.

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24. The most significant exception in legal scholarship is Michael Cahill, who has argued that “criminal juries should receive instructions that provide information not only as to the elements of the offenses with which a defendant is charged but also as to the offense grades and overall sentencing ranges that correspond to each of those offenses.” Cahill, *supra* note 23, at 92. Though we and Cahill share the same goal, our reasons differ. Cahill’s argument “is based largely on institutional competence and seeks to realign the roles of the judge and jury to maximize their competencies as well as the jury’s role as fault-finder.” *Id.* Though Cahill makes some excellent arguments that support our proposal, he devotes little attention to what we see as the single most important argument in favor of informed juries—the potential for ameliorative political feedback on other institutions. See *infra* Section III.A.

25. See Cahill, *supra* note 23, at 145; Bellin, *supra* note 23, at 2231–32; Kemmitt, *supra* note 23, at 145.

Part III, which makes the affirmative case for informing juries, is the heart of the Article. In Sections III.A and III.B, we make the arguments to which we've already alluded. Section III.A explains the virtuous political feedback loop that informing juries about punishment would engender—pressuring legislators to eschew mandatory minimums and excessive statutory maximums and prosecutors to eschew overcharging. Section III.B then shows how informed juries would be equipped to perform their political function of authorizing state punishment.

Beyond political feedback and democratic authorization, Part III considers two additional arguments for informed juries. In Section III.C, we respond to a likely defense of ignorant juries on the grounds of tradition. Ignorant juries have been with us for a long time—isn't that a point in their favor? But it turns out that the key premise underlying the move to ignorant juries in the late eighteenth and nineteenth centuries was something missing from today's criminal legal system—criminal statutes that contemporaries regarded as mild and rational. Even if ignorant juries might make sense in some place and time, they are ill-suited for this moment of American criminal justice.

Finally, in Section III.D, we consider the possibility of a *constitutional* case for informed juries. In a series of cases emanating from *Apprendi v. New Jersey*,<sup>26</sup> the Supreme Court purported to breathe new life into the constitutional right to trial by jury. In many ways, however, the *Apprendi* revolution was less impactful than many had hoped. We argue that informed juries are the missing link. Recognizing a constitutional right to an informed jury would—in fact and not just on paper—restore the jury to its central role in criminal justice, a proposition that should appeal, we think, even to originalists.

## I. THE LAW OF IGNORANT JURIES AND WHY IT MATTERS

This Part prepares the ground for our proposal in two ways. First, it sets forth the law of jury ignorance as it has come down from the Supreme Court and state lawmakers. That law is the target at which our proposal aims. Second, it explains how and why informed juries decide cases differently than ignorant ones.

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26. 530 U.S. 466 (2000).



*A. The Iron Law of Jury Ignorance*

The Supreme Court took its time before weighing in on jury ignorance, but when it did, it spoke unequivocally. In *Shannon v. United States*,<sup>27</sup> the Court rejected the defendant's bid to tell jurors that if they found him not guilty by reason of insanity, he would probably be confined civilly. Along the way, the Court expounded on the "principle" that "juries are not to consider the consequences of their verdicts."<sup>28</sup>

"It is well established," Justice Thomas wrote for the Court, "that when a jury has no sentencing function, it should be admonished to reach its verdict without regard to what sentences might be imposed."<sup>29</sup> The Court's reasoning in support of this "well established" principle was thin. It could find only one of its own cases to cite for it, and that case, *Rogers v. United States*,<sup>30</sup> offered little help, as Justice Stevens explained in a well-crafted dissent.<sup>31</sup> Lacking much in the way of precedent, Justice Thomas sought to justify the ignorance principle as reflecting the "basic division of labor in our legal system between judge and jury."<sup>32</sup> Whereas judges "impose[ ] sentence on the defendant after the jury has arrived at a guilty verdict," he explained, it is the jury's job to "find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged."<sup>33</sup> Thomas offered no historical or legal support for this "division of labor," nor did he entertain the possibility that information about consequences could be valuable to the jury in finding the facts, instead deriding sentencing information as irrelevant and confusing.<sup>34</sup>

The Court's authoritativeness, of course, does not depend on its persuasiveness, and *Shannon* established the principle of jury

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27. 512 U.S. 573 (1994).

28. *Id.* at 579.

29. *Id.* (internal quotation marks omitted).

30. 422 U.S. 35 (1975).

31. *Shannon*, 512 U.S. at 590–91 (Stevens, J., dissenting). In *Rogers*, a jury asked during deliberations whether the court would accept a verdict of guilty "with extreme mercy of the Court." 422 U.S. at 36. After the court indicated it would, the jury returned a guilty verdict. *Id.* at 36–37. Reversing the defendant's conviction, the Supreme Court explained that the trial judge should have told the jury that a sentencing recommendation would not be binding and further that the jury "had no sentencing function and should reach its verdict without regard to what sentence might be imposed." *Id.* at 40. As Justice Stevens explained in his *Shannon* dissent, the trial judge's "failure [in *Rogers*] to admonish the jury that it should reach its verdict without regard to what sentence might be imposed was prejudicial to the defendant." 512 U.S. at 591. Thus, "[i]nstead of supporting the majority's view, the case [was] more relevant for its illustration of how concerned juries are about the actual consequences of their verdicts." *Id.*

32. *Shannon*, 512 U.S. at 579 (majority opinion).

33. *Id.*

34. *Id.*

ignorance in the federal courts, at least for now.<sup>35</sup> Many federal courts, in fact, don't stop at forbidding jury instructions or defense arguments based on sentencing consequences. They go further by prohibiting defense lawyers from impeaching prosecution witnesses with the potential punishment *they* faced before cooperating with the government, on the grounds that jurors would infer that the defendant has the same exposure.<sup>36</sup> Judges' fear of how juries would react to knowing the consequences of a guilty verdict apparently overwhelms their fidelity to the Sixth Amendment, which guarantees to defendants the right to "engag[e] in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness."<sup>37</sup>

*Shannon* is not a constitutional ruling, so states could chart a different course if they wished.<sup>38</sup> Almost uniformly, they don't. Many state appellate courts echo *Shannon*.<sup>39</sup> "[I]n cases not involving the death penalty," the Supreme Court of California noted in 2002, "it is settled that punishment should not enter into the jury's deliberation."<sup>40</sup> The same principle is enshrined by statute in New York, where judges are required to charge juries that they "may not, in determining the issue of guilt or innocence, consider or speculate concerning matters relating to sentence or punishment."<sup>41</sup> Indeed, at least twenty-five states have pattern jury instructions telling jurors, in effect, that

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35. See *infra* notes 53–55 and accompanying text (describing appellate opinions swatting back attempts by district judges to limit or evade *Shannon*).

36. See, e.g., *United States v. Trent*, 863 F.3d 699, 701 (7th Cir. 2017); *United States v. Wright*, 866 F.3d 899, 906–08 (8th Cir. 2017); *United States v. Rushin*, 844 F.3d 933, 938–40 (11th Cir. 2016). These courts permit a defendant to impeach cooperating witnesses only with the information that their sentencing exposure but for cooperation would have been "substantial," or words to that effect. As attorneys for Phil Lamont Trent explained in a trenchant (albeit unsuccessful) petition for certiorari, the "specific term a witness would face absent the cooperation is essential evidence." *Petition for Writ of Certiorari at 25*, *Trent v. United States*, 138 S. Ct. 2025 (2018) (No. 17-830).

37. *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (internal quotation marks omitted). To their credit, some federal and state courts have so held. See, e.g., *United States v. Larson*, 495 F.3d 1094, 1106 (9th Cir. 2007) (en banc); *Manley v. State*, 698 S.E.2d 301, 306 (Ga. 2010). The split of authority has been presented to the Supreme Court, but it has so far passed on it. *Trent*, 863 F.3d 699, *cert. denied*, 138 S. Ct. 2025 (2018).

38. As evidence that the rule of jury ignorance is not of constitutional stature, consider *California v. Ramos*, 463 U.S. 992, 1008 (1983), where the Court held that it does not violate the Constitution to inform a capital jury that the governor possesses the authority to commute a life sentence (thereby encouraging the jury to endorse a death sentence).

39. E.g., *Haynes v. State*, 186 P.3d 1204, 1210 (Wyo. 2008) ("It is well established that a jury is to base its verdict on the evidence before it, without regard to the possible consequences of the verdict."); *Commonwealth v. Golinsky*, 626 A.2d 1224, 1230 n.4 (Pa. Super. Ct. 1993) ("[P]unishment is a matter solely for the court and not for the jury to know or consider in its deliberations." (internal quotation marks omitted)).

40. *People v. Engelman*, 49 P.3d 209, 212 (Cal. 2002).

41. N.Y. CRIM. PROC. LAW § 300.10 (McKinney 2021).

punishment is none of their business.<sup>42</sup> (That number is likely too low, moreover, as several states make their pattern jury instructions effectively inaccessible.<sup>43</sup>) Punishment, these pattern instructions often provide, should neither enter jurors' minds nor come out of their mouths. Hawaii's is typical: "You must not discuss or consider the subject of penalty or punishment in your deliberations of this case."<sup>44</sup>

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42. The list includes the following states, with the pertinent instruction number from the state's pattern instructions or criminal pattern instructions noted parenthetically (aside from New York, where the principle has been codified): Alaska (ALASKA CRIM. PATTERN JURY INSTRUCTIONS § 1.49 (1999)); Arizona (ARIZ. CRIM. PATTERN JURY INSTRUCTIONS – STANDARD CRIM. INSTRUCTIONS 5 (4th ed. 2016)); Arkansas (ARK. MODEL JURY INSTRUCTIONS – CRIM. 8103 (2d ed. 2020)); California (CAL. CRIM. JURY INSTRUCTIONS 706 (2006)); Connecticut (CONN. JUD. BRANCH CRIM. JURY INSTRUCTIONS § 2.10-3A (4th ed. 2019)); Georgia (GA. SUGGESTED PATTERN JURY INSTRUCTIONS – CRIM. § 1.70.20 (4th ed. 2021)); Hawaii (HAW. STANDARD CRIM. JURY INSTRUCTION No. 8.01 (2014)); Idaho (IDAHO CRIM. JURY INSTRUCTIONS 106 (2010)); Illinois (ILL. PATTERN JURY INSTRUCTIONS – CRIM. 1.01 (2021)); Iowa (IOWA CRIM. JURY INSTRUCTIONS § 100.13 (2018)); Kansas (KAN. PATTERN INSTRUCTIONS – CRIM. 50.080 (3d ed. 2010)); Maine (ME. JURY INSTRUCTION MANUAL § 6-6 (4th ed. 2021)); Maryland (MD. CRIM. JURY INSTRUCTIONS & COMMENT. § 1.51 (3d ed. 2021)); Massachusetts (MASS. SUP. CT. CRIM. PRAC. JURY INSTRUCTIONS § 1.1.10 (2021)); Michigan (MICH. MODEL CRIM. INSTRUCTIONS 2.23 (2021)); Minnesota (MINN. JURY INSTRUCTION GUIDES – CRIM. 3.01 (6th ed. 2021)); Nebraska (NEB. JURY INSTRUCTIONS, CRIM. 9.5 (2021)); New Mexico (N.M. UNIF. JURY INSTRUCTIONS – CRIM. 14-6007 (2021)); New York (N.Y. CRIM. PROC. LAW § 300.10); North Dakota (N.D. PATTERN JURY INSTRUCTIONS – CRIM. § 5.45 (2014)); Ohio (OHIO JURY INSTRUCTIONS 425.35 (2020)); Oregon (OR. UNIF. CRIM. JURY INSTRUCTIONS 1005 (2020)); Pennsylvania (PA. SUGGESTED STANDARD CRIM. JURY INSTRUCTIONS 2.07 (2016)); Utah (UTAH MODEL JURY INSTRUCTIONS CR215 (2d ed. 2013)); Vermont (VT. CRIM. JURY INSTRUCTIONS § 1-2-081 (2021)). In states with jury sentencing, of course, jurors are told to disregard punishment only at the guilt stage. Additionally, in July 2020, the New Jersey Supreme Court indicated that it too would like to add such an instruction. *See State v. Jackson*, 233 A.3d 440, 451 (N.J. 2020) ("We refer to the Committee on Model Criminal Jury Charges, for our consideration, the development of a Model Criminal Jury Charge addressing this situation.").

43. Examples include Missouri, *Jury Instructions*, UNIV. MO. LIBRS., <https://libraryguides.missouri.edu/juryinstructions> (last updated Oct. 21, 2021, 1:55 PM) [<https://perma.cc/M426-VF7S>], and Wisconsin, *Wisconsin Jury Instructions – In Print and Online!*, UNIV. WIS.-MADISON L. SCH., [https://law.wisc.edu/newsletter/Law\\_Library/Wisconsin\\_Jury\\_Instructions\\_in\\_p\\_2018-03-14](https://law.wisc.edu/newsletter/Law_Library/Wisconsin_Jury_Instructions_in_p_2018-03-14) (last visited Mar. 24, 2022) [<https://perma.cc/N5C7-WA4N>].

44. HAW. STANDARD CRIM. JURY INSTRUCTION No. 8.01 (2014). One might expect a different instruction where the jury plays a role in sentencing, but this appears not to be the case. In all but one of the six jury-sentencing states, a bifurcated process separates guilt and punishment stages. *See* ARK. CODE ANN. § 16-97-101 (2021); KY. REV. STAT. ANN. § 532.055 (West 2021); MO. REV. STAT. § 557.036 (2021); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2021); VA. CODE ANN. § 19.2-295.1 (2021). One of these states, Arkansas, even has a standard jury ignorance instruction for use at the guilt stage. ARK. MODEL JURY INSTRUCTIONS – CRIM. 8103 (2d ed. 2020) ("In your deliberations the subject of punishment is not to be discussed or considered by you."). In Oklahoma, which does not bifurcate jury trials, jurors in noncapital cases *are* told during voir dire of the "possible maximum punishment" that the defendant faces. OKLA. UNIF. CRIM. JURY INSTRUCTIONS § 1-5 (2d ed. 2020). They are then asked whether they will, if selected as a juror, "assess punishment in accordance with the law." *Id.* Thus, in Oklahoma, jurors in noncapital cases are "punishment-qualified" just as jurors in capital cases are "death-qualified." The obvious (and perhaps intended) likely effect is to remove potential jurors from the pool who *would* object to an overly punitive sentencing regime. Texas has a similar process for qualifying potential jurors. *See Johnson v. State*, 982 S.W.2d 403, 405–6 (Tex. Crim. App. 1998).

We have found only two true exceptions<sup>45</sup> to the rule of jury ignorance: Louisiana, where judges are required to inform the jury about possible mandatory sentences and permitted to tell them about discretionary ones,<sup>46</sup> and North Carolina, where a state statute “secures to a defendant the right to have the jury informed of the punishment prescribed for the offenses for which the defendant is being tried.”<sup>47</sup>

Louisiana and North Carolina aside,<sup>48</sup> the principle of ignorance has a strong grip in American law. Yet there are signs of discontent in the bottom rung of the federal judiciary. Since *Shannon*, at least four district judges have written or even ruled (temporarily) against it.<sup>49</sup> For

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45. Florida briefly flirted with informed juries after the Florida Supreme Court held that the Florida Rules of Criminal Procedure required courts to inform juries of mandatory maximum and minimum sentences. *See Tascano v. State*, 393 So. 2d 540, 541 (Fla. 1980). The relevant rule was amended in 1984 to effectively overturn this decision. *See Legette v. State*, 718 So. 2d 878, 880–81 (Fla. Dist. Ct. App. 1998) (discussing history of amendment).

46. *See State v. Jackson*, 450 So. 2d 621, 633–34 (La. 1984) (citations omitted):

When the penalty imposed by the statute is a mandatory one, the trial judge must inform the jury of the penalty on request of the defendant and must permit the defense to argue the penalty to the jury. In instances other than when a mandatory legislative penalty with no judicial discretion as to its imposition is required following verdict, the decision to permit or deny an instruction or argument on an offense’s penalty is within the discretion of the trial judge.

*But see State v. Guidry*, 221 So. 3d 815, 820–25 (La. 2017) (declining to extend rule to habitual offender enhancements).

47. *State v. Peoples*, 539 S.E.2d 25, 30 (N.C. Ct. App. 2000). The North Carolina Supreme Court has explained that because “such information serves the salutary purpose of impressing upon the jury the gravity of its duty,” the statute makes it “proper for defendant to advise the jury of the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration.” *State v. McMorris*, 225 S.E.2d 553, 554 (N.C. 1976). There is also a partial exception to the principle of jury ignorance—Washington. Jurors in Washington are told that they “have nothing whatever to do with any punishment that may be imposed” and so they should not consider it, “except insofar as it may tend to make you careful.” WASH. PATTERN JURY INSTRUCTIONS—CRIM. 1.02 (5th ed 2021).

48. While our efforts did not approach any kind of systematic survey, we spoke to some experienced criminal practitioners in Louisiana and North Carolina to get insight into how these provisions operate in practice. In Louisiana, the exclusion of the right to an informed jury for the state’s habitual offender sentencing provisions appears to limit the impact of the right. *See supra* note 46. As for North Carolina, the situation on the ground seems less clear; one lawyer with extensive prosecutorial experience said he had never seen a defendant inform the jury about punishment information. E-mail from W. Scott Harkey, Managing Att’y, Harkey Litig., to authors (Nov. 3, 2021) (on file with authors). An experienced defense lawyer surmised that many lawyers were unaware of the provision, but that he had relied on it to some apparent success in cases involving mandatory sentences for drug-related crimes. Telephone interview with Hart Miles, Partner, Cheshire Parker Schneider, PLLC (Nov. 4, 2021).

49. At least one state court judge has taken a similar tack. In a 2015 case, Judge Wendy Shoob of the Fulton County, Georgia, Superior Court informed the jury that if it returned a conviction for armed robbery, the defendant (who, it was alleged, used an air gun in a robbery) would receive a mandatory life sentence. The jury returned a guilty verdict for robbery, but not armed robbery. *See Order Denying Motion for Reconsideration of Order Denying Motion for Disqualification of Judge 1-2, State v. Taylor*, Indictment No. 14SC126099 (Ga. Superior Ct. 2015). In a thorough order denying the prosecution motion’s to disqualify her, Judge Shoob explained that while the “[g]eneral practice is that jurors are not informed about punishment,” the rationale

then-District Judge Gerard Lynch, it was a matter of symmetry. If prosecutors can introduce evidence to prepare the jury to “confront the difficult moral project of deciding to face the findings that can send another human being to prison,” Lynch reasoned, then a defendant should be able to make jurors fully “aware of the moral consequences of their decisions.”<sup>50</sup> For Judges Jack Weinstein and James Browning, the historical role of the jury was decisive. Each penned detailed historical tracts in the *Federal Supplement* (in Browning’s case, repeatedly), aiming to demonstrate that Founding-era juries understood the consequences of their verdicts.<sup>51</sup> For the most recent dissenter, Judge Stefan Underhill, the breaking point seems to have been frustration with an especially punitive charging decision.<sup>52</sup>

Of course, consistent with the iron law of jury ignorance, all four were swiftly rebuked by their respective court of appeals. Lynch and Underhill swallowed the strong medicine of mandamus.<sup>53</sup> Weinstein likely would have too, but for a complicated procedural posture.<sup>54</sup>

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for this practice “makes no sense in cases involving mandatory sentencing, where the traditional and interpretive power of the judge in sentencing is completely removed by the legislature.” *Id.* at 2. In the aftermath of the case, the Fulton County district attorney filed an ethics complaint against Judge Shoob, which was dismissed. E-mail from Wendy L. Shoob, Senior J., Superior Ct. of Fulton Cnty., Ga., to authors (Dec. 17, 2021) (on file with authors). We are grateful to Judge Shoob, who has since retired from the bench, for telling us of the case.

50. *United States v. Pabon-Cruz*, 255 F. Supp. 2d 200, 214 (S.D.N.Y. 2003) (internal quotation marks omitted) (citing *Old Chief v. United States*, 519 U.S. 172, 187 (1997)).

51. For Weinstein, see *United States v. Polouizzi*, 687 F. Supp. 2d 133, 167–97 (E.D.N.Y. 2010) and *United States v. Polizzi*, 549 F. Supp. 2d 308, 404–24 (E.D.N.Y. 2008). For Browning, see, for example, *United States v. Woody*, 336 F.R.D. 293, 311–17 (D.N.M. 2020); *United States v. Young*, 403 F. Supp. 3d 1131, 1133 (D.N.M. 2019); and *United States v. Edwards*, 266 F. Supp. 3d 1290, 1292 (D.N.M. 2017).

52. During a pretrial motion hearing in *United States v. Manzano*, No. 18-cr-00095 (D. Conn. Oct. 29, 2018), Judge Underhill announced that he would allow the defense to argue jury nullification and, as part of that, would permit defense counsel to cross-examine a government witness about the mandatory minimum sentence the defendant faced. Petition for Writ of Certiorari app. at 94–95, *Manzano*, 141 S. Ct. 658 (2020) (No. 19-1447). Underhill explained that this was a “shocking case” that “calls for jury nullification.” *Id.* at 94. He was “stunned,” he said, “that this case, with a 15-year mandatory minimum, has been brought by the government.” *Id.* The transcript of the motions hearing is included in the Appendix to Manzano’s petition for certiorari. See *id.* at 60–102.

53. See *United States v. Pabon-Cruz*, 391 F.3d 86, 94–95 (2d Cir. 2004) (explaining mandamus proceedings and affirming defendant’s conviction); *United States v. Manzano*, 945 F.3d 616, 621 (2d Cir. 2019) (granting mandamus petition as to Manzano’s nullification argument and “emphasizing” that that Manzano could not offer sentencing information in support of a nullification argument).

54. *United States v. Polouizzi*, 393 F. App’x 784, 784 (2d Cir. 2010) (reversing Weinstein’s order for a new trial and denying government’s mandamus motion as moot). Because three of the four dissenting district judges sit (or sat) in the U.S. Court of Appeals for Second Circuit, that court’s tortuous jurisprudence on jury ignorance merits special mention. The Second Circuit has drawn a distinction between two questions: whether a defendant has the *right* to a jury instruction on punishment consequences and whether a trial judge has the discretionary *power* to give such an instruction. See *United States v. Polouizzi*, 564 F.3d 142, 160–62 (2d Cir. 2009). And it insists

Browning's treatment is different, because after concluding that *Shannon* and equivalent circuit cases are historically misguided, he (again, repeatedly) ultimately applies them as binding. This earns him appellate snark, but not reversal. Noting Browning's "lengthy exposition," the U.S. Court of Appeals for the Tenth Circuit quipped in one case that "rather than embarking on a winding and uncertain journey into the minds of the framers," it would stick to precedent.<sup>55</sup> We are hopeful that our readers will be more receptive to long and winding journeys than the Tenth Circuit panel.

### *B. How Informed and Ignorant Juries Differ*

Does it matter that juries today are ignorant of the punishment consequences of their verdicts? Put differently—would juries decide cases differently if they knew the sentences defendants faced upon conviction?

This Section makes the case that jury ignorance matters to case outcomes. Specifically, we argue that two mechanisms—the confidence effect and the nullification effect—make informed juries more prone to acquit than ignorant ones when they are confronted with punishment consequences that seem excessive. The best evidence for the proposition that informed juries behave differently than ignorant ones comes from the Anglo-American criminal justice system of the eighteenth century,

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that while it has answered the first question in the negative, the second is open. *Id.* In fact, the court has suggested that there *are* circumstances in which a jury could be told about sentencing consequences. For instance, the court has noted that if a "witness or prosecutor states in the presence of the jury that a particular defendant would 'go free' if found [not guilty by reason of insanity], it may be necessary for the district court to intervene with an instruction to counter such a misstatement." *Id.* at 162 (alteration in original) (quoting *United States v. Shannon*, 512 U.S. 573, 587 (1994)). Because of this distinction, in the *Manzano* litigation the court formally denied mandamus as to sentencing information while granting it as to jury nullification. *Manzano*, 945 F.3d at 626–27. There is less to the distinction, however, than meets the eye. For one thing, the actual mandamus order in *Pabon-Cruz* does seem to resolve the question of a judge's discretionary power to instruct on sentencing consequences, or it would if the Second Circuit treated unpublished orders as binding precedent. *See Pabon-Cruz*, 391 F.3d at 91 (quoting mandamus order). And when *Pabon-Cruz*'s appeal reached the court in the ordinary course, the Second Circuit's precedential opinion applied a procedural sleight of hand to avoid commenting on the propriety of the mandamus order. *Id.* at 94:

[E]ven if we believed the earlier panel was incorrect in forbidding the District Court from instructing the jury on the sentencing consequences, the conviction remains sound unless the instructions actually given by the District Court were in error or the defendant had a legal entitlement to the instruction he was denied.

In its most recent foray into this area, moreover, the court apparently concluded that whatever discretion trial judges may have with respect to sentencing information, that discretion does not extend to anything in the vicinity of "nullification." *Manzano*, 945 F.3d at 631 ("[I]f the district court finds that *Manzano* is indeed seeking to introduce evidence of sentencing consequences solely for the purpose of encouraging nullification, the court must exclude that evidence as irrelevant.").

55. *United States v. Courtney*, 816 F.3d 681, 686 (10th Cir. 2016).

which we consider in detail. We then look to modern sources of empirical support, including both recent historical examples and insights from the social sciences.

Before we embark, a caveat is in order. The point we make in this Section is descriptive: that ignorant and informed juries are different. The associated normative claim—that informed juries are preferable—comes later.<sup>56</sup>

### 1. Theorizing the Informed Jury

At the outset, we note that legal actors throughout our system seem to embrace the idea that jurors' awareness of punishment consequences (or lack thereof) matters. Defense attorneys, hoping to encourage acquittals, seek to tell juries about harsh punishment consequences.<sup>57</sup> But defense lawyers cry foul when a jury learns that a defendant may receive lenient punishment, and appellate courts sometimes agree with them.<sup>58</sup> When trial judges try to tell juries about harsh punishments themselves, prosecutors rush to appellate courts to stop them.<sup>59</sup> Legislators and prosecutors argue against harsh penalties that they fear would make it too difficult to secure convictions.<sup>60</sup> And appellate courts design rules to ensure that juries are carefully sequestered from information about punishment consequences.<sup>61</sup>

Actors throughout the legal system thus seem to share the premise that jury awareness of punishment matters. Specifically, their actions reveal their belief that a jury aware of potentially harsh punishment consequences will be less likely to convict than an ignorant jury, and that a jury aware of lenient consequences will be more willing to convict. These views seem consistent with common sense—perhaps to such an extent that some will think them self-evidently true. If one is hoping to influence policy, however, it is necessary to identify the mechanisms by which awareness of punishment consequences might influence the jury, and to estimate how much of a difference awareness

56. See *infra* Part III (providing justifications).

57. See cases cited *supra* notes 50–52.

58. See, e.g., *United States v. Greer*, 620 F.2d 1383, 1384–85 (10th Cir. 1980) (overturning conviction where a U.S. deputy marshal had told the jury about defendant's potential eligibility for punishment under Federal Youth Corrections Act); see also *id.* at 1386 (Doyle, J., concurring):

[I]f the defendant has some personal appeal and the jury has a reluctance to convict him because of his youth and in view of their belief that he may go to prison, communication to the jury that it is likely that he will be treated as a youth offender and will be subject to early release quiets their fears . . . .

59. See *supra* Section I.A.

60. See Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 604–07 (2012) (listing examples).

61. See *supra* note 36 and accompanying text.

of punishment consequences might make in practice. For that reason, we try to theorize why awareness of punishment matters and lay out some of the empirical evidence that supports the theory. In the next Section, we'll turn to evidence from specific real-world examples for additional support.

Let's start with the hypothesis that juries who were informed about harsh punishment consequences might become less willing to convict (and thus more willing to acquit). Why would juries behave in this way, given that they are typically instructed that their role is to determine whether the defendant is in fact guilty of the crime, and not whether the defendant deserves punishment? There are two distinct mechanisms potentially at work.

First, awareness of punishment consequences may affect the *standard of proof* the jury applies. That is, where conviction may lead to particularly harsh punishment, the jury may demand greater certainty before convicting than it otherwise would. We call this the *confidence* effect. It's premised on the idea that factfinders feel responsibility for the consequences that follow from their decisions. Where those consequences are particularly harsh—for instance a life sentence—a factfinder may insist on a high degree of certainty to avoid complicity in an erroneous decision. On the other hand, a juror might be more willing to risk an erroneous conviction where a fine or short term of incarceration is at issue.<sup>62</sup> The confidence effect can also be understood in decision-theoretic terms. Assume that jurors are rational decisionmakers and that the social costs of erroneous convictions rise as the penalty rises (or, at least, that jurors believe this to be the case).<sup>63</sup>

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62. The reasonable-doubt standard itself may result from this very phenomenon. According to James Whitman, the standard arose as a way for medieval jurors to assuage their guilt and allay their fear of literal damnation if they sent an innocent person to his death. See JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* (2008).

63. See, e.g., James Andreoni, *Reasonable Doubt and the Optimal Magnitude of Fines: Should the Penalty Fit the Crime?*, 22 RAND J. ECON. 385, 387–88 (1991) (laying out a formal model under which jurors become less willing to convict as penalties rise because of the costs of error); Martin F. Kaplan & Sharon Krupa, *Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts*, 10 LAW & PSYCH. REV. 1, 1 (1986) (noting that “[i]n rational decision making, people are mindful of the consequences of their decisions” in support of an argument that awareness of punishment can influence jury behavior); Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining “Beyond a Reasonable Doubt,”* 6 PSYCH. PUB. POLY & L. 769, 783 (2000) (suggesting that flexibility in the reasonable-doubt standard is desirable because it allows “jurors to bring to their decision-making process a case-specific analysis of the disutilities associated with convicting the innocent and acquitting the guilty”). For the traditional account of the costs of false convictions, see *In re Winship*, 397 U.S. 358, 371–72 (1970) (Harlan, J., concurring), and John Kaplan, *Decision Theory and the Factfinding Process*, 20 STAN. L. REV. 1065, 1074–75 (1968), reasoning that there may be a greater disutility in convicting an innocent man with a good reputation because his “fall from grace” constitutes a “greater tragedy.”



Under those conditions, it makes good sense to vary the standard of proof with the punishment—the higher the punishment, the higher the burden of proof.<sup>64</sup>

Traditional jury instructions make it easy for jurors to demand more or less confidence depending on the context. Although the beyond-a-reasonable-doubt standard of proof is constitutionally required in criminal cases,<sup>65</sup> the standard is anything but precise. Appellate courts tend to reject trial courts' efforts to quantify reasonable doubt or otherwise to give it additional content,<sup>66</sup> with some expressing an explicit preference to leave the standard undefined.<sup>67</sup> As one judge put it, "after two hundred years, the courts themselves are still not sure what [reasonable doubt] means."<sup>68</sup> Given this lack of clarity in the meaning, it is perhaps unsurprising that studies exist showing that juries may vary widely in the level of certainty they believe reasonable doubt requires.<sup>69</sup>

The fuzziness of reasonable doubt may seem problematic, but if it allows juries to calibrate the standard of proof to the stakes of the case, it may actually be desirable. Indeed, Erik Lillquist has argued that the reasonable-doubt requirement's flexibility enables juries to

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For a critique of this approach to the costs of errors, see Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1092–1124 (2015).

64. The point can also be made in philosophical terms under the label of "pragmatic encroachment," as Sarah Moss does in an excellent recent article. Moss, *supra* note 23, at 259. "[W]hether you know something," she explains, "depend[s] on the stakes." *Id.* As such, whether a defendant in a criminal trial "has been proven guilty depends on whether you know that the defendant is guilty, and whether you know this proposition can depend on what's at stake." *Id.* Thus, Moss observes, "[w]hen judges instruct jurors to deliberate about a verdict without considering its consequences, they are asking jurors to do the impossible." *Id.* at 262.

65. See *Winship*, 397 U.S. at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

66. See, e.g., *Cage v. Louisiana*, 498 U.S. 39, 41 (1990) (per curiam) (overturning conviction where trial court "equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt'"); *McCullough v. State*, 657 P.2d 1157, 1158–59 (Nev. 1983) (holding that trial court erred "by placing the reasonable doubt concept on a numerical scale" in jury instructions).

67. See, e.g., *United States v. Walton*, 207 F.3d 694, 698 (4th Cir. 2000) (en banc) (per curiam) ("[W]e remain convinced that attempting to explain the words 'beyond a reasonable doubt' is more dangerous than leaving a jury to wrestle with only the words themselves."); *United States v. Shaffner*, 524 F.2d 1021, 1023 (7th Cir. 1975) ("It is our opinion that any use of an instruction defining reasonable doubt presents a situation equivalent to playing with fire.").

68. Patricia M. Wald, *Guilty Beyond a Reasonable Doubt: A Norm Gives Way to the Numbers*, 1993 U. CHI. LEGAL F. 101, 111.

69. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 111–18 (2002) (summarizing research). One experimental study found that participants reported they would rely on a somewhat higher burden of proof as the crime charged became more serious. Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 325–29 (1971).

choose the optimal level of confidence needed for conviction given the particular details of the crime and the offender.<sup>70</sup> Along related lines, Ehud Guttel and Doron Teichman have argued that making criminal penalties more severe could guard against false convictions, so long as juries were aware of those penalties.<sup>71</sup>

The confidence effect is not the only mechanism that could make juries sensitive to information about punishment. Another possibility is that, upon becoming aware of sufficiently harsh penalties, jurors will simply refuse to convict even in the face of strong evidence of guilt. This is the *nullification* effect. A nullifying jury (or an individual juror) might conclude that, even if it were certain the defendant was guilty, the punishment was simply too severe.<sup>72</sup> Perhaps the jury would conclude that the punishment was so harsh it would never be appropriate for the crime at issue. Or perhaps the jury would conclude that the penalty was too harsh given mitigating facts it had learned about the defendant or about the crime. Either way, when the nullification effect is at work, the jury would disregard the trial court's instructions about reasonable doubt. With the confidence effect, by contrast, the jury would follow its instructions but also look to information about punishment in order to fill in the gaps left by vague reasonable-doubt instructions.

Observers sometimes describe the effect of informing jurors about punishment as solely about nullification.<sup>73</sup> To be sure, some of the most prominent historical examples of juries relying on punishment information are hard to understand as anything other than nullification. The eighteenth-century notion of “partial verdicts,” which we consider in the next Section, presupposed that juries were ignoring evidence of guilt, rather than simply holding the prosecution to a

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70. Lillquist, *supra* note 69, at 91.

71. Guttel & Teichman, *supra* note 60.

72. For an argument that punishment information is important for the jury's decision to nullify, see David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 918 (1995). Of course, refusing to convict a guilty defendant because of an overly harsh penalty is not the only way in which a jury can nullify the law. Even where the jury is unaware of the penalty, it can still nullify the substantive law by refusing to find the defendant guilty—perhaps because the jury concludes the law is unjust, or because the jury concludes that the particular defendant should not be punished for her conduct. Jury nullification has a rich literature; for a sampling, see Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996); Nancy S. Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV. 877 (1999); and Alan W. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

73. See, e.g., Sauer, *supra* note 23, at 1267–69; see also *United States v. Datcher*, 830 F. Supp. 411, 412–13 (M.D. Tenn. 1993) (“This is an argument for the right of the jury to have that information necessary to decide whether a sentencing law should be nullified.”).

particularly high standard of proof.<sup>74</sup> Nonetheless, it is useful to recognize both possible mechanisms by which punishment information can influence the jury, as they have different implications. If punishment information's only effect were nullification, for example, one might think that informing a jury that a crime carries a surprisingly *low* penalty would make no difference. But the confidence effect suggests the possibility that the jury might become *more* willing to convict in that situation than if it had remained ignorant, since the low penalty could make the jurors willing to use a less demanding standard of proof.

## 2. Empirical Support

Thus far, we have described two ways in which information about punishment could, in theory, influence jury decisionmaking. It remains to be seen whether the effect is more than theoretical. Does punishment information actually influence jury decisions?

The best evidence in support of our theoretical claims arises from the behavior of British (and, to a lesser extent, colonial American) juries in the eighteenth century. Accordingly, we plumb that historical source in some depth. We then turn to more contemporary empirical evidence.

### *a. The Eighteenth Century*

In the eighteenth century, Anglo-American juries knew the sentencing implications of the verdicts available to them. Not only that, but they used that knowledge to mitigate the extraordinarily harsh punishments prescribed by the governing statutes. Eighteenth-century juries thus provide robust support for the proposition that knowledge of punishment consequences matters to juries.

To explain the punishment-informed Anglo-American juries of the eighteenth century, we must first introduce two background principles about the criminal justice system of the day: the ubiquity, on paper, of capital punishment and the principal mechanism to avoid it, the privilege of clergy. We will begin on the far side of the Atlantic and then turn to the colonial experience.

In eighteenth-century Britain, the death penalty reigned supreme, in theory.<sup>75</sup> “[T]here is probably no other country in the world,” the reformer Samuel Romilly told Parliament early in the

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74. See *infra* Section I.B.2.b.

75. See John H. Langbein, *Albion's Fatal Flaws*, PAST & PRESENT 96, 111 (1983) (observing that the eighteenth century was an “age before probation and large-scale penal imprisonment”).

nineteenth century, “in which so many and so great a variety of human actions are punishable with loss of life as in England.”<sup>76</sup> Even minor felonies—for instance thefts of one shilling—carried the specter of death.<sup>77</sup> Yet the actual practice of capital punishment was different. While statutes authorizing the death penalty proliferated in the eighteenth century,<sup>78</sup> actual executions had become the exception.<sup>79</sup> Historians disagree about why the “penal death rate,” as John Langbein calls it,<sup>80</sup> fell even as Parliament enacted more capital crimes.<sup>81</sup> But they agree about *how* death sentences were avoided.

The crucial mechanism was the benefit of clergy, which entered English law within a century of the Norman Conquest to route felony trials of clerics away from the royal courts and into ecclesiastical courts.<sup>82</sup> By the eighteenth century, it had been transformed from a privilege for the ordained into one that could be claimed, once in a lifetime, by anyone charged with a wide range of ostensibly capital felonies.<sup>83</sup> When a defendant invoked the benefit of clergy (or just

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76. 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 3 (1948) (internal quotation marks omitted).

77. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36 (1983).

78. Leon Radzinowicz counted 187 new capital offenses enacted between 1660 and 1819. 1 RADZINOWICZ, *supra* note 76, at 4–5. Langbein suggests that because the statutes were ambiguous and covered overlapping conduct, this count is at least somewhat “bloated.” Langbein, *supra* note 75, at 96, 117–18.

79. In a sample of cases decided at the Old Bailey (London’s main criminal court) from 1754 to 1756, Langbein found that of 204 accused—almost all of whom were charged with ostensibly capital crimes—only twenty were sentenced to death, and only nine actually executed. Langbein, *supra* note 77, at 43.

80. Langbein, *supra* note 75, at 96.

81. Compare Douglas Hay, *Property, Authority and the Criminal Law*, in ALBION’S FATAL TREE 17, 17–63 (1975) (arguing that the combination of severe capital laws on the books and discretion in practice served to reinforce the ruling class), with Langbein, *supra* note 75, at 119 (arguing that the “criminal law is simply the wrong place to look for the active hand of the ruling classes”).

82. See Langbein, *supra* note 77, at 37 (citing J.H. Baker, *Introduction to 2 THE REPORTS OF SIR JOHN SPELMAN 327* (J.H. Baker ed., 1978)); see also J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND, 1660-1800*, at 141 (1986).

83. The transformation began when royal courts took for themselves the responsibility of determining who qualifies as “clergy.” Langbein, *supra* note 77, at 37. They devised an expansive test, qualifying anyone who could read. BEATTIE, *supra* note 82, at 141; Langbein, *supra* note 77, at 37. But that meant that literate individuals were effectively beyond the reach of the criminal law, so Parliament enacted a statute in 1489 providing that a person could invoke clergy only once. Langbein, *supra* note 77, at 38. Clergy expanded through the early modern period. In 1576, the pretense of referral to ecclesiastical court was eliminated. BEATTIE, *supra* note 82, at 142; Langbein, *supra* note 77, at 38. Later, clergy was made available to female defendants, first in limited form and, in 1706, on equal terms with men. BEATTIE, *supra* note 82, at 142; Langbein, *supra* note 77, at 38. Female defendants were, from the start, absolved of the literacy requirement, which was not rigorously enforced against men either. In 1706, the reading test was formally eliminated for men too. JEROME HALL, *THEFT, LAW AND SOCIETY 114* (2d ed. 1953) (explaining that after 1706 legislation “no person was specially privileged”); BEATTIE, *supra* note 82, at 142. And

“clergy,” for short), he could, in theory, be imprisoned for a year, but more often he was released or transported to the colonies.<sup>84</sup>

Not all felonies, however, were eligible for clergy. Parliament enacted statutes in the sixteenth and seventeenth centuries “withdrawing” clergy from certain crimes, including petty treason, murder, and burglary.<sup>85</sup> Beginning in the last decade of the seventeenth century, Parliament withdrew clergy from dozens of additional felonies, including many seemingly low-level ones. The list included—to name just a few—stealing at least forty shillings from a house, stealing a “bleaching ground of linen or cotton cloth” valued at least ten shillings, stealing goods worth forty shillings from a ship in navigable waters, and stealing a sheep.<sup>86</sup> The legislation made the criminal law ostensibly harsher. It was also, in William Blackstone’s telling, “apt to create some confusion.”<sup>87</sup>

On the one hand, English criminal punishments on the statute books of the eighteenth century appeared exceptionally severe. On the other, the harshness of the capital punishment regime was, in reality, tempered by the far-reaching availability of clergy.<sup>88</sup> This structure made it enormously important whether a defendant was convicted of a

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while the rule that a person could claim clergy only once remained formally in effect, in practice the limitation was often ignored. BEATTIE, *supra* note 82, at 143.

84. BEATTIE, *supra* note 82, at 142 (“The [1576] statute authorized the judge to imprison a cleric prisoner for up to a year if he thought fit, but in fact that was rarely insisted on, then or later.”). An early version of transportation during the seventeenth century offered condemned prisoners conditional pardons in exchange for servitude in the American colonies. *Id.* at 470–83. Transportation as an alternative sanction was put on surer footing with the Transportation Act of 1718. *Id.* at 500–05. For a detailed treatment of the Transportation Act of 1718, see Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 125–28 (1999). An interesting debate in the historical literature considers what effect the availability of transportation had on the number of executions. One view is that transportation was a substitute for capital punishment, thus suppressing the number of executions. An alternative view is that without transportation many defendants would have escaped punishment altogether—or received a milder corporal punishment—rather than been executed. On this view, transportation expanded the reach of criminal punishment. For an overview of this debate, see Ashley T. Rubin, *The Unintended Consequences of Penal Reform: A Case Study of Penal Transportation in Eighteenth-Century London*, 46 LAW & SOC’Y REV. 815, 820–23 (2012).

85. HALL, *supra* note 83, at 112 (contrasting the “gradual extension of the benefit of clergy to increasingly large numbers of lay persons” with “a series of legislative enactments which entirely exclude an increasingly large number of felonies from any operation of the privilege”). Clergy was “withdrawn” from petty treason in 1497. BEATTIE, *supra* note 82, at 143. Over the next two centuries, it was withdrawn from murder, certain robberies, burglary, housebreaking (burglary, but during the day), horse theft, theft from churches, and pickpocketing more than a shilling. *Id.*; see also Langbein, *supra* note 77, at 38.

86. BEATTIE, *supra* note 82, at 144–45.

87. 4 WILLIAM BLACKSTONE, COMMENTARIES \*240.

88. Langbein, *supra* note 77, at 39 (“Benefit of clergy drained much of the blood from a system of criminal sanctions that remained nominally based upon capital punishment.”).

nonclergyable offense—and thus executed, absent a pardon—or a clergyable one—and thus released or sentenced to transportation.

Enter the jury. Criminal juries in the eighteenth century frequently engaged in a practice that Blackstone called “pious perjury,”<sup>89</sup> but that, following J.M. Beattie, we will call the “partial verdict.”<sup>90</sup> As we use the term, a partial verdict is one finding a defendant who had been charged with a nonclergyable offense guilty of a clergyable crime instead.<sup>91</sup> It was the pervasive use of partial verdicts that turned English juries into agents of mitigation.<sup>92</sup>

Perhaps the earliest systematic evidence of the practice comes from Fowell Burton’s 1821 speech to Parliament on criminal law reform. Burton began by reminding the members of the thresholds that made various types of larceny ineligible for clergy—forty shillings for thefts from a house, five shillings for thefts from a shop, and one shilling (twelve pence) for thefts from a person, i.e., pickpocketing.<sup>93</sup> He then regaled Parliament with stories of two dozen defendants who had been indicted for stealing goods and money in excess of those thresholds—sometimes *far* in excess—but whose juries returned verdicts in amounts of thirty-nine shillings (in house cases), four shillings and ten pence (in shop cases), and ten pence (in pickpocket cases).<sup>94</sup> More robust empirical support for the pervasiveness of the practice comes from modern historians, who have given us detailed snapshots of partial verdicts in two English jurisdictions: the assizes in Surrey and the Old Bailey in London.

*Surrey.* The most extensive data on partial verdicts in the eighteenth century comes from Beattie’s study of criminal court records

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89. 4 BLACKSTONE, *supra* note 87, at \*239.

90. BEATTIE, *supra* note 82, at 419–20.

91. As Beattie uses the term, partial verdicts also include verdicts that mitigate a defendant’s sentence from transportation to, for instance, whipping. To keep the discussion simple, we focus on the line between nonclergyable and clergyable crimes.

92. *Cf.* BEATTIE, *supra* note 82, at 420–21 (“Jurors and judges were both agents in this manipulation; both possessed discretionary powers that enabled them to temper the application of the law so as to achieve a result that seemed appropriate.”).

93. HC Deb (23 May 1821) (5) cols. 942–45.

94. *Id.* Buxton called special attention to the case of William Earl, who was indicted three times for stealing lace, twice from houses and once from a shop. *Id.* at col. 944 According to the indictments, Mr. Earl stole different amounts of lace each time—13.75 yards from the first house, 4.5 yards from the second house, and seven yards from the shop. *Id.* Nonetheless, his juries determined that he’d stolen thirty-nine shillings worth of lace from the first house, thirty-nine shillings worth from the second house, and only four shillings and ten pence worth from the shop. *Id.* at col. 945. “Is there any man who doubts the reason of these strange and sudden fluctuations in the value of the property,” Buxton asked his listeners. *Id.* He claimed, moreover, that the cases he’d described were the tip of an iceberg. “I hold in my hand,” he announced, “twelve hundred of a similar description.” *Id.* For Jerome Hall, Buxton’s address left “little doubt” that partial verdicts were “a commonplace of English criminal law administration.” HALL, *supra* note 83, at 128–30.

in Surrey, a county south of London, between 1660 and 1800. Beattie's analysis produced clear evidence that juries shaped their verdicts to influence a defendant's punishment, particularly in cases of property crimes. As Beattie explains, "jurors could anticipate precisely the sentence that would follow particular decisions," and were thus in a position to determine "not only the general issue of the accused's guilt or innocence but also, for many of those they did convict, the sentence that would follow."<sup>95</sup>

In capital property cases heard at the Surrey assizes (the felony courts) during the period, juries were most likely to return a partial verdict to shoplifting charges. Almost two-thirds of the verdicts in shoplifting case were of this variety. More than half of the verdicts were partial in cases of housebreaking and theft from a dwelling, and just thirty percent in burglary cases.<sup>96</sup> The evidence that juries were attuned to punishment is perhaps strongest in sheep-stealing cases. Because it's not possible to steal half a sheep, juries had no practical way to render a partial verdict in these cases,<sup>97</sup> so they acquitted defendants more often. Juries acquitted defendants in 52.5 percent of sheep-stealing cases, compared to 36.9 percent of burglary cases and just 17.2 percent of shoplifting cases.<sup>98</sup> Since there's no obvious reason why the evidence in sheep cases would have been systematically worse than in shoplifting cases, these juries seem to have taken the view that if they couldn't save the sheep thieves from the gallows, it was better to acquit them entirely.<sup>99</sup>

*Old Bailey.* Additional systematic evidence of partial verdicts emerges from John Langbein's study of 171 felony cases (with 204 defendants) decided at the Old Bailey between 1754 and 1756.<sup>100</sup> Langbein found evidence of partial verdicts in thirty-nine of the 171 cases, either via "downcharges," where the jury found the defendant guilty of a less serious crime, or "downvaluing," where the jury reduced

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95. BEATTIE, *supra* note 82, at 429.

96. The data described in the text appear in Beattie's table 8.5. *Id.* at 428.

97. As Langbein notes, "the accused either stole the hose (or other beast) or not, and the governing statute did not further condition the capital sanction on the value of the animal or on any aggravating circumstance that the jury could manipulate in a partial verdict." Langbein, *supra* note 77, at 53.

98. BEATTIE, *supra* note 82, at 428–29.

99. Or at least that's what they said *some* of the time. In deciding whether to render a partial verdict in sheep cases and other property offenses, Beattie notes, juries found "character evidence" quite persuasive. *Id.* at 443. Even in the most serious property cases—robberies and burglaries, for instance—"good character evidence could well influence the jury's decision." *Id.*

100. Langbein, *supra* note 77, at 41–43. This is obviously far less than the total number of felony cases decided at the Old Bailey during those years. Langbein studied the criminal docket of a particular judge—Sir Dudley Ryder. *Id.*

the value of stolen goods.<sup>101</sup> The partial verdicts, Langbein explains, were not randomly distributed. Juries never returned partial verdicts in cases of livestock theft (because, as in Surrey, no partial verdict was available), or in cases of highway robbery (likely because they regarded it as a serious crime).<sup>102</sup> On the other hand, mitigation was nearly automatic in capital pickpocketing cases. Of the nine capital pickpocketing cases in Langbein's sample that resulted in guilty verdicts, juries saved eight of the defendants from the gallows by finding that the value of the property they had stolen was under a shilling.<sup>103</sup> While jury decisions about whether to render a partial verdict were in part guided by the "seriousness of the offense," Langbein suggests that jurors also considered "the conduct and character of the accused."<sup>104</sup> Thus in shoplifting cases and thefts from houses—crimes falling between pickpocketing and highway robbery in severity—juries returned partial verdicts *except* where the defendant was a professional criminal or a member of a criminal gang.<sup>105</sup>

Between Buxton, Beattie, and Langbein, the evidence that eighteenth-century juries deliberately manipulated their verdicts to influence punishment seems quite clear. Of course, a jury could return a partial verdict only if it understood the distinctions that made some crimes clergyable and other crimes not. This is, for our purposes, the critical point. Only juries that understood that forty shillings is the difference between life and death would routinely return thirty-nine-shilling verdicts.

What is less clear is the precise *mechanism* through which jurors came to understand criminal sentencing.<sup>106</sup> Where, that is, did jurors learn about the difference between thirty-nine and forty shillings? It's possible that this was general knowledge among the class of people from which juries were drawn,<sup>107</sup> but the sheer complexity of the sentencing

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101. *Id.* at 52.

102. *Id.* at 53.

103. *Id.* The eight were sentenced to transportation. *Id.* at 52. The ninth defendant ultimately received a sentence of transportation as well, but that came via executive commutation. *Id.* at 53 n.205. Juries also sometimes rendered mitigating verdicts in cases where defendants were charged with clergyable crimes, with the effect of reducing a defendant's sentence from transportation to whipping. Out of ten cases where the charge was simple grand larceny (theft of more than a shilling without aggravating circumstances), juries, as Langbein notes, "reduced the value of the goods below a shilling and convicted of petty larceny." *Id.* at 52.

104. *Id.* at 53.

105. *Id.* at 53–54.

106. Langbein observes that "evidence about how the "patterns and conventions of the partial verdict system" were "formed, influenced, and transmitted" remains elusive. *Id.* at 54.

107. Over on this side of the Atlantic, John Adams rather ostentatiously suggested as much:

The general Rules of Law and common Regulations of Society, under which ordinary Transactions arrange themselves, are well enough known to ordinary Jurors. The great



system renders that a difficult hypothesis to sustain. Recall Blackstone's admonition that the clergy thresholds in larceny cases were "apt to create some confusion."<sup>108</sup>

The two most likely sources of jury information about the sentencing consequences of verdicts were judges and fellow jurors with prior jury service. Though there does not appear to have been any formal system by which judges alerted jurors to how their verdict would impact punishment, it sometimes happened. Dudley Ryder, a judge at the Old Bailey, described one instance in his notes. In a 1754 case, John Taplin was accused of stealing twenty-one guineas in cash (equivalent to 441 shillings) and a watch.<sup>109</sup> "I told them," Ryder wrote in his notebook, referring to the jury, "that [forty shillings] was necessary to make him guilty of felony that was without benefit of clergy. It is by Act of 12 Ann."<sup>110</sup> The jury dutifully found Taplin guilty of larceny to the tune of thirty-nine shillings.<sup>111</sup>

A secondary likely source of information for jurors about how the system of criminal punishment worked was fellow jurors with prior experience. In Surrey, the combination of property requirements for assizes juries and the fact that jurors were drawn from the immediate area around where the court sat (to make sure enough potential jurors showed up) meant that jurors were picked from a fairly limited pool.<sup>112</sup> This inevitably led to repeat jury service for some.<sup>113</sup> Juries heard several cases in one sitting, so prior service could be expected to impart significant information about how the criminal laws worked.<sup>114</sup>

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Principles of the Constitution, are intimately known, they are sensible felt by every Briton—it is scarcely extravagant to say, they are drawn in and imbibed with the Nurses Milk and first Air.

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

108. See *supra* text accompanying note 87. Indeed, Beattie identifies cases in which juries apparently tried to spare a defendant with a partial verdict but failed for technical reasons. BEATTIE, *supra* note 82, at 426.

109. Langbein, *supra* note 77, at 54.

110. *Id.* at 22 (internal quotation marks omitted).

111. *Id.* The historical record doesn't reveal whether such clear guidance was commonplace. Langbein describes "[o]ur glimpse of Ryder's involvement in the case of John Taplin" as "exceptional." *Id.* at 54. Beattie, however, observes that judges "'recommended' verdicts, 'intimated' to the jury the conclusion they themselves had reached, or merely hinted at the options the jury had before them." BEATTIE, *supra* note 82, at 426. Beattie also suggests that "judge[s] must often have reminded [juries] briefly of the possible verdicts they might reach as the trial came to an end, and perhaps nudged them toward a conclusion they could all agree on." *Id.* at 425–26.

112. *Id.* at 378–82.

113. *Id.* at 395.

114. *Id.* The extremely fast pace of jury deliberations, moreover, probably gave the experienced jurors substantial influence. *Id.* at 398.

Partial verdicts were not, as some have suggested, “extralegal.”<sup>115</sup> They were an essential part of the structure of criminal justice in eighteenth-century England.<sup>116</sup> We have seen that Britain’s system of criminal punishment in this period sought justice through the tug-of-war between a draconian criminal code and the compassion of jurors and judges. It was expected that jurors would exercise discretion in rendering verdicts.<sup>117</sup> They did so, moreover, with at least the tacit blessing of Parliament. By putting the ultimate punishment on the books, Parliament aimed to scare people into compliance.<sup>118</sup> But that doesn’t mean Parliament wanted the maximum authorized sentence to be the routine one.<sup>119</sup> “There was clearly no intention,” Beattie observes, “of hanging everyone who might have been guilty on the evidence.”<sup>120</sup> Parliament looked to England’s jurors, not its statutes, to make the normative assessment about which defendants deserved the gallows.<sup>121</sup>

We have so far been looking across the pond. What of jury verdicts in eighteenth-century colonial America? Less is known, but the available evidence suggests that a similar system of partial verdicts was at work.<sup>122</sup> Our best information is from Massachusetts. Severe

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115. *Contra* *Apprendi v. New Jersey*, 530 U.S. 466, 479 n.5 (2000) (“[J]uries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant.”); *Jones v. United States*, 526 U.S. 227, 245 (1999) (“This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as ‘pious perjury’ on the jurors’ part.”).

116. See HALL, *supra* note 83, at 127 (“[T]he practice of returning fictitious verdicts was so widespread that it was generally recognized as a typical feature of English administration of criminal justice.”); see also Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2186 (2015) (“The near consensus that punishments should be mitigated led to a high degree of participation by actors within the system, that, in turn, allowed pious perjury to become routinized.”).

117. BEATTIE, *supra* note 82, at 420–21 (explaining that jurors and judges “both possessed discretionary powers that enabled them to temper the application of the law so as to achieve a result that seemed appropriate”); Langbein, *supra* note 77, at 41 (“To the extent that trial had a function [in cases where guilt was essentially uncontested,] it was to decide the sanction.”).

118. See Langbein, *supra* note 77, at 47 (“Contemporaries understood and approved of this selectivity in enforcement . . . [because] they thought that it maximized the preventive value of deterrence without resulting in a bloodbath.”).

119. See BEATTIE, *supra* note 82, at 421 (“It is likely that parliament expected the law to be enforced with discretion, though that could hardly have been announced in the statutes themselves.”).

120. *Id.*

121. Though it is beyond our scope, juries were not the *only* agent of mitigation. Judges played a role too, as did the Crown via its pardon and commutation powers. *Id.* at 430–36.

122. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 169 (2005) (“America too had the pious perjury, by which juries assigned a low value to stolen goods in order to spare the offender.”); KATE STITH & JOSÉ A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 10 (1998) (“The de facto discretionary nature of de jure ‘mandatory’ capital sentences has been a hallmark of

criminal codes during the Puritan period prioritized moral crimes over property offenses, raising adultery and blasphemy to capital stakes.<sup>123</sup> Yet, as Adam Hirsch notes, “Widespread evasion” of these statutes “held the carnage to a minimum.”<sup>124</sup> The means, naturally, was the partial verdict. Rather than convict defendants of the capital crime of adultery, Massachusetts juries returned verdicts for noncapital crimes like “libidinous Actions” and “acts leading to Adultery.”<sup>125</sup> Later, when moral offenses were decapitalized in colonial Massachusetts and property crimes elevated, similar “evasions” happened again.<sup>126</sup> In a case just past the colonial period, two defendants who had broken into a house at night were convicted of the noncapital crime of housebreaking.<sup>127</sup> Beyond Massachusetts, the partial verdict appears to have been in use at least in New York and Virginia, and perhaps more broadly.<sup>128</sup>

### *b. Contemporary Evidence*

We have just seen evidence that juries in Blackstone’s time were aware of the punishment consequences of their decisions and that this knowledge shaped their verdicts. Of course, Blackstone’s time is far removed from our own. Would informing *modern* juries about the consequences of punishment also affect *their* decisions? In this Section, we look to evidence from surveys of actual trials, psychological experiments, and real-world examples. Although the evidence is not unequivocal, there is strong support for the notion that awareness of punishment matters to modern juries.

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criminal sentencing throughout the history of the common law in England and the Colonies as well as in the American Republic.”). There were, unsurprisingly, American twists. One twist was that transportation to America was, for obvious reasons, not a viable punishment. Banishment, on the other hand, was occasionally used. See ADAM JAY HIRSCH, *THE RISE OF THE PENITENTIARY: PRISONS AND PUNISHMENT IN EARLY AMERICA* 5 (1992) (noting that in colonial Massachusetts, convicts were sometimes banished for crimes such as heresy and political misconduct).

123. HIRSCH, *supra* note 122, at 5–6.

124. *Id.* at 6.

125. *Id.* at 131 n.27.

126. *Id.* at 40–41, 164 n.76.

127. *Salem, November 18: Summary*, SALEM GAZETTE (Mass.), Nov. 18, 1794, at 3.

128. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 89 (2002) (“Juries in eighteenth-century America, as in England, sometimes tailored their verdicts to avoid imposing the death penalty for lesser felonies.”); Peter Charles Hoffer, *Introduction* to CRIMINAL PROCEEDINGS IN COLONIAL VIRGINIA, at liv (Peter Charles Hoffer & William B. Scott eds., 1984) (noting that juries in Virginia could reduce a burglary charge to felonious theft if they wished to prevent a defendant’s execution); JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK* 675 (1944) (“Verdicts [finding the value of goods stolen to be less than twelve pence] were usual in New York, and there is evidence that the colonists added some variations as where persons indicted for burglary were merely found guilty of felonious stealing.”).

*Surveys of Trials.* Consider first studies of real trials. In their seminal work, Harry Kalven, Jr., and Hans Zeisel examined more than 3,500 jury verdicts in the United States, seeking to understand why juries sometimes disagree with a judge's personal assessments of a defendant's guilt.<sup>129</sup> One reason, they discovered, was a "jury's perception of a gross discrepancy between the offense and the anticipated punishment."<sup>130</sup> In such cases, juries would sometimes make incorrect assumptions about how harshly the defendant would be punished, leading them to acquit despite evidence that persuaded judges of the defendants' guilt beyond a reasonable doubt.<sup>131</sup>

Or consider Andrew Leipold's examination of the fact that federal judges are more likely to acquit defendants at bench trials than juries are at jury trials. Although Leipold could not fully control for meaningful differences between the cases in which defendants opted for bench trials versus those in which defendants opted for jury trials, he hypothesizes that part of the explanation is that judges—unlike juries—are inevitably aware of the harsh mandatory sentences defendants face upon conviction.<sup>132</sup>

*Jury Experiments.* Experimental studies are perhaps the most significant source of scholarly inquiry on how punishment information might impact juries. While these studies do not all point in the same direction, several yield reason to think juries would be influenced by punishment information. A common research method for these studies is to present participants with criminal fact patterns and other information in order to assess how jurors might approach cases. The first study, by Neil Vidmar, gave simulated juries a fact pattern and then varied the options available among more and less serious

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129. See HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 33 (1966).

130. *Id.* at 306.

131. No other study has examined real jury trials as comprehensively as Kalven and Zeisel's did, but there is evidence that jurors can make incorrect assumptions about punishment that can influence their decisionmaking. A study examining South Carolina juries in capital cases concluded that one factor juries appeared to weigh heavily in deciding whether to sentence defendants to death was their uninformed expectation about how much punishment the defendant would receive if they declined to authorize the death penalty. Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 *CORNELL L. REV.* 1, 6–9 (1993). Jurors who feared the term of incarceration would be too lenient tended to opt for the death penalty; those who thought the defendants would spend longer in prison were less likely to sentence the defendants to death. *Id.*

132. See Andrew D. Leipold, *Why Are Federal Judges So Acquittal Prone?*, 83 *WASH. U. L.Q.* 151, 217–18 (2005). Scholars have also looked to public opinion polls as evidence of the effect of making juries aware of penalties. In one survey, about sixty percent of respondents stated that they would require more evidence to convict a defendant "if the penalty was death than if it was life imprisonment." Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 *CRIME & DELINQ.* 116, 137–38 (1983).

charges.<sup>133</sup> It observed that subjects became less willing to convict when more severe charges were “the least severe guilt alternative.”<sup>134</sup> Another early study found that simulated jurors reported being less willing to convict when told that the mandatory death penalty, rather than a prison term, was the penalty for a crime—but not when the fact pattern involved a particularly heinous murder.<sup>135</sup> Other studies have found that mock jurors’ conviction rates went down as the penalty became more severe.<sup>136</sup>

That said, the association between punishment severity and jury decisionmaking remains controversial within experimental psychology.<sup>137</sup> Other studies found no statistically significant association between punishment severity and determinations of guilt. In a study of six- and twelve-member mock juries, for example, increasing the severity of the penalty led to longer deliberation time but did not affect rates of conviction.<sup>138</sup> Another study that provided simulated jurors with case fact patterns and varied both severity of penalty and the seriousness of charge concluded that “the likelihood that mock jurors will vote guilty is not affected by either the seriousness

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133. See Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCH. 211, 214 (1972). Immediately thereafter, another study used Vidmar’s design but attempted to disentangle the effects of more severe charges and more severe punishments for those charges. It concluded that the severity of the charge, but not the expected punishment, influenced how participants evaluated guilt. See William C. McComas & Mark E. Noll, *Effects of Seriousness of Charge and Punishment Severity on the Judgments of Simulated Jurors*, 24 PSYCH. REC. 545 (1974). This study, however, suffered from the serious problem that it did not ask simulated jurors what verdict they would vote for, but merely how they evaluated guilt. See *id.* at 546.

134. Vidmar, *supra* note 133, at 215.

135. See Reid K. Hester & Ronald E. Smith, *Effects of a Mandatory Death Penalty on the Decisions of Simulated Jurors as a Function of Heinousness of the Crime*, 1 J. CRIM. JUST. 319, 324–26 (1973).

136. See Norbert L. Kerr, *Severity of Prescribed Penalty and Mock Jurors’ Verdicts*, 36 J. PERSONALITY & SOC. PSYCH. 1431, 1437, 1439 (1978); Keith E. Niedermeier, Irwin A. Horowitz & Norbert L. Kerr, *Informing Jurors of Their Nullification Power: A Route to a Just Verdict or Judicial Chaos?*, 23 LAW & HUM. BEHAV. 331, 337 (1999) (finding simulated jurors were more likely to find a defendant guilty when the penalty was five hundred dollars versus twenty-five years in prison); Kalman J. Kaplan & Roger I. Simon, *Latitude and Severity of Sentencing Options, Race of the Victim and Decisions of Simulated Jurors: Some Issues Arising from the “Algiers Motel” Trial*, 7 LAW & SOC’Y REV. 87, 92 (1972) (showing that the severity of the penalty associated with a guilty verdict is inversely related to the likelihood of a guilty verdict).

137. See Jonathan L. Freedman, Kirsten Krismer, Jennifer E. MacDonald & John A. Cunningham, *Severity of Penalty, Seriousness of the Charge, and Mock Jurors’ Verdicts*, 18 LAW & HUM. BEHAV. 189, 190 (1994) (finding no empirical support for the association).

138. See James H. Davis, Norbert L. Kerr, Garold Stasser, David Meek & Robert Holt, *Victim Consequences, Sentence Severity, and Decision Processes in Mock Juries*, 18 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 346, 363–64 (1977) (but suggesting that, although the ultimate verdict was unaffected, mock juries spent more time deliberating cases with high penalties due to a “poor fit between crime and punishment”).

of the charge or the severity of the penalty.”<sup>139</sup> And most recently, a study by Jennifer Teitcher and Nicholas Scurich purported to find that simulated jurors’ “expectation about the potential punishment did not affect their implicit conviction threshold.”<sup>140</sup>

As outsiders to experimental psychology, we are not positioned to adjudicate between these studies.<sup>141</sup> But we think it is significant that all of the experiments we have described so far involved subjects who *knew* that they were participating in a simulation with no real-world stakes. The experimenters were thus analyzing subjects who could not possibly fear complicity in the wrongful or excessive punishment of a human being—in other words, subjects for whom the confidence effect was wholly absent.

But then consider a clever experiment conducted by Martin Kaplan and Sharon Krupa that managed to test the punishment severity hypothesis in a setting where subjects believed that they were participating in a real-world decision. In their study, some student participants were told that they would have a role in adjudicating a fellow student’s responsibility for cheating, while others were told the exercise was a simulation.<sup>142</sup> In addition, participants “were told that either *they* or an *authority* would select a punishment, if convicted from a range of *mild to moderate*, or *moderate to severe* penalties.”<sup>143</sup> The authors found that students who believed that the exercise was real—but *not* students who understood that it was a simulation—became less willing to convict when the evidence was only mildly incriminating, the instructor (rather than the jury) would control the punishment, and the punishment would be severe.<sup>144</sup> From that finding, the authors concluded “that severe punishments exert their dampening effect on convictions when the greatest chance of unjust harm might befall the defendant.”<sup>145</sup>

In light of Kaplan and Krupa’s study, there is good reason to suspect that experiments in which subjects know they are participating

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139. Freedman et al., *supra* note 137, at 200.

140. Jennifer Teitcher & Nicholas Scurich, *On Informing Jurors of Potential Sanctions*, 41 LAW & HUM. BEHAV. 579, 585 (2017).

141. We note, however, that the simulations cited above that reject an association between severity and guilt determinations drew their conclusions from the failure to reject null hypotheses. See Davis et al., *supra* note 138, at 354, 358; Freedman et al., *supra* note 137, at 202; Teitcher & Scurich, *supra* note 140, at 585. Inferences from the null are fraught. See Martin F. Kaplan, *Setting the Record Straight (Again) on Severity of Penalty: A Comment on Freedman et al.*, 18 LAW & HUM. BEHAV. 697, 697 (1994) (“[T]he frailties of arguing from the null are well known to scientists . . .”).

142. Kaplan & Krupa, *supra* note 63, at 4–5.

143. *Id.* at 3.

144. See *id.* at 14.

145. *Id.*

in a simulation may systematically understate the effect that penalty severity may have on real juries' willingness to convict. It may be that penalty severity becomes salient when the jurors think of the defendant as a real person, something ordinary experimental vignettes cannot simulate.<sup>146</sup> It could also be that penalty severity only influences jury behavior in some factual circumstances but not others. Responding to one of the studies finding no effect, Kaplan stressed these points: "Jurors are concerned with penalty, but only when a real person may suffer a severe penalty and there is some doubt as to whether the person deserves it and whether the jury might be able to have some control in administering the penalty."<sup>147</sup>

Given the inconsistency between the studies, as of this writing, a punishment severity effect cannot be said to be conclusively demonstrated experimentally. Nonetheless, it is hard to dismiss the studies that do report an effect when one also considers the studies of actual jury trials and the apparent assumptions of many actors in the real-world criminal justice system, which also support the idea that penalty affects jury decisionmaking. That proposition seems even more likely in light of the historical evidence recounted above,<sup>148</sup> as well some other real-world examples we will discuss next.

*Real-World Examples.* Though the iron law of jury ignorance constrains what we can say, historical examples more recent than Blackstone's time lend further credence to our claim. First consider capital punishment in the nineteenth century. Jurors in nineteenth-century capital cases understood that death would result from their guilty verdicts. Their reluctance to convict was a fact of life—and an arrow in the quiver of American death-penalty abolitionists. As historian Philip Mackey explains, "Antebellum Americans . . . were satisfied that mandatory capital punishment did indeed have a deterrent effect; it deterred jurors from convicting palpably guilty men."<sup>149</sup> This was a problem, in the words of a Connecticut governor, because "so long as the doctrine of 'blood for blood' shall continue to be tolerated by law, so long will criminals, guilty of the highest offenses

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146. See John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 771–72 (2020) ("The point, of course, is that laboratory vignettes differ meaningfully from actual jury service. . . . Framing effects, time constraints, and even reading comprehension all affect how research subjects respond to laboratory vignettes; the lack of real-world consequences may matter as well." (footnotes omitted)).

147. Kaplan, *supra* note 141, at 698.

148. See *supra* Section I.B.2.b.

149. Philip English Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U. L. REV. 32, 35 (1974).

known to our laws, escape merited punishment.”<sup>150</sup> For at least two states that abolished capital punishment in the nineteenth century, Maine and Wisconsin, Mackey observes that “jury reluctance to convict was an important contributing cause.”<sup>151</sup> This concern about jurors in capital cases was not limited to politicians either. Walt Whitman, not yet of literary fame, wrote in an 1843 editorial that “murderers are so often allowed to escape with impunity—because juries will not convict, where the penalty is death, unless the cases are very aggravated indeed.”<sup>152</sup>

One solution to the problem of jurors refusing to convict guilty defendants was to abolish the death penalty. Another was to make the death sentence discretionary. That’s the direction many American jurisdictions went beginning in the middle of the nineteenth century.<sup>153</sup> A little more than a century later, Justices Stewart, Powell, and Stevens, writing jointly in *Woodson v. North Carolina*, described discretionary capital sentencing as “one of the most significant developments in our society’s treatment of capital punishment.”<sup>154</sup> These Justices had a clear-eyed view of the practical importance of informed juries. “In view of the historic record,” they reasoned, “it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict.”<sup>155</sup>

In the noncapital realm, the iron law of jury ignorance means that jurors are usually in the dark about punishment consequences.<sup>156</sup> But not always. In their analysis of jury decisionmaking, Kalven and Zeisel observed that cases do exist where jurors have “special reason to know what the penalty actually is.”<sup>157</sup> Their primary example was drunk driving cases. Jurors at the time of the study widely understood

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150. *Id.* at 34 (quoting Chauncey F. Cleveland, Governor of Conn., Message from His Excellency Chauncey F. Cleveland to the Legislature of Connecticut (1843)).

151. *Id.* at 35.

152. *Id.* at 33 (quoting Editorial, *Our Answer to a Reasonable Question*, BROOK. DAILY EAGLE, Mar. 24, 1846).

153. *Woodson v. North Carolina*, 428 U.S. 280, 291 (1976); HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES 5–6 (1998); James S. Liebman, *Slow Dancing with Death: The Supreme Court and Capital Punishment, 1963–2006*, 107 COLUM. L. REV. 1, 16 (2007). We do not mean to suggest that avoiding jurors’ reluctance to condemn defendants to death was the only motivation for this development. See Rory K. Little, *The Future of the Federal Death Penalty*, 26 OHIO N. U. L. REV. 529, 538 n.42 (2000) (“It is significant to note that antebellum racial prejudice likely also played a role in making death penalties discretionary rather than mandatory in the late Nineteenth century—juries were expected to dispense capital punishment ‘in the desired manner,’ imposing death on black but not white defendants.”).

154. *Woodson*, 428 U.S. at 301.

155. *Id.* at 303.

156. See *supra* Section I.A.

157. KALVEN & ZEISEL, *supra* note 129, at 307.



that a drunk driving conviction entailed mandatory suspension of the defendant's driving privileges for a year.<sup>158</sup> According to judges surveyed by Kalven and Zeisel, jurors were reluctant to find defendants guilty because they perceived this penalty as too severe. As one judge told them, "I have come to the conclusion that one of the basic reasons for the jury's refusal [to convict] is the belief on the part of the jury that to suspend the license of a working man for one year is too severe a punishment."<sup>159</sup> According to another judge, the Indiana legislature itself "noticed the frequent jury acquittals in drunken driving cases" and reduced the mandatory suspension from one year to sixty days in response.<sup>160</sup>

A slightly more recent example of the power of juror knowledge comes from Michigan in the 1970s. That state's Felony Firearm Statute ("FFS") imposes a mandatory two-year sentence for possessing a firearm during the commission of a felony, on top of any sentence for the underlying felony.<sup>161</sup> When the FFS was enacted, the slogan "One With Gun Gets You Two" was advertised widely on billboards and even bumper stickers.<sup>162</sup> Beyond whatever deterrent effect the advertising may (or may not) have had, it ensured that FFS trial jurors knew at least part of a defendant's sentencing exposure.<sup>163</sup> In a 1983 article, Milton Heumann and Lance Cassak explored what happened next. They looked specifically at the FFS in cases charging felonious assault—a low-level felony often committed with a firearm—in Wayne County (Detroit).<sup>164</sup> In the forty-three jury trials in their sample, thirty-two defendants (nearly seventy-five percent) were acquitted fully, three

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158. *Id.* at 309.

159. *Id.*

160. *Id.* at 310. We have not been able to identify the legislative amendment referenced by the anonymous judge. It is possible that Kalvin and Zeisel misattributed the state. Beyond Kalvin and Zeisel, further support for the idea that sentencing can impact jurors' decisions in drunk driving cases arises from a short-lived policy by Chicago judges in the early 1970s to automatically sentence convicted drunk drivers to seven days in jail. Leon S. Robertson, Robert F. Rich & H. Laurence Ross, *Jail Sentences for Driving While Intoxicated in Chicago: A Judicial Policy That Failed*, 8 LAW & SOC'Y REV. 55 (1973). In a careful study of the policy and its effects, Leon Robertson, Robert Rich, and H. Laurence Ross discovered that the conviction rate for drunk driving defendants who submitted to a blood alcohol test did not change while the policy was in effect. *Id.* at 66. For defendants who refused the test, however, there was a "significant decrease in convictions." *Id.* As Robertson and his coauthors note, "Since the number tested did not decrease, this change appears to be a result of changes in plea bargaining or reluctance of judges or juries to convict and sentence to seven days in jail those drivers for whom objective evidence of impairment was not available." *Id.* (emphasis omitted). In other words, the evidence suggested that jurors may have adopted a higher standard of proof because they perceived the penalty upon conviction to be harsh.

161. MICH. COMP. LAWS § 750.227b (2021).

162. See Heumann & Cassak, *supra* note 23, at 346–47, 354 (discussing the law).

163. *Id.* at 354.

164. *Id.* at 345–57.

were convicted only on misdemeanor counts (thus avoiding the FFS), and five were convicted of a felony but acquitted of FFS.<sup>165</sup> Only three defendants were convicted on FFS charges.<sup>166</sup> Heumann and Cassak acknowledge that this pattern is not definitive proof that juries were reluctant to consign low-level offenders to two years in prison, but that is precisely how Michigan judges and lawyers they interviewed understood the situation.<sup>167</sup> As one judge explained: “It’s very obvious from the way they handle the case and their verdict. They don’t want somebody [to be] a victim of a charge that will send them to jail automatically.”<sup>168</sup> Just as the theoretical perspectives discussed above predict, sentencing information—in this case, from an advertising campaign—impacted how jurors performed their roles.<sup>169</sup>

## II. THE PROPOSAL: WHAT JURIES SHOULD KNOW

Having explained why informed juries might decide cases differently, we next hope to convince readers that our system should rely on informed juries. But before we explain the normative benefits of informed juries, we need to explain exactly what it would mean in practice for juries to be properly informed. Only after doing so can we explain in detail why properly informed juries would produce a more just criminal justice system.

This Part thus outlines the key procedural details of our proposal. We will explain what juries should know and how and when they should be given that information. Our objective is straightforward—to ensure that criminal trial juries know the potential punishment consequences of their decisions. We stress at the outset

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165. *Id.* at 352 n.27.

166. *Id.* Complicating the story is that Wayne County’s chief prosecutor announced a policy requiring his assistants to charge FFS whenever possible and prohibiting them from plea bargaining the charge. *Id.* at 346. Assistant prosecutors were able to evade the plea-bargaining ban in some cases by “wiring” a disposition through a bench trial. *Id.* at 348. This obviously affected the mix of cases that wound up being tried by juries. *Id.* at 352 n.27. Heumann and Cassak recognized the possibility that cases tried before juries were unusually weak, and that this partially explains the high acquittal rate. They subscribed, however, to the explanation that “jurors were aware of the potential punishment the defendant faced, and that this knowledge led to some of the acquittals.” *Id.*

167. *Id.* at 353–56.

168. *Id.* at 353.

169. Another statute from the 1970s supports this idea as well. Enacted in 1974, the Bartley-Fox Amendment in Massachusetts imposes a mandatory one-year minimum sentence for unlawfully possessing a firearm. DAVID ROSSMAN, PAUL FROYD, GLEN L. PIERCE, JOHN MCDEVITT & WILLIAM J. BOWERS, BOS. UNIV. SCH. OF L., *THE IMPACT OF THE MANDATORY GUN LAW IN MASSACHUSETTS* 1 (1979). A few years later, David Rossman and colleagues interviewed Massachusetts practitioners about the law’s impact. “Defense attorneys, prosecutors, and judges,” they reported, “all felt that juries were aware of and influenced by the sentencing provision of the Bartley-Fox law.” *Id.* at 15.

that it is the objective, not the details, that matters most. Still, it is incumbent on us to show that juries could be informed about punishment without upending the trial process.

The core of the proposal is that trial judges should give, as part of their final charge to the jury, an instruction on the sentencing consequences of a guilty verdict. That instruction should tell the jury as to each charge the mandatory minimum sentence, if there is one, and the maximum sentence authorized by law. The instruction should also tell the jury if the punishment for any charge would necessarily run consecutively.

It is helpful to be concrete here, so imagine that John is a federal criminal defendant charged in a three-count indictment with possession of one hundred grams of heroin with the intent to distribute (Count 1),<sup>170</sup> a false statement in connection with a gun sale (Count 2),<sup>171</sup> and aggravated identity theft during the gun sale (Count 3).<sup>172</sup> At the conclusion of John's trial, after defining the elements of each offense, we would have the judge give an instruction along these lines:

Jury Instruction on Punishment

If you find the defendant guilty on any count, it will be up to me to establish the punishment, which may include incarceration in jail or prison and a fine. You are advised of the following:

If you find the defendant guilty on Count 1, your verdict requires me to impose a sentence of at least five years and authorizes me to impose a sentence of up to forty years. It also authorizes me to impose a fine of up to \$5,000,000.

If you find the defendant guilty on Count 2, your verdict authorizes me to impose a sentence of up to ten years. It also authorizes me to impose a fine of up to \$250,000.

If you find the defendant guilty on Count 3, your verdict requires me to impose a sentence of two years.

If you find the defendant guilty on more than one count, I will determine whether the sentences run concurrently—meaning that the defendant serves them at the same time—or consecutively—meaning that the defendant finishes serving one sentence before serving another. However, if you find the defendant guilty of aggravated identity theft (Count 3), I will be required to order that the sentence for that offense runs consecutively with any other sentence I impose in this case.

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170. See 21 U.S.C. § 841(a) (criminalizing possession of controlled substance with intention to distribute); *id.* § 841(b)(1)(B)(iii) (establishing five- to forty-year sentencing range and criminal fine for one hundred or more grams of heroin).

171. See 18 U.S.C. § 922(a)(6) (establishing false statement in connection with gun sale offense); *id.* § 924(a)(2) (authorizing ten-year maximum sentence); *id.* § 3571(b)(3) (establishing maximum fine of \$250,000 for felonies for individuals when offense does not otherwise specify a maximum fine).

172. See *id.* § 1028A (establishing aggravated identity theft offense and providing for two-year consecutive sentence).

The judge's instruction at the end of the case would be the jurors' definitive source of sentencing information, but it might not be the first time jurors learned of John's exposure. Just as prosecutors and defense counsel may discuss the elements of an offense with jurors,<sup>173</sup> so too could they raise punishment. In his opening statement, John's lawyer would likely cite the dramatic sentencing consequences for his client as a reason why the jury should pay close attention to the witnesses he will call. And at closing, he would invoke the punishment—especially on the drug charge, with its mandatory minimum and stratospheric maximum—in urging the jurors to exercise care in parsing the testimony for reasonable doubts.

Some arguments relating to punishment would remain off-limits. John's lawyer could not cite the sentencing consequences of a guilty verdict in support of an explicit nullification argument.<sup>174</sup> The prosecutor, for her part, could not tell the jury that a sentence at or near the maximum on Count 1 or Count 2 would be unusual. Indeed, she could make no representations at all on what constitutes a "typical" sentence for charges like these. Any notion of a "typical" sentence is incoherent, and thus misleading, without information that would be inappropriate or impractical to share with the jury, including (i) the defendant's criminal history, if any,<sup>175</sup> (ii) comprehensive sentencing data at the local, county, and state levels, (iii) the sentencing judge's overall punitiveness, (iv) the judge's policy views about the offense,<sup>176</sup> and perhaps even (v) whether sentencing would take place before or after lunch.<sup>177</sup> And, more importantly, even if such a thing could be known, the "typical" sentence is immaterial—what matters is that a

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173. See H. Mitchell Caldwell, L. Timothy Perrin & Christopher L. Frost, *The Art and Architecture of Closing Argument*, 76 TUL. L. REV. 961, 1008 (2002) ("The discussion of the elements of the charge, claim, or defense provide the body of most closing arguments, and thus, will likely be discussed in the middle of the typical closing.")

174. To be precise, it is not *necessary* to our proposal that John's lawyer be permitted to make an explicit nullification argument. One need not change current law, which prohibits such arguments, to embrace the proposal. On the other hand, it would not be inconsistent with our proposal to allow such arguments.

175. See, e.g., U.S. SENT'G GUIDELINES MANUAL § 4 (U.S. SENT'G COMM'N 2018) (providing detailed rules for how criminal history impacts a defendant's guidelines range in federal cases).

176. See *United States v. VandeBrake*, 679 F.3d 1030, 1037 (8th Cir. 2012) (explaining that a "policy disagreement" with a federal sentencing guideline is a "permissible reason[] for varying from the guidelines").

177. See Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT'L ACAD. SCI. 6889, 6892 (2011) (finding differences between pre- and post-lunch parole decisions by Israeli parole boards); see also Keren Weinshall-Margel & John Shapard, *Overlooked Factors in the Analysis of Parole Decisions*, 108 PROC. NAT'L ACAD. SCI., at E833 (2011) (disputing the finding); Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, *Reply to Weinshall-Margel and Shapard: Extraneous Factors in Judicial Decisions Persist*, 108 PROC. NAT'L ACAD. SCI., at E834 (2011) (replying to and refuting dispute).

guilty verdict authorizes a judge to impose a sentence up to the statutory maximum.<sup>178</sup>

But what about instances where a defendant's potential sentence depends on the fact of a prior conviction? As we explain in Section III.D, our proposal makes the already strong case for overruling the prior conviction exception to *Apprendi* even stronger. To understand a defendant's true sentencing exposure, juries must know the effects of recidivism enhancements. But that poses a difficulty, since information about a defendant's past convictions is ordinarily kept from the jury to avoid prejudice.<sup>179</sup> As Justice Jackson famously remarked in *Michelson v. United States*, common law courts have "almost unanimously . . . come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt" in order to "prevent confusion of issues, unfair surprise and undue prejudice."<sup>180</sup> Modern empirical scholarship corroborates Jackson's concerns, at least for evidentiarily close cases.<sup>181</sup>

So, how can we tell jurors what they need to know about a defendant's sentencing exposure without inviting them to rule based on their perception of the defendant's character?<sup>182</sup> We think the best solution is a bifurcated trial. Bifurcation, Nancy King observes, is "one of the oldest approaches to the problem of jury prejudice," with antecedents extending at least to the early nineteenth century.<sup>183</sup> At the first stage of a bifurcated trial, the jury would hear the evidence about—and be instructed about the sentencing consequences of—the underlying, unenhanced offense. If it returned a guilty verdict, at the second stage the jury would then be told that the government was seeking an enhanced penalty. Only then would jurors learn about the prior conviction, after which they would be instructed as to the defendant's sentencing exposure if they find him guilty as to the enhancement.

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178. See *infra* Section III.B.

179. *Michelson v. United States*, 335 U.S. 469, 475 (1948).

180. *Id.* at 475–76.

181. See Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1353–57 (2009) (finding a correlation between a defendant's criminal record and their willingness to testify at trial).

182. To be clear, our bifurcation proposal applies only to recidivism enhancements—i.e., provisions that heighten penalties for conduct that is illegal without regard to whether a person has a prior conviction. It does not apply to trials where criminal liability turns on the fact of a prior conviction, like the federal felon-in-possession crime.

183. Nancy J. King, *Juries and Prior Convictions: Managing the Demise of the Prior Conviction Exception to Apprendi*, 67 SMU L. REV. 577, 586 (2014).

Again, it may help to be concrete, so let's return to our hypothetical federal defendant, John. Recall that Count 1 of his indictment charged him with possessing one hundred grams of heroin with the intent to distribute it, an offense with a sentencing range of five to forty years. The Controlled Substances Act, however, has a recidivism enhancement for John's charge. If he committed the offense "after a prior conviction for a serious drug felony or serious violent felony has become final," then his sentencing range shifts to ten years to life.<sup>184</sup> Let's suppose that evidence exists that John has a prior conviction for a "serious drug felony." That would not change anything about the jury instructions above, which would be given at the first stage of John's bifurcated trial. But then, if the jury found John guilty on Count 1, the jury would reassemble to receive the prosecution's evidence about the prior conviction and the defense's responsive evidence, if any. After that, the judge would give instructions explaining what the government needs to prove to establish the enhancement and its burden for proving it. The judge would also give an instruction along these lines:

Jury Instruction on Punishment (Stage Two)

If you find the defendant guilty as to the punishment enhancement, it will still be up to me to establish the punishment. However, your guilty verdict would change the punishment options available to me. You are advised that if you find the defendant guilty on the enhancement, your verdict requires me to impose a sentence for Count 1 of at least ten years and authorizes me to impose a sentence of life. It would also authorize me to impose a fine of up to \$8,000,000. If you find the defendant not guilty as to the punishment enhancement, I will sentence the defendant on Count 1 in accord with my previous instructions.

As the second trial stage would be brief—ordinarily, it does not take much court time for a prosecutor to offer a judgment of conviction into evidence—bifurcation would not add much to the cost of trials.<sup>185</sup> We think that incremental cost is well worth the benefit of informing the jury about the defendant's sentencing exposure without infecting the jury's underlying deliberation with character evidence.

There are, to be sure, further procedural questions lurking. For instance, should lawyers be permitted to inquire about potential jurors' views on sentencing in voir dire? If so, could those views be the basis of a challenge for cause? Could defendants waive the right to an informed jury? How should jury instructions deal with statutory provisions that modify otherwise applicable mandatory minimums, like the federal

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184. 21 U.S.C. § 841(b)(1)(B).

185. For a contrary view of the costs of bifurcation, see Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1144 (2001) (discussing how bifurcation would be "more cumbersome").

safety valve?<sup>186</sup> And given the extraordinary variety of sentencing practices that can be found in the United States, further work is required to align our proposal to the specifics of any given jurisdiction.<sup>187</sup> Our desire not to test our readers' patience, however, obliges us to simply note that these details would need to be worked out over time. None that we can contemplate poses any substantial barrier to informing the jury to the consequences of a guilty verdict.

### III. THE CASE FOR INFORMED JURIES

So far we have described the “iron law” of jury ignorance and explained why it matters to jury decisionmaking in particular cases. We have also explained how we propose to change the law. The task that remains is the most important—to justify our proposal. In this Part, we offer arguments for informed juries from four directions. We look first to the political economy of criminal justice. Adopting our proposal would, we argue, counteract one of the most pathological features of twenty-first-century criminal justice—the penchant of legislatures to enact and prosecutors to exploit statutes with draconian sentencing provisions. We then turn to political theory and argue that juries must be informed to perform their core political function of authorizing state punishment, especially given the state of American criminal punishment today. After that, we turn back to history. We pick up where Section I.B, which examined the informed juries of the eighteenth century, left off. We explain that late eighteenth- and early nineteenth-century reformers embraced jury ignorance because they believed that informed juries were unnecessary due to the mild and rational sentencing statutes they enacted. Yet modern sentencing statutes are far from mild or rational, so the factual predicate for

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186. See 18 U.S.C. § 3553(f) (creating exceptions to otherwise applicable mandatory minimums).

187. See Frank O. Bowman, III, *Debauch: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 403 (2010) (noting “fifty-plus sentencing systems boasting every conceivable combination of discretionary judicial sentencing, modified determinate sentencing, post-conviction sentence enhancements, mandatory minimums, and several varieties of more- and less-binding sentencing guidelines”). Some tailoring may be required. For instance, imagine that a state possessed a genuinely mandatory guideline sentencing system in which judges had no authority to impose sentences above or below guideline ranges. (And also imagine that the system withstood scrutiny under *Blakely v. Washington*, 542 U.S. 296, 305 (2004).) In that situation, the guidelines range would, in effect, become the statutory range, and judges would tailor their punishment instructions accordingly. Note, however, that this does *not* apply to guidelines that are merely advisory, like the United States Sentencing Guidelines. See *United States v. Booker*, 543 U.S. 220, 246 (2005) (making “the Guidelines system advisory”). In an advisory guidelines system, a guilty verdict authorizes a sentence anywhere within the statutory range. Accordingly, punishment instructions would not reflect advisory guidelines ranges. See *infra* text accompanying notes 262–263.

ignorant juries is today nonexistent. This Part ends by evaluating a potential argument that our proposal for informed juries (or one like it) is not just good policy, but a constitutional right of criminal defendants.

### A. *Argument from Political Economy*

Statutes that authorize excessively draconian punishment are a primary driver of criminal-justice dysfunction. Mandatory minimums and “three strikes” laws, under which third-time felons receive extremely harsh sentences,<sup>188</sup> sometimes result in defendants spending far more time incarcerated than any recognizable theory of punishment could justify.<sup>189</sup> Even more often, such laws are used—often in combination with statutes providing astonishingly high maximum sentences—as hammers for prosecutors to hold over defendants’ heads to coerce their guilty pleas.

Draconian statutes are largely a product of the political incentives of lawmakers and prosecutors, as this Section explores. If we want to change the statutes, we need to adjust their incentives. Informing juries about the punishment consequences of their decisions would do that. The details are in this Section, but the core logic is straightforward. Informed juries are more likely than ignorant ones to acquit defendants in the face of draconian statutes. But to legislators and prosecutors, acquittals are undesirable. In order to avoid acquittals in a world with informed juries, legislators and prosecutors would thus have some reason to steer clear of excessively punitive statutes.

#### 1. Legislators

Today, the political incentives of legislators operate as a one-way ratchet on punitiveness in criminal statutes, driving punishments nearly always higher. The primary reason has to do with voters. Legislators respond to voters, and voters systematically overestimate

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188. See, e.g., Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 110–12 (1998) (reviewing statutory schemes); John Clark, James Austin & D. Alan Henry, “*Three Strikes and You’re Out*”: A Review of State Legislation, NAT’L INST. OF JUST. (Sept. 1997), <https://www.ojp.gov/pdffiles/165369.pdf> [<https://perma.cc/895J-LH8L>] (comparing different states’ three-strikes provisions).

189. See Michael Tonry, *Legal and Ethical Issues in the Prediction of Recidivism*, 26 FED. SENT’G REP. 167, 170 (2014) (“Almost all such laws [three-strikes, LWOPs, sexual predator, career criminal, and lengthy mandatory minimums] are incompatible with conventional retributive and consequentialist ideas about proportionate punishments.”); see also David Yellen, *Sentence Discounts and Sentencing Guidelines for Juveniles*, 11 FED. SENT’G REP. 285, 286 (1999) (“Mandatory minimum sentences mechanistically send away to prison offenders for terms far longer than justified by any reasonable theory of punishment.”).



the optimal degree of punishment. Informed juries would disrupt that dynamic.

For decades, voters have been seen as invariably favoring “tough-on-crime” candidates and policies. This punitive streak has led legislators to adopt the draconian sentencing regimes noted above. Indeed, voters themselves have enacted severely punitive laws through the initiative process in some states,<sup>190</sup> a fact which some commentators emphasize in arguing against direct democratic control over criminal justice.<sup>191</sup> Voters’ punitive preferences are understood as contributing significantly to the pressing problem of mass incarceration.<sup>192</sup>

Informed juries would turn voters’ punitiveness into a force for *less* draconian punishment schemes. The premise of our argument is that punitive voters dislike acquittals.<sup>193</sup> If informed juries began acquitting in some significant number of cases when particularly harsh sentencing laws were at issue, it would change the calculus for legislators—and that’s true even if they were highly motivated to appear “tough on crime.” Reducing penalties could actually be justified as a crime-control measure, especially if acquittals resulting from overly harsh penalties were salient to the public.<sup>194</sup>

But across-the-board reduction in penalty severity is not the only option legislators might choose. Another possibility is that they would introduce more gradations into the law to better calibrate penalties to relative culpability.<sup>195</sup> Indeed, as we will explain in Section III.C, Pennsylvania created the modern degree system for murder in

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190. See Rappaport, *supra* note 146, at 732 (“Some of our most draconian laws began as popular referenda.”).

191. See generally FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2003) (examining the effects of California’s three-strike law and the national trend toward populist criminal policies).

192. See *infra* notes 244–248 and accompanying text. To be sure, there’s reason to think that voters’ tough-on-crime sentiments may be softening as support for criminal-justice reform measures grows. The extent to which this is true, and whether it really heralds the end of mass incarceration, as some contend, is not our concern here.

193. This is why, for instance, elected judges may worry that presiding over a trial that yields a high-profile acquittal will result in losing their post. See James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2112 (2000) (“[J]udges, and the governors who appoint them, run for office based on the high number of death sentences *juries* impose in trials over which the judges preside, and may be defeated for reelection because trials over which the judges preside result in acquittals or life sentences.”).

194. See Bellin, *supra* note 23, at 2232 (noting that if juries refuse to convict because of harsh penalties, “[p]roponents of moderate, discretionary sentencing laws will be able to characterize their reforms as tougher on criminals”). As we saw in Section I.B, this is precisely the dynamic that led Maine and Wisconsin to abolish capital punishment entirely. See *supra* note 151 and accompanying text.

195. See Cahill, *supra* note 23, at 142 (arguing that if juries had to be told about punishment “[o]ne possible result . . . might be that offenses would be more narrowly defined than at present, with more distinct grades”).

order to separate the most serious murders—which were eligible for capital punishment—from those where the defendant was somewhat less blameworthy (and where juries might hesitate to convict if death were on the table).<sup>196</sup> To the extent that informed juries encouraged legislators to tailor punishments to culpability, that would likely be a welcome development.

One can, of course, debate the potential magnitude of the feedback effect we've identified, and what kinds of criminal laws might trigger it. But however large the feedback effect might be, it would push only in one direction: towards leniency. That is, there's no reason to think that informed juries would behave in a way that encouraged legislators to make criminal laws more punitive. Where law is already lenient, informing jurors of penalties could actually make convictions *easier* for prosecutors to obtain, if jurors assume the penalty imposed would be more severe than it is.<sup>197</sup> But that would create no pressure on legislators to make laws harsher; presumably tough-on-crime legislators (and prosecutors) would see this effect as a benefit.<sup>198</sup>

But does the fact that voters are punitive *as voters* undercut our claim that these same voters would, *as informed jurors*, take umbrage at existing punishment statutes? We think not. The reason is that voters-as-voters are in a low-information environment. As Rachel Barkow observes, the “democratic process . . . does not necessarily reflect the actual preferences of voters on specific policies when they are fully informed.”<sup>199</sup> There is empirical support for this idea.<sup>200</sup> Studies have suggested that in some instances ordinary people become less punitive when presented with the facts of specific cases than they are when considering crime in the abstract.<sup>201</sup> That suggests that voters'

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196. See *infra* notes 291–292 and accompanying text (discussing the death penalty).

197. See, e.g., Cahill, *supra* note 23, at 122 (“Knowing the relatively low typical sentence ranges for, say, negligent homicide or involuntary manslaughter might encourage juries to return convictions in cases where they might now assume that the penalty is too harsh.”); Robert D. Bartels, *Punishment and the Burden of Proof in Criminal Cases: A Modest Proposal*, 66 IOWA L. REV. 899, 917 n.63 (1981) (relating judge's account of a jury acquitting a defendant based on an incorrect assumption that the penalty would be severe).

198. The only possible situation in which raising the conviction rate might encourage legislators to prefer harsher penalties is if legislators believed that too many innocent defendants were being convicted, and that a more severe penalty would prevent this result. Cf. Guttel & Teichman, *supra* note 60, at 604. We find this scenario unlikely.

199. RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION 110 (2019).

200. See, e.g., *id.* at 108–10 (discussing evidence); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 37 (2015) (highlighting studies in Illinois and California).

201. See, e.g., Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing: Misperception and Discontent*, 14 LAW & HUM. BEHAV. 199 (1990) (noting that citizen opinions are affected by erroneous assumptions about the characteristics of crimes); Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus*

punitive impulses when considering crime generally—to which politicians respond—may not match their assessment of just punishment when considering individual cases.<sup>202</sup>

We make no claim that informed juries would *invariably* find penalties on the books too harsh or that they are a *complete* solution to mass incarceration and overly harsh criminal punishment. Recently, John Rappaport has offered a forceful critique of the argument that if voters were better informed, the criminal justice system would be more lenient. In addition to raising methodological concerns about some of the studies,<sup>203</sup> he notes that the leading national surveys seem to indicate that “the public is at least slightly more punitive than the courts.”<sup>204</sup> But even if one shares Rappaport’s caution about the leniency of voters, there is still reason to think that informing juries could make a difference in important contexts. As Rappaport notes, studies show that “the public is less punitive than notoriously harsh mandatory sentencing laws” even if they do not show that “laypeople are less punitive than the courts would be in the absence of these laws.”<sup>205</sup> If these findings indicate how citizens might think about the law when acting as jurors—a point that is certainly not without

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*Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 CRIME & DELINQ. 337 (1987) (finding that the public gave more lenient sentences when they simulated the decision processes of judges and considered the financial costs of current and alternative sentencing); see also Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1781 (1999):

When asked about sentencing in the abstract, citizens report a desire for harsher penalties, but when presented with detailed descriptions of cases, these same citizens often suggest more lenient penalties than those meted out by judges and, in many cases, than the mandatory minimum sanctions currently in force in their jurisdictions.

202. See, e.g., Loretta J. Stalans & Arthur J. Lurigio, *Lay and Professionals’ Beliefs About Crime and Criminal Sentencing: A Need for Theory, Perhaps Schema Theory*, 17 CRIM. JUST. & BEHAV. 333 (1990) (finding that laypeople’s beliefs about burglary crimes involved more dangerous characteristics than those of probation officers). One proffered explanation for this phenomenon is that laypeople’s assumptions about archetypal crimes and criminals involve more culpable defendants than ordinary cases actually present. Scholars have relied on this line of reasoning to defend the jury as a solution to punitive politics. As Barkow puts it:

As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case. Jury trials force the people—in the form of community representatives—to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged.

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) (footnotes omitted).

203. See Rappaport, *supra* note 146, at 769–72.

204. *Id.* at 767.

205. *Id.* at 768–69 (first citing Paul H. Robinson, Geoffrey P. Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010); then Brandon K. Applegate, Francis T. Cullen, Michael G. Turner & Jody L. Sundt, *Assessing Public Support for Three-Strikes-and-You’re-Out Laws: Global Versus Specific Attitudes*, 42 CRIME & DELINQ. 517 (1996); and then Thomson & Ragona, *supra* note 201).

controversy—they suggest that informed juries could make a difference when harsh, mandatory sentencing laws are at issue. And indeed, there is no shortage of anecdotal evidence of real-life juries being shocked when they discover the harsh sentencing consequences of a guilty verdict they have just rendered.<sup>206</sup>

## 2. Prosecutors

By making harsh statutory punishments less valuable to prosecutors, informed juries would also change prosecutors' incentive structures for the better. To explain why, we must take a step backwards to explain more precisely the role that harsh sentencing statutes play in inducing defendants to plead guilty.

For many (perhaps nearly all) criminal acts, prosecutors have a range of plausible charges from which to choose, with punishments ranging from modest to severe.<sup>207</sup> These options give prosecutors vast leverage over defendants. Imagine, for instance, that you are a Michigan prosecutor presented with a defendant who initiated a bar fight that put a bartender in the hospital with a broken arm. You might charge the defendant with basic assault (up to ninety-three days

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206. See, e.g., James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. REV. L. & SOC. CHANGE 331, 345 (2009) (discussing an interview with a juror in the documentary *Snitch* in which the juror expresses surprise that a defendant received three life sentences); William E. Nelson, *Political Decision Making by Informed Juries*, 55 WM. & MARY L. REV. 1149, 1156–60 (2014) (discussing a case in which the jury compromised on the verdict based on an incorrect assumption that the defendant would “probably only get a year or two” when the actual penalty imposed was an effective life sentence (internal quotation marks omitted)); COMM. ON THE MORE EFFECTIVE USE OF JURIES, ARIZ. SUP. CT., JURORS: THE POWER OF 12 (pt. 2), at 12 (June 1998), <https://www.azcourts.gov/Portals/15/Jury/Jury12.pdf> [<https://perma.cc/SNG3-H5XS>] (“[I]n many cases, juries have expressed strong dissatisfaction upon learning that that the defendant was the subject of a mandatory sentence the jurors believed was unjust.”); Brenda Goodman, *Man Convicted as Teenager in Sex Case Is Ordered Freed by Georgia Court*, N.Y. TIMES (Oct. 27, 2007), <https://www.nytimes.com/2007/10/26/us/26cnd-georgia.html> [<https://perma.cc/9D8K-ZJ5D>] (describing a jury as “shocked” by a ten-year mandatory minimum in a statutory rape case); Bill Rankin, *Georgia Juries Are Left in the Dark When It Comes to Punishment*, ATLANTA J.-CONST. (June 8, 2018), <https://www.ajc.com/news/local/georgia-juries-are-left-the-dark-when-comes-punishment/Fofu7tj470lIbyy9KGI50N/> [<https://perma.cc/2J3U-SXFM>] (“Several jurors said they had no idea [the defendant] would spend the rest of his life in prison as a result of their decision and, had they known, they might have stuck to their guns and not agreed to a murder charge.”); *Why Do We Hide Sentences from Jurors?*, APPEAL (Apr. 16, 2019), <https://theappeal.org/why-do-we-hide-sentences-from-jurors/> [<https://perma.cc/VF6S-VMMD>] (describing how jurors “gaped” when they learned the sentence for a defendant they had convicted); Jon Swaine, *Occupancy Trial Juror Describes Shock at Activist’s Potential Prison Sentence*, GUARDIAN (May 6, 2014), <https://www.theguardian.com/world/2014/may/06/cecily-mcmillan-juror-occupy-activists-jail-sentence> [<https://perma.cc/35RG-R4BS>] (describing some jurors as “shocked to learn that they had just consigned the [defendant] to a sentence of up to seven years in prison”).

207. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (“[Criminal codes] are filled with overlapping crimes, such that a single criminal incident typically violates a half dozen or more prohibitions.”).

imprisonment);<sup>208</sup> assault causing serious injury (up to one year);<sup>209</sup> assault with intent to do great bodily harm less than murder (up to ten years);<sup>210</sup> or assault with intent to murder (up to life).<sup>211</sup> Further imagine that you assess the facts and punishment options and decide that assault causing serious injury is most commensurate with the defendant's culpability.

Does this mean that you charge the defendant with assault causing serious injury? If you do, the defendant may take his case to trial, costing you time and exposing you to the possibility of an embarrassing loss.<sup>212</sup> So instead, you charge the defendant with assault with intent to do great bodily harm less than murder and you offer a plea to assault causing serious injury. And just in case the defendant hasn't gotten the message, you let his lawyer know that unless her client takes the deal posthaste, you'll file a superseding information charging assault with intent to murder.<sup>213</sup> Facing the prospect of ten years in prison, and maybe even life if you follow through with the threat to upgrade the charge, the defendant takes the deal, and you are satisfied that justice has been done.

As the example illustrates, prosecutors use harsh statutes as tools to induce defendants to plead guilty. Indeed, that is often the point of mandatory minimums and high statutory maximums.<sup>214</sup> In 2019, a mandatory minimum sentence appears to have been applied in only about fourteen percent of federal cases where a defendant pleaded guilty, versus forty-three percent of cases where a defendant was found guilty by a jury.<sup>215</sup> Part of the reason for the difference may be that

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208. MICH. COMP. LAWS § 750.81(1) (2021).

209. *Id.* § 750.81a.

210. *Id.* § 750.84.

211. *Id.* § 750.83.

212. See Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1596 (2011):

Prosecutors, for example, have many reasons to plea bargain independent of the public's interest: they may pursue pleas to get a high conviction rate in order to build reputation or political standing, they may plea bargain to avoid high-profile losses at trial for the same reasons, they may reach a deal to build goodwill with a defense attorney they work with often, or they may plea bargain simply to avoid lengthy trials for personal reasons;

Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2471–72 (2004) (explaining that risk aversion and loss aversion contribute to prosecutorial motivations to plea bargain).

213. The Supreme Court endorsed the constitutionality of such threats in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

214. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006) (“[T]he longer sentences exist on the books largely for bargaining purposes.”).

215. These figures are derived from the United States Sentencing Commission's datafile for fiscal year 2019. *Commission Datafiles*, U.S. SENT'G COMM., <https://www.ussc.gov/research/datafiles/commission-datafiles> (last visited Mar. 24, 2022)

prosecutors routinely release defendants from charges carrying a mandatory minimum in exchange for their guilty pleas.<sup>216</sup> As for sentences set at a statutory maximum, they are unusual, at least in cases where the defendant pleads guilty.<sup>217</sup> Defendants, of course, don't always know that. One prosecutor told Nancy Schultz: "I'm often able to negotiate plea bargains prior to trial by making defendants aware of what the statutory maximum penalty would be after trial if they do not accept my offer."<sup>218</sup> As the prosecutor's tactic indicates, framing the punishment in terms of the statutory maximum has powerful psychological consequences.<sup>219</sup> "Defendants who anchor initially on maximum life sentences," Stephanos Bibas explains, "are more likely to think that they are getting good deals when they are offered lower sentences."<sup>220</sup>

Harsh sentencing statutes are thus valuable to prosecutors as a means of inducing guilty pleas. Occasionally, of course, a defendant will proceed to trial anyway. In those cases, prosecutors are often stuck with trying the harsh charges. If they didn't—if prosecutors routinely dropped the harsh charges on the eve of trial—their credibility in future plea negotiations would suffer.<sup>221</sup> To return to the bar fight case, that means that if the defendant insists on trial, you will be obliged to seek a punishment—ten years or even life, depending on whether you filed the superseding information—that exceeds your own assessment of the defendant's culpability. The incentive structure of prosecutorial

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[<https://perma.cc/J2L6-X6DZ>] (linked under "Individual Offender Datafiles" subheading). The data is generated from the "Court Findings on Mandatory Minimum" field of the standard Statement of Reasons filed in federal criminal cases. The reported figures exclude cases in which that data is missing, as well as cases in which the form appears to have been incorrectly filled out (i.e., forms in which a judge or court staff checked mutually inconsistent boxes on the Statement of Reasons). Stata commands to replicate the figures reported are available from the authors.

216. See JOHN PFAFF, *LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM* 132 (2017) ("[F]ederal prosecutors often wield the threat of the mandatory minimum to persuade a defendant to plead guilty to a charge that doesn't carry such a stiff sentence.").

217. See *id.* at 65 ("[A]s a general rule, prosecutors and judges impose sentences that are below the statutory maximum for the crime, perhaps often significantly so.").

218. Nancy L. Schultz, *Law and Negotiation: Necessary Partners or Strange Bedfellows?*, 15 *CARDOZO J. CONFLICT RESOL.* 105, 117 (2013).

219. Bibas, *supra* note 212, at 2519 ("But overcharging works for another reason as well: it provides high anchors for defendants. Defendants who anchor initially on maximum life sentences are more likely to think that they are getting good deals when they are offered lower sentences.").

220. *Id.*

221. See Michael D. Dean & Rick McKelvey, *The Basics of Plea Negotiation: A Dual Perspective*, *CRIM. JUST.*, Fall 2013, at 52, 77 ("However, part of good negotiating also involves knowing when to stop negotiating and take a case to trial. . . . The only way defense counsel will know our plea offers mean anything is by standing behind them and taking cases to trial when necessary.").

charging thus strong-arms both defendants (into taking pleas) *and* prosecutors (into seeking excessive punishment in tried cases).

Informed juries would disrupt this noxious logic. In a world without informed juries, “overcharging” a defendant—by which we mean charging a defendant with crimes more punitive than a prosecutor’s assessment of a defendant’s culpability—is a viable prosecutorial tactic for coercing pleas.<sup>222</sup> In a world with informed juries, on the other hand, it could backfire, as it could induce a jury to acquit even when it would convict a defendant on a normatively justifiable charge.<sup>223</sup> And because overcharging could backfire, its utility as a plea bargaining tactic would be undercut.<sup>224</sup> Prosecutors depend on the threat of harsh sentences after trial to induce guilty pleas before trial. Reducing the odds that a defendant will be convicted on such a charge makes that threat less credible. With an informed jury waiting in the wings, that is, prosecutors would be less able to coerce guilty pleas by holding the prospect of harsh punishment over defendants’ heads. Moreover, in light of the potential for feedback affecting legislators, statutory maximums that serve no purpose other than to give prosecutors plea-bargaining leverage might not be enacted in the first place.

The ability to overcharge a defendant would thus be less valuable to prosecutors in a system with informed juries than it is today. That has two crucial implications. The first and most straightforward is that prosecutors would simply do less of it. To avoid the chance of a harsh charge backfiring with a jury, prosecutors would simply bring fewer harsh charges. And because such charges couldn’t (on the margin) be credibly brought or threatened, they couldn’t induce a defendant to plead guilty either.

The second implication is that prosecutors would have less reason to lobby legislators to enact harsh sentencing laws in the first place. Prosecutors are currently the leading lobbyists for such laws.<sup>225</sup> That’s because statutory severity is all upside for prosecutors. As Barkow explains, “An increased sentence makes going to trial more

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222. To be sure, this is not the only way to define overcharging. See Kyle Graham, *Overcharging*, 11 OHIO ST. J. CRIM. L. 701, 702–14 (2014) (describing three distinct definitions of “overcharging”).

223. See *supra* Section I.B. (discussing informed juries).

224. See Kemmitt, *supra* note 23, at 139 (“[I]nforming 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.”).

225. See Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 728, 728 n.25 (2005); (noting that “the congressional record is full of examples of the Department of Justice requesting more stringent sentencing laws because it makes prosecutors’ jobs easier”); BARKOW, *supra* note 199, at 113 (describing opposition to sentencing reform by prosecutor associations).

costly for the defendant,” and thus, “prosecutors lobby for harsher sentences to enhance their position during plea negotiations.”<sup>226</sup> “Indeed,” Barkow adds, “prosecutors have an incentive to lobby for higher statutory maximums than even they themselves believe to be appropriate for the crime, just to enhance their bargaining power.”<sup>227</sup>

In a world of informed juries, though, statutory severity would have both benefits *and costs* for prosecutors. If mandatory minimums and statutory maximums are harsh enough to dissuade juries from convictions, then they would be too high for prosecutors’ liking. The harshness of sentencing statutes would become, from the prosecutor’s perspective, something to be optimized rather than maximized. Prosecutors would then have less motivation to lobby for ever more harsh sentencing laws in general. And under certain conditions, prosecutors might even push legislatures to enact *less* punitive statutes. This would be most likely in scenarios in which there are sizeable gaps between two gradations of an offense. Say that the punishment for simple assault is zero to two years and the punishment for aggravated assault is seven to ten. Prosecutors would likely be concerned about their ability to secure guilty verdicts in cases that are more serious than a typical simple assault but not obviously meriting a ten-year sentence. If so, they would have good reason to lobby legislators to either reduce the sentencing range for aggravated assault or to create a new, less punitive grade of assault between the existing levels.

The informed jury would operate only in trials, but, as this Section has explained, its consequences would reverberate much more widely. This is a critical point, considering that guilty pleas, not trials, dominate our criminal legal system.<sup>228</sup> As such, ideas about how best to reform the criminal trial sometimes bear a passing resemblance to ideas about how best to arrange the deck chairs on the Titanic. The informed jury is different. Our coercive system of plea bargaining could not operate without menus of overlapping criminal offenses and a prosecutorial willingness to use the menus to induce guilty pleas.<sup>229</sup> The informed jury would undercut legislative and prosecutorial incentives for both. That makes it the rarest of beasts: a trial reform that could

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226. Barkow, *supra* note 225, at 728.

227. *Id.*

228. See *Missouri v. Frye*, 566 U.S. 134, 144 (2012) (“[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *YALE L. J.* 1909, 1912 (1992))).

229. William Ortman, *Second-Best Criminal Justice*, 96 *WASH. U. L. REV.* 1061, 1072–73 (2019).



make plea bargaining—and thus the criminal legal system on the ground—a little better.<sup>230</sup>

### *B. Argument from Political Theory*

Further support for our proposal comes from the political theory underlying our jury system. Many scholars have echoed Alexis de Tocqueville's observation that "[t]he jury is pre-eminently a political institution."<sup>231</sup> There is good reason to understand the jury this way—particularly so when it comes to the American criminal jury. It is notable, for example, that the Framers included the right to a criminal jury trial in the body of the Constitution, before later reinforcing the right in the Bill of Rights.<sup>232</sup> This suggests a vision of the jury-trial guarantee as a *structural* provision as much as it is an individual-rights provision.<sup>233</sup> Indeed, writers contemporary to the Constitution's ratification spoke of the jury as a kind of democratic check against a potentially tyrannical government.<sup>234</sup> Such rhetoric has continued throughout American history. In *Duncan v. Louisiana*,<sup>235</sup> which held that the Sixth Amendment jury-trial right was incorporated against the states, the Court described the jury as serving "to prevent oppression by the Government" by requiring "community participation in the determination of guilt or innocence."<sup>236</sup>

This conception of the jury, however, raises difficult questions about what the jury's precise role in criminal cases should be. If the criminal jury is designed to provide a democratic check on government action, why should its role be limited purely—or even primarily—to

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230. Cf. Albert W. Alschuler, Lafler and Frye: *Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673, 707 (2013) ("[T]he time may have come for criminal justice scholars to abandon the search for ways to make the criminal justice system fair and principled. Their principal mission today should be to make it less awful.").

231. TOCQUEVILLE, *supra* note 17, at 523; see, e.g., Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 876 (1994) (discussing Tocqueville's view); Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1175 (1995) (same); Barkow, *supra* note 202, at 55 (same).

232. See U.S. CONST. art. III, § 2, cl. 3 (guaranteeing a jury for "The trial of all Crimes, except in Cases of Impeachment"); *id.* amend. VI (providing that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"); see also Joan L. Larsen, *Ancient Juries and Modern Judges: Originalism's Uneasy Relationship with the Jury*, 71 OHIO ST. L.J. 959, 964 (2010) ("The Constitution is obsessed with juries.").

233. For an argument that both the Article III jury-trial right and the Sixth Amendment jury-trial right are collective, not individual, rights, see Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 398 (2009). See also AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 10–14 (1998) (discussing the Anti-Federalists' structural concerns of the Constitution).

234. See Barkow, *supra* note 202, at 55–58 (recounting historical sources).

235. 391 U.S. 145 (1968).

236. *Id.* at 155–56.

factfinding? If accurate factfinding is the goal, it is not obvious that giving the job to six or twelve citizens chosen randomly for each case is the best solution. George Fisher has shown that the notion that the jury has some special ability to divine credibility when assessing witness testimony is a relatively recent invention, and one that stems more from the system's need to maintain legitimacy than from any actual reason to believe juries have such expertise.<sup>237</sup> But as Andrea Roth argues, “jurors may not be particularly reliable at determining credibility from demeanor, but they still bring tools to the table that judges do not have—tools that the public values.”<sup>238</sup> In her view, the “jury’s true expertise” is “bringing its folk wisdom and community values to factfinding.”<sup>239</sup>

We might go further and say that the jury’s expertise is bringing community values to bear on the decision whether to convict or acquit. That decision involves factfinding, to be sure, but it also involves the jury’s views on morality and fairness. Why is the political institution of the jury needed to interject moral reasoning when criminal laws are written by legislators who are elected by the public, and thus at least in theory share the public’s values?<sup>240</sup> The key is that a jury, unlike a legislature, makes moral judgments in the context of specific cases. As Darryl Brown puts it, the jury’s role is “to make individualized moral judgments through application of indeterminate rules with terms that must be given normative content from broadly held social norms.”<sup>241</sup> Or, in Barkow’s words:

Jury trials force the people—in the form of community representatives—to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged. The result is a more measured, individualistic evaluation of whether liberty deprivation is appropriate.<sup>242</sup>

The best way to understand the jury’s role, we think, is as an institution that provides *democratic authorization* for punishment. The Constitution requires that, before a defendant can be punished, a legislature must have passed a criminal statute that covers her conduct.

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237. See George Fisher, *The Jury’s Rise as Lie Detector*, 107 YALE L.J. 575, 578–79 (1997).

238. Andrea Roth, *Defying DNA: Rethinking the Role of the Jury in an Age of Scientific Proof of Innocence*, 93 B.U. L. REV. 1643, 1695 (2013).

239. *Id.* at 1648. For an argument that the idea of the jury as a representative of the community’s moral values is flawed, see Youngjae Lee, *The Criminal Jury, Moral Judgments, and Political Representation*, 2018 U. ILL. L. REV. 1255.

240. Whether it is true that state legislators represent voters’ values in practice rather than theory is much less clear. See Miriam Seifter, *Countermajoritarian Legislatures*, 122 COLUM. L. REV. 1733 (arguing that state legislatures often do not, in practice, represent the views of a majority of voters).

241. Darryl K. Brown, *Plain Meaning, Practical Reason, and Culpability: Toward a Theory of Jury Interpretation of Criminal Statutes*, 96 MICH. L. REV. 1199, 1209 (1998).

242. Barkow, *supra* note 202, at 62.

But the jury is an additional democratic check on the back end of the criminal process, in which a group of citizens decides that a particular defendant deserves punishment under the general law that those citizens' representatives enacted. The problem, of course, is that ignorant juries lack information critical to their role: how much punishment a conviction will entail. Or, rather, how much punishment their conviction decision will authorize an agent of the state (a judge) to impose upon the defendant. Absent this information, the jury cannot determine whether a particular defendant really deserves to be convicted under a particular criminal law. Ignorant juries thus cannot perform their political function.<sup>243</sup>

The need for democratic authorization from juries is particularly urgent given the problems facing the criminal legal system today. Our system faces a crisis of mass incarceration.<sup>244</sup> As of 2019, there were nearly 1.4 million people in state or federal prison nationwide<sup>245</sup> for an incarceration rate of 419 persons per 100,000.<sup>246</sup> These staggering figures do not even count the hundreds of thousands of people in jail awaiting trial, in immigration detention, and in various other forms of confinement; when those numbers are included, there are nearly 2.3 million people locked up.<sup>247</sup> These numbers make the United States the most punitive country in the world.<sup>248</sup> Moreover, this massive level of punishment is not distributed evenly throughout society. Its brunt is disproportionately borne by members of disadvantaged racial and

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243. Moreover, it is particularly odd that our system assumes that citizens as *voters* democratically authorize punishments through their legislators, but then insists that they cannot be aware of this information when it actually affects individual defendants' lives. That is, our system seems to depend on the notion that citizens are not aware of what their legislators are doing.

244. The literature on mass incarceration is large, but for a sampling, see BARKOW, *supra* note 199; TODD R. CLEAR & NATASHA A. FROST, *THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION IN AMERICA* (2014); ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* (2003); PETER K. ENNS, *INCARCERATION NATION: HOW THE UNITED STATES BECAME THE MOST PUNITIVE DEMOCRACY IN THE WORLD* (2016); MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (David Garland ed., 2001); MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* (2015); and PFAFF, *supra* note 216.

245. E. ANN CARSON, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., NCJ 255115, PRISONERS IN 2019, at 6 (Oct. 2020).

246. *Id.* at 9.

247. See WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (Mar. 2020), <https://www.prisonpolicy.org/reports/pie2020.html> [<https://perma.cc/64AN-HJKH>] (providing statistics on immigration detention and other forms of confinement).

248. See PETER WAGNER & WENDY SAWYER, PRISON POL'Y INITIATIVE, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2018 (June 2018), <https://www.prisonpolicy.org/global/2018.html> [<https://perma.cc/U4UY-Z6KT>].

ethnic groups.<sup>249</sup> Again looking to 2019 data, the incarceration rate for Black Americans was 5.1 times that of whites, and the rate for Latinos was nearly 2.5 that of whites.<sup>250</sup>

While it is impossible to be certain, there are reasons to expect that informed juries could help ameliorate these problems. That's because criminal juries are the key way for citizens to participate in criminal justice at the local level. The criminal laws that drive mass incarceration are enacted by state and federal lawmakers. And even though prosecuting attorneys are often elected from smaller political subdivisions, such as counties, those jurisdictions may still be large enough that minority voters lack the political power to outvote punitive voters in the suburbs. But juries must be drawn from the community, and they must be unanimous—which means that they create an opportunity for members of minority groups sitting on juries to act as a veto on criminal punishment.

This set of arrangements led Paul Butler to argue that Black jurors should nullify in cases involving nonviolent, “victimless” crimes such as drug offenses.<sup>251</sup> Butler's proposal, however, has not led to widespread changes in jury behavior. An important reason why is that juries simply do not know about their power to nullify. Courts look on nullification with disfavor<sup>252</sup> and thus prevent juries from learning about nullification.<sup>253</sup> But it also matters that jurors do not necessarily understand the severe consequences that follow from conviction in

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249. On racial disparities in the criminal justice system, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); JAMES FORMAN, JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); and SENT'G PROJECT, *REPORT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE* (Mar. 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [<https://perma.cc/ZK5V-7B3F>].

250. CARSON, *supra* note 245, at 9; see also ASHLEY NELLIS, SENT'G PROJECT, *THE COLOR OF JUSTICE: RACIAL AND ETHNIC DISPARITY IN STATE PRISONS* 3 (2021), <https://www.sentencingproject.org/wp-content/uploads/2016/06/The-Color-of-Justice-Racial-and-Ethnic-Disparity-in-State-Prisons.pdf> [<https://perma.cc/5R7R-BFY2>].

251. Butler, *supra* note 72, at 715.

252. See, e.g., *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (“We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.”).

253. See, e.g., *United States v. Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972) (rejecting defendant's request for a nullification instruction to jury). Some have tried to make potential jurors more aware of their power to nullify. See, e.g., *What We Do*, FULLY INFORMED JURY ASS'N, <https://fija.org/what-we-do/overview.html> (last visited Mar. 24, 2022) [<https://perma.cc/YWL8-5MT7>]. Prosecutors and courts have sought, sometimes successfully, to prevent efforts to increase juror awareness. See, e.g., Steven Nelson, *Jury Convicts Ex-Pastor Who Shared Jury Nullification Fliers*, U.S. NEWS (June 2, 2017, 4:02 PM), <https://www.usnews.com/news/articles/2017-06-02/jury-convicts-ex-pastor-who-shared-jury-nullification-fliers> [<https://perma.cc/X7P4-8MPL>] (reporting on a Michigan man who was found guilty of jury tampering for “distributing pamphlets about jury nullification near a courthouse”).

many cases. Our system of informed juries would give jurors some of the key information they need to exercise their veto power.

We certainly do not presume that all Black and Brown jurors would invariably vote against the imposition of criminal punishment. Attitudes towards punishment in minority communities are diverse, and some jurors drawn from those communities would no doubt favor harsh punishment for crime.<sup>254</sup> Although our criminal legal system wildly overpunishes minorities, it also simultaneously fails to provide protection *against* crime against minorities, as Randall Kennedy has observed.<sup>255</sup> At the very least, though, a system of informed jurors would give those in the most affected communities a role in shaping punishment practices of which they bear the greatest cost. And that would, if nothing else, make our system more democratic.<sup>256</sup>

Our conception of the jury's political role also explains why our proposal to inform juries about punishment consequences differs from those that have come before. Though some do not go into the details of their proposals,<sup>257</sup> supporters of informed juries have suggested a range of possibilities for what the jury should be told. Most emphasize telling juries about particularly harsh mandatory sentencing consequences of conviction.<sup>258</sup> Michael Cahill argues that juries should be told about "the offense grades and overall sentencing ranges" for each offense charged.<sup>259</sup> A group of "democratizing" criminal justice scholars would go further and tell the jury about "the minimum, average, and maximum possible sentences," as well as a great deal of other information about possible consequences of conviction.<sup>260</sup> Others go further still and argue that juries should not merely be informed about

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254. See generally FORMAN, *supra* note 249.

255. See generally RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* (1998).

256. Cf. STUNTZ, *supra* note 8, at 286 ("If [criminal justice] choices are made by outsiders, residents of the communities where mass incarceration hits hardest, or at least many of them, are bound to see the justice system as an alien force that does not have those communities' best interests at heart.").

257. See, e.g., Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 GA. L. REV. 123, 172 (1985); Kemmitt, *supra* note 23, at 147; Nelson, *supra* note 206, at 1163.

258. See Sauer, *supra* note 23, at 1260; Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2444–45 (1999); Heumann & Cassak, *supra* note 23, at 344; Maximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 286 (2006); Nancy Gertner, *Juries and Originalism: Giving Intelligible Content to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 956–58 (2010).

259. Cahill, *supra* note 23, at 92.

260. Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693, 1704 (2017).

punishment, but that juries, not judges, should be responsible for sentencing.<sup>261</sup>

Our view is that the jury should be told only the statutory minimum and maximum for any offense. It is critical that the jury know the maximum punishment—what is the most serious punishment that the conviction decision will authorize a judge to impose? We also think a jury should be aware of the minimum sentence—what consequence will *necessarily* flow from conviction? Yet, unlike the democratizers cited above, we do not think the jury should be informed about the average punishment defendants convicted of particular offenses should receive. That’s in part because, as we explained earlier, such information would inevitably mislead the jury.<sup>262</sup> But our judgment also rests on our view of the importance of democratic authorization: the jury should be comfortable with the potential consequences of its choice, and the fact that some judges choose to impose punishments less than the maximum should not make the jury more comfortable with authorizing an otherwise overly severe maximum for any particular defendant.

There is also a pragmatic side to our reasoning. We’ve explained why informed juries are capable of producing political feedback that would counteract structural features of the system that tend to make criminal law overly harsh.<sup>263</sup> That function, however, will work best when juries have the information—and *only* the information—that we prefer. If a law has an overly harsh mandatory minimum, the jury may refuse to convict some factually guilty defendants, or may apply a particularly high burden of proof, making convictions difficult for the government to obtain. So too if the jury is concerned that the maximum punishment—which it will know is a possible, although not inevitable, consequence of conviction—is too harsh. And the legislature’s response should be to make the law less severe, or to introduce more gradations in offenses to make punishment ranges better correspond to culpability. If jurors are told that the average sentence actually imposed is something less than the maximum, however, this information will presumably make them less concerned about the maximum punishment they are authorizing, and thus can serve only to reduce the

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261. See, e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Lanni, *supra* note 201, at 1802–03 (advocating for jury sentencing in noncapital cases).

262. See *supra* notes 175–177 and accompanying text (urging that, to avoid misleading the jury, jurors should not be given information on the “typical” sentence).

263. See *supra* Section III.A (reasoning that if jurors believe consequences are too severe, they can encourage legislators to enact less punitive laws by choosing to acquit defendants).

possibility of political feedback that we hope informing juries of punishment would encourage.

A similar pragmatic logic informs our view that the jury's job should only be to decide the issue of conviction, not to decide the appropriate sentence. Though there are legitimate concerns with how jury sentencing works in the states where it is used today,<sup>264</sup> we have no inherent objection to it in practice. Given the jury's important role in bringing ordinary citizens' values to bear on criminal punishment, it could perform this function by acting not merely as a veto on punishment but as an entity charged with determining punishment. Nonetheless, assigning the sentencing role to juries would likely diminish the political feedback effects of informing juries about punishment when asking them to decide whether to convict. That is, if the jury knows it will have ultimate control over the sentence, its concerns about the severity of the punishment range—and the maximum penalty in particular—will make it less likely to acquit based on punishment information. Kaplan and Krupa's experimental study, discussed earlier,<sup>265</sup> found that decisionmakers were more likely to acquit when they were not in charge of the punishment decision.<sup>266</sup> Thus, if giving the jury power over sentencing reduces the chance the jury will acquit because of severe statutory penalties, there is less of a chance of ameliorative political feedback that would reduce the severity of criminal law.

### *C. Argument from History*

Even if you accept the political economy and political theory arguments we've presented, you may still be concerned that adopting our proposal means breaking with a long-standing tradition of jury ignorance. To assuage such concerns, we next turn back to the history of informed juries. When we left that history in Section I.B, we'd seen that Anglo-American jurors in the middle of the eighteenth century understood, in broad terms at least, the consequences of their verdicts. This Section explores why American lawyers, judges, and lawmakers in the late eighteenth and early nineteenth century embraced jury ignorance. Critically, we will see that the reform was premised on the belief that they had adopted rational and mild criminal statutes, such that jury knowledge of punishment—and the mitigation that goes with

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264. Nancy King and Rosevelt Noble have shown how jury sentencing often acts to the detriment of defendants in states where it is available. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 895 (2004).

265. See *supra* Section I.B.2.b.

266. Kaplan & Krupa, *supra* note 63, at 9.

that—was no longer desirable. But our criminal statutes today are far from mild or rational.<sup>267</sup> Our predecessors thus embraced jury ignorance on the strength of a premise that no longer holds water. That fact undermines, we think, any case for ignorant juries based on deference to tradition.

So why did Americans reject the eighteenth-century tradition of informed juries and turn to jury ignorance? In our view, the critical development was the emerging belief in the late eighteenth and nineteenth centuries that a defendant's prospective punishment should not affect the jury's determination of his guilt or innocence. From there, it was a short step to the idea that jurors may not even *know* about the possible sentence. If punishment is irrelevant to their work, after all, that knowledge could only confuse and distract them. But that just pushes the question back a step: Where did Americans in the late eighteenth and nineteenth centuries get the idea that the consequences of a verdict should not influence deliberations? We contend that it was the product of the new rationalist penology that substituted long-term incarceration for corporal and capital sanctions. In a real sense, the roots of jury ignorance lay in the penitentiary.

In the decades after Independence, reformers fundamentally reshaped criminal punishment in America.<sup>268</sup> Massachusetts led the way, authorizing the first “proto-prison” in 1785, on Castle Island in Boston Harbor.<sup>269</sup> By 1800, Adam Hirsch observes, “eight of the sixteen American states had instituted some sort of program for criminal incarceration,” including two in the South—Virginia and Kentucky.<sup>270</sup> By 1822, according to Ashley Rubin, the count exceeded fifteen state prisons.<sup>271</sup> In 1829, the immense Eastern State Penitentiary opened in Philadelphia, “one of,” Lawrence Friedman notes, “if not the first, of the ‘big houses.’”<sup>272</sup> There is no single explanation for the rapid rise of incarceration at the end of the eighteenth century and beginning of the

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267. See *supra* Section III.A (noting that informed juries are more likely to acquit defendants charged under draconian statutes).

268. See generally HIRSCH, *supra* note 122 (discussing early prisons and punishments); Ashley T. Rubin, *Early US Prison History Beyond Rothman: Revisiting The Discovery of the Asylum*, 15 ANN. REV. L. SOC. SCI. 137, 142–43 (2019) (describing how states began using incarceration, instead of corporal or capital punishment, as an alternative criminal penalty).

269. For the term “proto-prison,” see Rubin, *supra* note 268, at 142 n.6. For a description of the Castle Island facility, see HIRSCH, *supra* note 122, at 11, 57–59. The prison on Castle Island would prove short-lived, but Massachusetts opened its new state prison in Charlestown in 1805. *Id.* at 11.

270. HIRSCH, *supra* note 122, at 11.

271. Rubin, *supra* note 268, at 143.

272. Lawrence M. Friedman, Book Review, 55 LAW & SOC'Y REV. 532, 532 (2021) (reviewing ASHLEY T. RUBIN, *THE DEVIANT PRISON: PHILADELPHIA'S EASTERN STATE PENITENTIARY AND THE ORIGINS OF AMERICA'S MODERN PENAL SYSTEM, 1829-1913* (2021)).



nineteenth, but the critical intellectual spark came from the rationalist approach to crime and punishment of Enlightenment writers, above all Cesare Beccaria and his treatise, *On Crimes and Punishments*.<sup>273</sup>

For Beccaria, punishment was justified only insofar as it prevents crime. “The purpose of punishment,” he explained, “is nothing other than to prevent the offender from doing fresh harm to his fellows and to deter others from doing likewise.”<sup>274</sup> Thus, Beccaria argued, punishments must be proportional—painful enough to make the crime not worth doing, but no more.<sup>275</sup> They must be prompt—“the smaller the lapse of time between the misdeed and the punishment, the stronger and more lasting the association in the human mind between the two ideas *crime* and *punishment*.”<sup>276</sup> And, most importantly, they must be certain.<sup>277</sup> “The certainty of even a mild punishment,” Beccaria elaborated, “will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all.”<sup>278</sup>

When they assessed their criminal justice apparatuses through a rationalist Beccarian lens, American reformers found them wanting. Crime, they saw, was rising.<sup>279</sup> The traditional pillars of punishment—corporal punishment for minor crime and the death penalty for anything serious—seemed not up to the challenge.<sup>280</sup> Corporal punishments had perhaps deterred crime and rehabilitated offenders in the closed societies of early colonial days, when the stigma of the

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273. CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS* (Richard Bellamy ed., Richard Davies trans., 1995). On Beccaria’s influence, see DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 58–59 (1990), which explains that Enlightenment thinkers found old forms of punishment to be barbaric and believed severe punishments perpetuate severe crimes. See also Paul Spurlin, *Beccaria’s Essay on Crimes and Punishments in Eighteenth-Century America*, 27 *STUD. ON VOLTAIRE & EIGHTEENTH CENTURY* 1489, 1490 (1963); BANNER, *supra* note 128, at 91–92; John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 *NW. J.L. & SOC. POL’Y* 195, 201 (2009). For a more skeptical take on Beccaria’s influence, see HIRSCH, *supra* note 122, at 21–22.

274. BECCARIA, *supra* note 273, at 31.

275. See *id.* at 19–21.

276. *Id.* at 49.

277. *Id.* at 63 (“One of the most effective brakes on crime is not the harshness of its punishment, but the unerringness of punishment.”).

278. *Id.* Blackstone concurred, writing in his *Commentaries on the Laws of England* that it was the “sentiment of an ingenious writer, who seems to have well studied the springs of human action, that crimes are more effectually preserved by the *certainty*, than by the severity, of *punishment*.” 4 BLACKSTONE, *supra* note 87, at \*17; see also THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200–1800*, at 294–95 (1985) (exploring Beccaria’s influence on Blackstone).

279. HIRSCH, *supra* note 122, at 37–38.

280. See *id.* at 37–39; ROTHMAN, *supra* note 273, at 61–62.

sanction could not easily be shaken.<sup>281</sup> But they appeared ineffectual in the increasingly mobile world of the late eighteenth and early nineteenth centuries.<sup>282</sup>

As to the death penalty itself, reformers worried, as Beccaria had, that the widespread application of capital punishment “hardened” public sentiments, leading to more crime, not less.<sup>283</sup> Their misgivings focused particularly on juries. The system of ad hoc jury mitigation that matured in the eighteenth century, they believed, undercut the criminal law’s deterrent force.<sup>284</sup> The problem lay in jurors’ hesitation to condemn defendants to death for relatively minor crimes.<sup>285</sup> In the preamble to ultimately unsuccessful 1778 legislation, Thomas Jefferson remarked that the “experience of all ages and countries hath shewn that cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias.”<sup>286</sup> Representative Smilie of Pennsylvania made a similar point in a 1786 debate:

Sir, human nature will be human nature still, and I do say, when laws are made too severe the criminal will frequently escape; for let us suppose that this house would make a law so penal, that a man stealing the value of one shilling, should be liable to the severest punishment—you could not get a jury to convict him; their feelings as men would not let them do it . . . .<sup>287</sup>

Jefferson, Smilie, and other American reformers saw ad hoc jury mitigation as incompatible with the “mild but certain” punishment

281. See HIRSCH, *supra* note 122, at 32–36; cf. NATHANIEL HAWTHORNE, *THE SCARLET LETTER* (Bos., James R. Osgood & Co. 1850) (fictional example of how public shaming and social stigmatization could be used for punitive purposes in seventeenth-century Massachusetts).

282. See HIRSCH, *supra* note 122, at 37–39 (“As crime became increasingly the province of strangers, the utility of admonition [associated with capital or corporal punishment] accordingly diminished.”).

283. See BECCARIA, *supra* note 273, at 66–72; ROTHMAN, *supra* note 273, at 60–61 (summarizing Beccaria’s view).

284. See ROTHMAN, *supra* note 273, at 60.

285. See BANNER, *supra* note 128, at 91 (“As dissatisfaction with the retributive aspect of capital punishment for property crime spread, concern about its deterrent aspect had to spread too, because a penalty from which juries were known to shrink could hardly deter prospective criminals.”); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1507 (2001) (“But in the 1780s, this trend began to reverse, declarations of sentencing reform appeared in the constitutions of some new states, and there was a widespread view that whipping and capital punishment had lost their deterrent power.”).

286. BANNER, *supra* note 128, at 96 (internal quotation marks omitted).

287. *Philadelphia, Sept. 1: Proceedings of the General Assembly*, PA. PACKET & DAILY ADVERTISER, Sept. 1, 1786, at 3. The remarks are attributed to “Mr. Smilie.” This was presumably John Smilie, a member of the Pennsylvania House of Representatives. See *Smilie, John (1741-1812)*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., <https://bioguideretro.congress.gov/Home/MemberDetails?memIndex=S000508> (last visited Feb. 16, 2022) [<https://perma.cc/28WC-2RZG>].

championed by Beccaria.<sup>288</sup> That was the backdrop for their move to replace the death penalty with carceral punishment for many felonies.<sup>289</sup> In 1786, Pennsylvania abolished the death penalty for robbery and burglary and substituted imprisonment for up to ten years.<sup>290</sup> Less than a decade later, Pennsylvania cut back on the death penalty even further, limiting it to first-degree murder.<sup>291</sup> For other serious felonies, legislators provided sentencing ranges—five to eighteen years for second-degree murder, five to twelve for arson, ten to twenty-one for rape, and two to ten for maiming.<sup>292</sup> Other states followed with similar reforms, including three—Virginia, New York and New Jersey—in 1796 alone.<sup>293</sup> Some states lagged behind, but even still, as Stuart Banner notes, “the small number of offenses carrying the death penalty relative to the English penal code became a point of pride for Americans of the late eighteenth century.”<sup>294</sup>

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288. The American reformers echoed the contemporaneous sentiments of British writers. As Thomas Green observes, beginning around 1770, a series of English writers were sharply critical of the prevailing system of “ad hoc jury-based mitigation.” GREEN, *supra* note 278, at 268. This was a nuanced and even wavering criticism, as the reformers mostly retained the traditional British ideal of the jury as a “bulwark against tyranny.” *Id.* Like their American contemporaries, these English writers were influenced by Beccaria and the “Enlightenment tradition of penology.” *Id.* at 268, 289. Romilly, the last of the writers in Green’s study, advanced the thesis with particular verve. SAMUEL ROMILLY, OBSERVATIONS ON A LATE PUBLICATION, INTITLED, THOUGHTS ON EXECUTIVE JUSTICE 87 (London, sold by T. Cadell, in the Strand & R. Faulder, in New Bond Street 1786). “Undoubtedly,” Romilly explained, “to render laws respected and efficacious, they must be strictly executed; but a far more indispensable requisite to that end is, that those laws be wise and just, for otherwise, the more rigorously they are enforced, the more they will be detested and despised.” *Id.* When that happens, Romilly noted, juries “take upon themselves to judge of the policy and justice of the law upon which every prisoner was indicted.” *Id.* at 89. As Green explains, Romilly believed that “with reform, jury mitigation would be largely unnecessary and generally unwise.” GREEN, *supra* note 278, at 309.

289. BANNER, *supra* note 128, at 96–99.

290. *Id.* at 97; see also *An Act Amending the Penal Laws of This State* (Sept. 15, 1786), in 12 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 280 (comp. by James T. Mitchell & Henry Flanders, 1906).

291. *An Act for the Better Preventing of Crimes, and for Abolishing the Punishment of Death in Certain Cases* (1794), in 15 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 174 (comp. by James T. Mitchell & Henry Flanders, 1911).

292. *Id.* at 175–76.

293. BANNER, *supra* note 128, at 98.

294. *Id.* at 99. Of course, the changes to the jury’s role in criminal cases did not happen overnight. The rise of prisons and incarceration—and with them the demise of jury mitigation—was the project of decades, not years. See HIRSCH, *supra* note 122, at 57 (“[I]t took time—time to put the new institutions in place, of course, but also time for legislators to convince themselves to take the plunge.”). Beyond the inherent slowness of institutional and political change, see *id.* at 57–62, criminal lawyers battled over the jury’s role for the first half of the nineteenth century, as Michael Millender explored in a fascinating unpublished dissertation. See Michael Jonathan Millender, *The Transformation of the American Criminal Trial, 1790-1875* (Nov. 1996) (Ph.D. dissertation, Princeton University) (ProQuest). On Millender’s telling, defense lawyers kept the flame of jury mitigation lit well into the nineteenth century. Their jury arguments in the first half of the century, he explains, stressed “the severe and perhaps irreversible consequences of a guilty verdict in a felony trial,” and insisted that these consequences “ought to shape the jury’s search

What effect did these penal reforms have on juries? The reformers' objective was to deter crime by making punishment certain. Ad hoc jury mitigation stood in their way. To get around it, they had to stop juries from acquitting guilty defendants out of fear that a conviction would lead to inhumane punishment. Their solution was to excise the inhumanity from the penal statutes. The same juries that shuddered to condemn a defendant to death, they evidently believed, wouldn't hesitate before sending him to the penitentiary.<sup>295</sup> Juries would no longer act as the system's "guard[ ] against inhumanity,"<sup>296</sup> that is, if there was no inhumanity to start out with. Or so it seemed to the reformers of the time.<sup>297</sup>

None of this is to say that jurors in the late eighteenth or nineteenth centuries were actually ignorant of the punishment that a defendant would face upon a guilty verdict. The point is that this knowledge was no longer *necessary* to the system design. From there, a principle of jury ignorance was a short step away.

Judges took that step in the nineteenth century, telling juries that the punishment a defendant would face upon conviction was none of their concern. In 1848, a New York trial judge instructed jurors that if the defendant is innocent, they must "let him go free," but if guilty, "let him not escape the punishment due to his crime, by your want of firmness, nor by reason of your shrinking from the faithful discharge of your sworn duty."<sup>298</sup> The judge elaborated on his thinking: "You are

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for truth." *Id.* at 29–30. Prosecutors and judges fought back, Millender argues, by "attempting to keep jurors from reflecting on the fate that might befall a defendant after a guilty verdict." *Id.* at 2. They envisioned the trial as less a moral reckoning than a simple "fact-finding procedure, designed to separate the guilty from the innocent." *Id.* at 3. Thus they emphasized procedures meant to turn the trial into an "equal contest"—access to defense counsel, fully formed evidentiary rules, and the standard of proof beyond a reasonable doubt. *Id.* It was only with the coming of these adversarial mechanisms in the middle of the nineteenth century, Millender argues, that the new penology fully superseded the older regime of ad hoc jury mitigation. *Id.* at 2.

295. See Millender, *supra* note 294, at 48 ("Juries and judges, of course, were the linchpins of the new system, for only if they forbore from interfering with the fates of the guilty, funnelling them instead into penitentiaries, could the new institutions fulfill their aims.").

296. GREEN, *supra* note 278, at 296.

297. There remained the question of who would determine the sentence when the law prescribed a range. On this, American jurisdictions split. In most, sentencing authority was reposed in the judge, further separating the jury from questions of punishment. Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 CHI.-KENT L. REV. 937 (2003). A handful of states, starting with Virginia in 1796 and spreading to Kentucky, Georgia, and Tennessee over the next few decades, assigned the function to juries, at least for certain crimes. *Id.* at 937. Even in those states, however, the purpose of shifting to a carceral punishment scheme was, at least in part, to foil ad hoc jury mitigation. As Nancy King emphasizes, "the adoption of jury sentencing for felony offenses" was not a "simple story of preserving the power that jurors already wielded through their verdicts of guilt or innocence prior to the establishment of the penitentiary." *Id.* at 986 (emphasis omitted).

298. *People v. Pine*, 2 Barb. 566, 567 (N.Y. Gen. Term 1848).

merely to answer to the question of guilt or innocence; you have nothing to do with the *consequences* of your decision.”<sup>299</sup> The principle of jury ignorance was ascendant.<sup>300</sup> When appeals became an ordinary part of criminal practice at the end of the nineteenth century,<sup>301</sup> appellate courts wrote it into formal law. The Supreme Court of Georgia noted in 1876 that where “the jury have nothing to do with the punishment prescribed by law for [an] offense,” the “better practice” is “for the court to say nothing about it in its charge to them.”<sup>302</sup> The New York Supreme Court followed suit in 1889, and Iowa’s high court agreed the next year.<sup>303</sup> These courts were soon joined by many more,<sup>304</sup> and, as the nineteenth century gave way to the twentieth, treatise writers voiced their agreement.<sup>305</sup>

The shift to a rationalist penology underwrote this jurisprudential change from informed to ignorant juries. By swapping statutes that authorized ubiquitous capital punishment for statutes

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299. *Id.*

300. That said, a punishment-sensitive jury still had at least one prominent advocate in the mid-nineteenth century. In an 1850 tract arguing against the practice of death-qualifying a capital jury—i.e., removing potential jurors opposed to capital punishment—Lysander Spooner forcefully insisted that jurors be permitted to take punishment into account. LYSANDER SPOONER, *ILLEGALITY OF THE TRIAL OF JOHN W. WEBSTER* 3 (Bos., Bela Marsh 1850). Even if there is “a clear legal distinction between the question of guilt, and the question of punishment,” he explained, “it does not follow that the former is to be determined without any reference to the latter.” *Id.* at 7. That’s because, Spooner argued, “The law does not require a man to cease to be a man, and act without regard to consequences, when he becomes a juror.” *Id.* Foreshadowing an argument we made in Section III.A, Spooner recognized that jurors’ knowledge of punishment has political significance. If potential jurors refuse on moral grounds to participate in a capital trial, he wrote, the court must postpone the trial “until the statute, prescribing the punishment of death, be repealed, and such a penalty substituted, as jurors will *all* consent to aid in enforcing.” *Id.* at 4.

301. See 7 WAYNE R. LAFAVE, JEROD H. ISRAEL, NANCY J. KING & ORIN S. KERR, *CRIMINAL PROCEDURE* § 27.1(a), at 2–6 (4th ed. 2015) (discussing the development of appellate review).

302. *Russell v. State*, 57 Ga. 420, 424 (1876).

303. *People v. Ryan*, 8 N.Y.S. 241, 243 (Gen. Term 1889); *State v. Peffers*, 46 N.W. 662, 663 (Iowa 1890).

304. See *State v. Ragsdale*, 59 Mo. App. 590, 606 (1894) (“While [the defendant’s proposed instruction] correctly stated the legal effect of a conviction of the offense charged, it was not a matter for the jury, but for the court.”); *Ford v. State*, 64 N.W. 1082, 1084 (Neb. 1895) (similar); *Eggart v. State*, 25 So. 144, 149 (Fla. 1898) (similar); *Currier v. State*, 60 N.E. 1023, 1025 (Ind. 1901) (similar); *Edwards v. State*, 95 N.W. 1038, 1039 (Neb. 1903) (similar). *But see State v. Yourex*, 71 P. 203, 205–06 (Wash. 1903) (“[W]e are satisfied that it is not error for the court to inform the jury what the statutory penalty is for the [accused] offense” when the penalty is fixed by statute).

305. DE WITT C. BLASHFIELD, *A TREATISE ON INSTRUCTIONS TO JURIES IN CIVIL AND CRIMINAL CASES* § 186, at 436–37 (1902) (“In jurisdictions where it is the exclusive province of the court to fix the punishment for the offense with which the defendant is charged, the refusal of an instruction as to the degree of punishment to be meted out to defendant if he should be convicted is proper. . . . The verdict should not be affected by any such considerations.” (footnotes omitted)); H. C. Underbill & Wm. Lawrence Clark, *Criminal Law*, in 12 *CYCLOPEDIA OF LAW AND PROCEDURE* 70, 641–42 (William Mack ed., 1904) (similar); 1 *THE AMERICAN AND ENGLISH ANNOTATED CASES* 270 (H. Noyes Greene ed., 1906) (similar).

centered on mild carceral punishment, American reformers thought they had eliminated any need for juries to mitigate punishment, and thus for jurors to know about the punishment consequences of their verdicts. Perhaps they had, for a time. But today, the predicate of the reform—mild and rational punishment—has long since disappeared.<sup>306</sup> Jury ignorance thus belongs to the class of criminal procedure devices that was built for a system that no longer exists.<sup>307</sup> In our view, that confounds any defense of jury ignorance grounded in its history.

Before we leave the history of the informed jury, we must address the possibility that the much-heralded demise of the “law-finding jury” also played a role in its nineteenth-century fall. This is possible, but the connection is complicated and uncertain. As many historians have explored, criminal juries in the colonial era and into the early nineteenth century were often instructed that it was within their power to decide questions of law, and not just of fact.<sup>308</sup> The “law-finding jury” of that period was not, however, synonymous with a nullifying jury.<sup>309</sup> Rather, the law-finding jury could “make law” as judges do—through, Gary Simson observes, an “essentially interstitial or, in the case of common law, incremental operation.”<sup>310</sup> That is, they could fill in the law’s gaps on a case-by-case basis, but they could not “nullify” in the sense of rejecting laws they disliked on policy or political grounds.<sup>311</sup> At least by the Supreme Court’s 1895 decision in *Sparf v. United States*,<sup>312</sup> however, the line between law-finding in this sense and nullification had become blurred, and nullification became understood as a type of law-finding. On its facts, *Sparf* was about nullification,<sup>313</sup>

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306. See *supra* Section III.A.

307. It is far from the only member of that class. See William Ortman, *Confrontation in the Age of Plea Bargaining*, 121 COLUM. L. REV. 451, 456–64 (2021) (arguing that the premises of the Supreme Court’s Confrontation Clause jurisprudence are out of step with the contemporary criminal legal system); William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 567 (2016) (same for “probable cause” charging standard).

308. See William Ortman, *Chevron for Juries*, 36 CARDOZO L. REV. 1287, 1305–06 (2015) (collecting sources).

309. See Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 122 (1998) (noting that the nineteenth-century “juries had no right to nullify laws”); David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 601 (2000) (same).

310. Gary J. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 507 (1976).

311. See Pepper, *supra* note 309, at 601 (“[The jury’s right to find the law] clearly did not warrant jurors to find a law or prosecution void, or to refuse to apply a law, for running counter to their personal notions of justice . . .”); Krauss, *supra* note 309, at 213 (“I have found no evidence that anyone claimed that these juries had the right to ignore what they deemed the applicable law.”).

312. 156 U.S. 51 (1895).

313. *Id.* at 60–61.

not interstitial or incremental interpretation, yet it is the canonical Supreme Court case for the proposition that juries have no law-finding function.<sup>314</sup> Once nullification became an aspect of law-finding, rejecting the law-finding jury *meant* rejecting nullification, and that's where it connects to our story. Because informing the jury about punishment is understood to encourage nullification, opposition to jury law-finding (and hence nullification) may have provided additional reason to avoid it.

#### *D. Towards a Constitutional Argument*

We must still explain how our system could plausibly change to recognize the right to an informed jury. Legislative reform seems unlikely for the very reason why the jury as political feedback mechanism is needed. A legislature focused on crime control seems unlikely to adopt a reform the very purpose of which is to make convictions harder to obtain.<sup>315</sup> The alternative, then, would be for courts to recognize the right to an informed jury as part of a defendant's constitutional jury-trial right. Here, too, there are certainly ample grounds for skepticism. The judiciary presided over the rise of the ignorant jury,<sup>316</sup> and it continues to assert the importance of shielding juries from punishment information.<sup>317</sup>

Yet there are serious arguments that present arrangements have lost sight of widely shared constitutional values. Of course, a true constitutional pragmatist, like Richard Posner,<sup>318</sup> or a judge who, like Ronald Dworkin, believed in reading the Constitution in light of moral values<sup>319</sup> might be persuaded of our view based solely on the arguments we have already laid out in favor of our preferred approach. But most judges tend to see themselves—or, perhaps, portray themselves—as

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314. See Alschuler & Deiss, *supra* note 231, at 910–11 (“The event that most clearly marked the end of the American jury’s power to judge legal questions was the United States Supreme Court’s 1895 decision in [*Sparf v. United States*].”).

315. We are mindful not to partake in the “inside/outside fallacy” articulated by Eric Posner and Adrian Vermeule. See Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1745 (2013) (explaining that in “a typical pattern” of the fallacy, “the diagnostic sections of a paper draw upon the . . . literature to offer deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system, while the prescriptive sections of the paper then turn around and issue an optimistic proposal for public-spirited solutions”).

316. See *supra* notes 298–304 and accompanying text.

317. See, e.g., *Shannon v. United States*, 512 U.S. 573 (1994) (holding a judge does not have to instruct a jury on the consequences of a “not guilty only by reason of insanity” verdict).

318. See, e.g., Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 538–46 (2012) (discussing the pragmatic approach).

319. See generally RONALD DWORGIN, *LAW’S EMPIRE* (1986) (arguing that moral principles should guide judicial decisions to produce just outcomes).

bound by law more than merely policy or moral judgments. Even so, there are plausible grounds to find a right to informed juries in the Constitution.

Consider first how a jurist one might call a “doctrinalist” would approach this question. When interpreting the Constitution, the judge would emphasize the body of precedent the Court has built up more than the text and original understanding of the document itself.<sup>320</sup> Here, the doctrinalist would of course confront the problem that the Supreme Court has rather emphatically ruled out the notion that juries should be informed about punishment.<sup>321</sup> But even committed doctrinalists are willing to overrule precedent in some instances.<sup>322</sup> And here, there are good arguments that the Court’s refusal to permit juries to be informed about punishment is inconsistent with other principles the Court has laid out elsewhere in its case law.

In particular, keeping the jury ignorant is hard to square with the Court’s cases on the scope of the Sixth Amendment jury-trial right. In a series of cases over the last two-plus decades, the Court, starting in *Apprendi v. New Jersey*,<sup>323</sup> has established the principle that any fact that makes a defendant eligible for an increased statutory maximum, or a mandatory minimum, is functionally an element of a crime that must be found by a jury beyond a reasonable doubt.<sup>324</sup> In these cases, the Court has repeatedly stressed the importance of jury “authorization” for increased penalties.<sup>325</sup>

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320. As Akhil Amar puts it, doctrinalists “rarely try to wring every drop of possible meaning from constitutional text, history, and structure. Instead, they typically strive to synthesize what the Supreme Court has said and done, sometimes rather loosely, in the name of the Constitution.” Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 26–27 (2000). Prominent doctrinalists include Richard Fallon and David Strauss. See Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

321. *Shannon*, 512 U.S. at 587; see also *supra* Section I.A.

322. See, e.g., Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 585 (2001) (arguing that “while decisions that are severely misguided or dysfunctional surely should be overruled, continuity is presumptively desirable with respect to the rest”).

323. 530 U.S. 466 (2000).

324. See *Alleyne v. United States*, 570 U.S. 99, 103 (2013) (extending the *Apprendi* doctrine to factual findings that increase the mandatory minimum sentence to which a defendant is exposed).

325. See, e.g., *Apprendi*, 530 U.S. at 494 (explaining that the “relevant inquiry” is: “[D]oes the required finding expose the defendant to a greater punishment than that authorized by the jury’s guilty verdict?”); *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (finding defendant’s sentence unconstitutional because under the state’s sentencing law, “the jury’s verdict alone does not authorize the sentence”); *Cunningham v. California*, 549 U.S. 270, 290 (2007) (“If the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.”).



Yet the Court's insistence that juries be kept ignorant of penalties has deprived this line of cases of some of its substantive bite. There is no illustration of this point better than *Almendarez-Torres v. United States*<sup>326</sup> and its aftermath. *Almendarez-Torres* held that a judge, rather than a jury, may find the fact of a prior conviction, which increases the maximum sentence that may be imposed upon a defendant.<sup>327</sup> The case was decided 5-4, over a dissent by Justice Scalia. That dissent planted a seed that soon blossomed into *Apprendi*. In the latter case, Justice Thomas, who had been in the *Almendarez-Torres* majority, acknowledged that he had erred and joined the four dissenters in the previous case to form a majority.<sup>328</sup>

Despite five Justices apparently agreeing that *Almendarez-Torres* was wrongly decided, the Court has never reconsidered its holding. And it is easy to see why. In a world where juries are kept ignorant of punishment, what difference would it make to require juries to find that the defendant had one or more previous convictions? The issue is not whether the defendant actually committed the previous criminal conduct, but merely whether the conviction exists. Such a matter is usually not a difficult fact to ascertain, and it would presumably require the jury to do little more than review an official document issued by the court of conviction. In a world where juries were informed, however, insisting on jury authorization would make an enormous difference. Juries would know the sentencing consequences of finding additional facts and could decide whether to find those facts and thereby expose a defendant to a greater punishment. And if juries regularly refused to do so, that would provide a good indication that the law was too harsh. But as things stand, the doctrine allows harsh recidivist enhancements to be applied without any jury authorization.

And even in contexts where *Apprendi* does require jury findings beyond a reasonable doubt, its protections seem more procedural and formalistic and less substantively meaningful. Some *Apprendi* critics have explicitly tied this failing to the jury's ignorance. Richard Bierschbach and Stephanos Bibas argue that “[j]uries cannot tailor and individualize punishments when they do not know them, no matter how many additional facts they are empowered to find. Thus, although *Apprendi*'s and *Blakely*'s reasoning sound in individualization, their holdings fail to accomplish that end.”<sup>329</sup> Other advocates of informed

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326. 523 U.S. 224 (1998).

327. *Id.* at 226.

328. See *Apprendi*, 530 U.S. at 520 (Thomas, J., concurring) (describing “the chief errors of *Almendarez-Torres*”).

329. Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 418 (2013) (footnote omitted).

juries have argued that jury ignorance is hard to square with the values underlying *Apprendi* and its progeny.<sup>330</sup>

To be sure, there is no evidence the Court sees a tension between the *Apprendi* line of precedent and its embrace of ignorant juries. In arguing that *Apprendi* “provide[s] little support for a constitutional right to a jury informed of punishment,” Jeffrey Bellin stresses that four Justices joined both *Apprendi* and *Shannon*.<sup>331</sup> Nonetheless, there are powerful arguments that the *Shannon* Court erred by endorsing the ignorant jury, in turn rendering the criminal jury a much less potent protection for defendants than it should be.

That conclusion becomes only clearer when one considers the history of the jury laid out in Section I.B. As we discussed, the history shows that Anglo-American juries prior to the ratification of the Constitution were not only aware of punishment, but that they routinely used their verdicts to influence it by refusing to find the facts required to make defendants eligible for execution. Even if not universal, this was a significant, widespread, and consequential aspect of the jury system. And even committed doctrinalists tend to still think history deserves some weight in constitutional interpretation. The historical background reinforces other arguments in favor of recognizing a right to an informed jury.

That history also poses a quandary for originalists, for whom text and original understanding are paramount. The Sixth Amendment guarantees a trial “by an impartial jury of the State and district wherein the crime shall have been committed.”<sup>332</sup> The question for an originalist would be whether the original meaning of “jury” includes a jury that is informed about the penalty a defendant faces. There is no doubt that that word connotes some *features* of the jury that were known to the Founding generation, even if not enumerated in the text. As Justice Gorsuch explained in *Ramos v. Louisiana*:

[T]he promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. . . . No: The text and structure of the Constitution clearly suggest that the term “trial by an impartial jury” carried with it *some* meaning about the content and requirements of a jury trial.<sup>333</sup>

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330. Though Cahill “makes no claim about how to read the Constitution,” he observes that a system that informed jurors about punishment “actually provides for jury ‘authorization’ in a more meaningful way than” current arrangements. Cahill, *supra* note 23, at 144–45. Kemmitt criticizes the *Apprendi* line for relying on a conception of the jury’s role that “is misleading at best, and intentionally disingenuous at worst.” Kemmitt, *supra* note 23, at 124.

331. Bellin, *supra* note 23, at 2245.

332. U.S. CONST. amend. VI.

333. 140 S. Ct. 1390, 1395 (2020).

In *Ramos*, the “something” that the Court recognized was the requirement of juror unanimity. But one is left wondering what other jury characteristics the Sixth Amendment guarantees. And as Judge Joan Larsen notes, determining the scope of the jury-trial right “turns out to be surprisingly hard. And it is particularly hard for an originalist, or more precisely, for an originalist judge.”<sup>334</sup> Larsen stresses difficult questions about whether the right should encompass long-abandoned features of the jury such as its law-finding power.<sup>335</sup> But the question could as easily be asked about jury awareness of penalties.

Is it obvious that the original meaning of the jury trial doesn’t include a requirement that the jury be aware of punishment? We do not attempt to answer this question definitively here.<sup>336</sup> For as we see it, that would require resolving several difficult questions that we are not prepared to answer. First, did the original understanding of juries include the idea of a jury informed about penalties? More historical research into the role of the jury in early America could help reveal the degree to which the Founding generation thought that a jury necessarily meant a body that understood the penalties a defendant faced.

The second question is what, exactly, an originalist should do about a feature of the jury system that may not have been seen as a *legal* requirement but instead was a background assumption about how juries worked. Perhaps Founding-era juries just happened to know about penalties because there were fewer crimes, simpler gradations of punishment, and so on. How should we respond when that circumstance ceases to hold—particularly when the change results in a profound degradation of the jury system? An originalist would need to ask whether a legitimate solution to this state of affairs would be recognizing a right to have the jury informed about penalties, even if that right was not necessary at the time of the Founding because juries were already aware of punishments. A scholar or jurist who believes that it is necessary to “translate” constitutional rights to modern circumstances could conclude that effectuating the jury-trial right requires informing juries about penalties,<sup>337</sup> but originalists may disagree that constitutional translation of this sort is permissible.<sup>338</sup>

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334. Larsen, *supra* note 232, at 965.

335. *See id.* at 968–69.

336. Nancy Gertner has “sketch[e]d the contours” of an argument that originalism requires juries to be informed when a defendant is “subject to a mandatory minimum punishment or a mandatory statutory enhancement.” Gertner, *supra* note 258, at 938.

337. *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) (arguing that constitutional interpretation must adapt to contextual changes).

338. *See, e.g.,* John O. McGinnis, *The Inevitable Infidelities of Constitutional Translation: The Case of the New Deal*, 41 WM. & MARY L. REV. 177 (1999) (criticizing the translation approach).

The Court has previously concluded that some features of the original jury are not constitutionally required. Long before *Ramos*, the Court struggled with the scope of the jury-trial right in *Williams v. Florida*,<sup>339</sup> which addressed the constitutionally required size of juries. After declaring the inability “to divine precisely what the word ‘jury’ imported to the Framers, the First Congress, or the States in 1789,” the Court concluded that there was “no indication in ‘the intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.”<sup>340</sup> Thus, though the common-law jury had consisted of twelve members, the Court found this a mere “historical accident” and upheld the use of six-person juries.<sup>341</sup>

*Williams* may not exemplify the approach that originalist jurists would take today—particularly in its willingness to emphasize functional and purposive arguments after concluding that history was indeterminate.<sup>342</sup> Nonetheless, paired with *Ramos*, it starkly presents the difficulty in determining whether a particular feature of the common-law jury is an integral part of the “jury” guaranteed by the Sixth Amendment. Without resolving these questions, we suggest they are weighty ones for originalist scholars, and perhaps more importantly originalist Supreme Court Justices, to grapple with.

However one answers them, it is hard to dispute that “the present day jury is only a shadow of its former self.”<sup>343</sup> And it is also, we think, hard to dispute that the rise of the ignorant jury is an important part of the story of how the once-powerful criminal jury has been rendered so toothless today. Any originalist who thinks that the values of the Founding generation deserve weight in constitutional interpretation should carefully consider the questions we have posed here.

## CONCLUSION

The modern criminal jury is kept ignorant of some of the most important information relevant to the grave decision it is asked to make at the close of a criminal trial. Hiding punishment information from criminal juries results in unjust punishment and convictions of defendants in untold numbers of cases where the jury would decide the case differently if only they knew what was truly at stake. And it

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339. 399 U.S. 78 (1970).

340. *Id.* at 98.

341. *Id.* at 102–03.

342. *See id.* at 99–100 (“The relevant inquiry, as we see it, must be the function that the particular feature performs and its relation to the purposes of the jury trial.”).

343. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

reinforces incentives for legislators and prosecutors to prefer harsher criminal law. Informing criminal defendants of the statutory minimum and maximum would be fairer and more consistent with our constitutional tradition. It would also go some ways towards restoring an equilibrium that our system currently lacks. We should keep the jury ignorant no longer.