

Juries and Originalism: Giving “Intelligible Content” to the Right to a Jury Trial

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In a series of cases, beginning with *Apprendi v. New Jersey*,¹ the United States Supreme Court ruled that the Constitution required what appeared to be a new and substantial role for the twentieth century jury—namely, a role in sentencing offenders.² Justice Stevens, writing for the Court, held that the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that any fact (other than a prior conviction) which increases the maximum penalty for a crime must be found by a jury beyond a reasonable doubt, rather than a judge by a fair preponderance of the evidence.³ Justice Scalia (and Justice Thomas), who concurred, contended that the majority’s conclusion flowed directly from the original words of the Constitution.⁴ The Sixth Amendment, Justices Thomas and Scalia insisted, “means what it says.”⁵ To be sure, the Sixth Amendment *said* nothing about sentencing, nothing about which factors are elements of an offense for a jury and which are sentencing factors for a judge. Rather, Justice Scalia concluded that the need to give “intelligible content” to the right to a jury trial required the Court to clarify the facts that were in each category,⁶ in effect, redefining—originalists would say rediscovering⁷—the division of labor between judge

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¹ 530 U.S. 466 (2000).

² *See, e.g.*, *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

³ *Apprendi*, 530 U.S. at 476, 490.

⁴ *See id.* at 499–500 (Thomas, J., concurring).

⁵ *Id.* at 499.

⁶ *Id.* (Scalia, J., concurring).

⁷ *See, e.g.*, Sanjay Chhablani, *Disentangling the Sixth Amendment*, 11 U. PA. J. CONST. L. 487, 512 (2009) (“*Apprendi* and its progeny, thus, are best seen not as having extended the Sixth Amendment right to jury trial to a subset of sentencing proceedings, but rather as a reclamation of that subset of sentencing proceedings within the scope of

and jury. With *Blakely v. Washington*, four years later, the Court, now with Justice Scalia writing, broadened *Apprendi*'s scope still more.⁸ Giving "intelligible content" to the Sixth Amendment now meant that a jury was required not simply to find facts that would determine the statutory maximum penalty but any fact that is "legally essential to the punishment."⁹ A year later, in *United States v. Booker*, the Court concluded that facts a jury had to decide under the Sixth Amendment now included those that the Federal Sentencing Guidelines made relevant, a constitutional result avoided only when the Court concluded that the Federal Guidelines were no longer mandatory.¹⁰

One may argue that giving "intelligible content" to the jury trial requires even more than *Apprendi* and its progeny outlined. While the words used to describe the jury are the same today as they were at the time of the Constitution's framing and ratification, the institution is not. As Professor Akhil Amar has described, the modern jury is but "a shadow of its former self," a far less robust and less powerful institution than the colonial jury.¹¹ What are the implications of these changes for constitutional interpretation? To be sure, many of the government entities that the Constitution recognized or established have changed over the years—the executive because of the demands of the national security state, as one example. But in the case of the jury, these changes are especially telling, and at the very least, raise the following questions: Does the Constitution require nothing more than giving this sentencing role to any jury-like institution, whatever "jury-like" may mean today? Or does giving "intelligible content" to the right to a jury mean making other changes to the institution to bring it more in line with its powerful colonial forebears? While no one would—or constitutionally could—suggest restoring the privileged, all white male jury, or undoing Sixth Amendment representation law or Fourteenth Amendment Equal Protection guarantees, one aspect of the earlier jury surely resonates with today's new sentencing role. I speak specifically about informing modern juries of the punishment consequences of their verdict in mandatory minimum cases.

the Sixth Amendment's 'all criminal prosecutions' predicate clause.").

⁸ See generally *Blakely v. Washington*, 542 U.S. 296 (2004).

⁹ *Id.* at 313.

¹⁰ 543 U.S. 220, 226–27 (2005). Justice Scalia joined the first part of the majority opinion, finding that the Sixth Amendment right to a jury trial applied to the facts made relevant by the Federal Sentencing Guidelines, but dissented from the second part, the so-called remedial opinion. See *id.* at 226, 244, 272.

¹¹ See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 97 (1998).

Colonial juries were fully aware of the implications of their verdicts.¹² Since most serious offenses were capital crimes, the jury's determination of guilt had specific and well-known consequences.¹³ Indeed, according to some scholars, the jury was permitted—even encouraged—to find both the facts and the law.¹⁴ While the judge formally imposed the sentence, the jury's judgment was often outcome-determinative.¹⁵ What we understand today to be jury nullification was what they understood to be their role, a role Professor Rachel Barkow describes as acting as a check on overinclusive or overly rigid criminal laws, effectively mitigating or tempering the law in an individual case.¹⁶ Knowing what they did about punishments enabled them to fulfill their constitutional responsibility. Modern juries, in contrast, are not told by the court about mandatory punishments.¹⁷ They are admonished that punishment is exclusively for the judge.¹⁸ Not surprisingly, they are often shocked when, after their verdict, they learn of the severe sentences the law, particularly federal law, requires.¹⁹

Following the rationale of *Apprendi* and its progeny, one can argue that giving “intelligible content” to the right to a jury trial today means, at the very least, telling the jury about punishments, even if they are also told that the ultimate sentencing decision is for the judge. There are limitations, of course. This approach would not apply in every case. With advisory sentencing guidelines, for example, the relationship between offense factors and sentencing factors is more attenuated.²⁰ The approach would only apply in cases that are the functional equivalent of the colonial fare, namely cases

¹² See Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL'Y 411, 438 (2007) [hereinafter Cassak & Heumann, *Old Wine in New Bottles*] (noting that trial jurors knew when the punishment for a defendant found guilty would be the death penalty).

¹³ See *infra* note 25 and accompanying text.

¹⁴ See *infra* note 30 and accompanying text.

¹⁵ See *infra* note 24 and accompanying text.

¹⁶ Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36 (2003).

¹⁷ See *infra* note 86 and accompanying text.

¹⁸ See *infra* note 87 and accompanying text.

¹⁹ See, e.g., James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 173 (2010) (describing the disjunction between the sentences suggested by convicting juries and the sentence required by the Federal Sentencing Guidelines); see also *United States v. Polizzi*, 549 F. Supp. 2d 308, 320 (E.D.N.Y. 2008) (explaining that several jurors were distressed upon learning of the 5-year mandatory minimum sentence to be imposed on the guilty defendant), *vacated*, 564 F.3d 142 (2d Cir. 2009). For a discussion of *Polizzi*, see *infra* Part IV.

²⁰ See *infra* note 110–13 and accompanying text.

subject to a mandatory minimum punishment or a mandatory statutory enhancement. In those cases, as in the colonial era, the jury's verdict goes a long way to determining the sentence.²¹ In order to fulfill that responsibility, it may be argued that jurors have to understand the punishment context, just as they did at the Constitution's ratification. This Article only sketches the contours of that argument.

Part I outlines the role of the colonial jury roughly as it existed when the Constitution and Bill of Rights were ratified. Part II outlines its changes over the years, particularly as the guilt determination and the sentencing determination stages sharply diverged, with the jury in charge of the former, and the judge, the latter. Part III describes the evolution of the Supreme Court's sentencing jurisprudence, from *Apprendi* to *Blakely* and more recently *United States v. Booker*. After *Booker*, federal sentencing proceeded on two tracks. On one track were advisory guidelines, where the judge had more discretion in sentencing, and on the other track, statutory mandatory minimum sentences, or worse, mandatory statutory enhancements, where the judge had none. With more discretionary sentencing, the jury's verdict does not determine the punishment; a judge exercises his or her judgment as to what the appropriate sentence is. With mandatory minimum statutes, however, the jury's verdict is, like the colonial jury's verdict, often outcome-determinative, but unlike the modern jury's forebears, it does not know why. Part IV suggests what several prominent judges, like Judge Gerald Lynch (Southern District of New York) and Judge Jack Weinstein (Eastern District of New York),²² have already urged in their extraordinary decisions: giving "intelligible content" to the jury trial right, the right Justice Scalia identified in *Apprendi* and *Blakely* as deriving from the language of the Constitution and the Bill of Rights, requires informing the juries about mandatory punishments or mandatory enhancements.²³

²¹ See *infra* notes 84–85, 88 and accompanying text (describing mandatory minimum statutes, in which juries make the factual determinations triggering the minimum sentence; the judge has no discretion to go below that sentence).

²² *Polizzi*, 549 F. Supp. 2d at 404 (Weinstein, J.) ("A brief historical review demonstrates the right of the jury in this case under the Sixth Amendment of the Constitution to know the sentencing impact of its decision—a right shared by the defendant."); *United States v. Pabon-Cruz*, 255 F. Supp. 2d 200, 214–15 (S.D.N.Y. 2003) (Lynch, J.) ("[J]urors should be aware of the moral consequences of their decisions[; t]his is especially the case where . . . the average juror might well not remotely imagine that advertising child pornography not only carries a harsher penalty than actually delivering it, but that the penalty is a mandatory ten years in prison."), *aff'd. in part and vacated in part*, 391 F.3d 86 (2d Cir. 2004). For a discussion of *Polizzi* and *Pabon-Cruz*, see *infra* Part IV.

²³ Many scholars had argued and reargued in favor of telling juries about mandatory punishments before *Apprendi*. See generally Lance Cassak & Milton Heumann, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*,

I. THE COLONIAL JURY

While scholars disagree about the details, it is reasonable to conclude that the colonial jury was a de facto and, to a degree, a de jure sentencer.²⁴ It was a de facto sentencer because of the nature of the criminal law, on the one hand, and the process by which it was selected, on the other. Many crimes were capital offenses.²⁵ The result was necessarily binary and easy to understand—guilt and death or not guilty and freedom. Scalable punishments, punishments involving a term of years, were not common until the end of the eighteenth century with the growth of penitentiaries.²⁶

The jurors came from a very narrow and relatively informed elite.²⁷ They were picked from the rolls of white men with property.²⁸ Indeed, in some cases steps were taken to secure better qualified people to serve on particular

20 AM. CRIM. L. REV. 343 (1983) [hereinafter Cassak & Heumann, *Not-So-Blissful Ignorance*]; Cassak & Heumann, *Old Wine in New Bottles*, *supra* note 12.

²⁴ See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 869–76 (1994); see also Cassak & Heumann, *Old Wine in New Bottles*, *supra* note 12, at 438 (noting that trial jurors who knew that the punishment in a given case was death had discretion to tailor the application of the law in particular cases); Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 424 (1999) [hereinafter Gertner, *Circumventing Juries*] (“The jury’s verdict was the pivotal event. Pronouncement of the sentence by a judge was an essentially ministerial task.”); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 962–63 (2003) (noting that, in England, “[o]nce the verdict was in, the judge’s role in sentencing was simply to announce the mandatory punishment”; that the “[j]uries imposed the real sentences by their verdicts on the charged or lesser offenses”; and that “judges sentenced in name only”).

²⁵ See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5 (2002) (“English colonists . . . came from a country in which death was the penalty for a list of crimes that seems shockingly long today. Treason, murder, manslaughter, rape, robbery, burglary, arson, counterfeiting, theft—all were capital crimes in England. All became capital crimes in the American colonies as well.”). To be sure, practices were different across the colonies in terms of which offenses were eligible for the death penalty. See Joseph Margulies, Book Note, *Tinkering Through Time: A History of America’s Experiment with the Death Penalty*, 92 GEO. L.J. 369, 371–72 (2003) (reviewing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002)).

²⁶ See SOL RUBIN, *THE LAW OF CRIMINAL CORRECTION* 27–30 (1973); Susan N. Herman, *The Tail that Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 302 n.55 (1992) (describing the growth of the penitentiary system in the United States).

²⁷ See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 432–34 (1996) (discussing qualifications for jury service on the colonial jury).

²⁸ See *id.*

juries, people selected precisely because of what they knew of the case or their unique competence.²⁹

But the jury was also a de jure sentencer in two areas. First, the colonial jury was expected, often authorized, to find both the facts and the law.³⁰ Second, it was entitled to render a general verdict of acquittal, which could not be appealed and which, under the Double Jeopardy clause of the Fifth Amendment, stanchd further prosecution.³¹ If a given jury concluded that capital punishment was inappropriate, whether or not it formally applied based on the obvious facts and the existing law, it would simply decline to find guilt, or find the defendant guilty of a lesser crime.³² No one disparaged this as “jury nullification.” Ignoring the formal legal requirements to affect a more lenient outcome in a criminal case was well within the jury’s

²⁹ See *id.* at 432; see also *United States v. Polizzi*, 549 F. Supp. 2d 308, 408–09 (E.D.N.Y. 2008) (Weinstein, J.) (discussing extensively the history of the colonial jury and the jury in the early republic).

³⁰ See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1193 (1991) (“[I]t was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact. So said a unanimous Supreme Court in one of its earliest cases (. . . [*Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794)]), in language that resonates with the writings of some of the most eminent American lawyers of the age—Jefferson, Adams, and Wilson, to mention just three. Indeed, Chase himself went out of his way to concede that juries were judges of law as well as of fact.” (citations omitted)); see also R.J. Farley, *Instructions to Juries – Their Role in the Judicial Process*, 42 YALE L.J. 194, 202 (1932) (“In America by the time of the Revolution and for some time thereafter, the power to decide the law in criminal cases seems to have been almost universally accorded the jury.”); David A. Pepper, *Nullifying History: Modern-Day Misuse of the Right to Decide the Law*, 50 CASE W. RES. L. REV. 599, 609 (2000) (arguing that colonial juries had the right to decide the law as outlined by the court). *But see* Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 299, 317–18, 321 (1966) (distinguishing between the power to decide the law in civil and criminal juries and dismissing *Georgia v. Brailsford* as anomalous); Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY 111, 130–31 (1998) (suggesting that the historical record is not clear about when and to what extent American juries were given the power to decide the law). In part, the debate may be more about what the power to decide the law actually meant. See, e.g., Amar, *supra*, at 1194 (suggesting the jury had the power to decide constitutional issues); Barkow, *supra* note 16, at 38 (contending that the jury had the power to individualize overinclusive criminal laws).

³¹ U.S. CONST. amend. V; see, e.g., *Green v. United States*, 355 U.S. 184, 224 (1957) (noting that the Fifth Amendment bars further prosecution for the same offense following a jury verdict for acquittal).

³² See RUBIN, *supra* note 26, at 31.

province.³³ Moreover, several colonies explicitly provided for jury sentencing (and many continue to do so, even in non-capital cases).³⁴

In effect, the colonial jury was far more than just another dispute resolver. It was a critical component of a representative government. Initially characterized as a colonial bulwark against royal authority, it continued as a uniquely populist and local voice. Even after independence, it remained a critical line of defense against government overreaching by both “the corrupt or overzealous prosecutor” and the “compliant, biased, or eccentric judge.”³⁵ A “permanent government official,” as Professor Amar notes, even an Article III judge, was not adequate to safeguard liberty.³⁶

The jury’s role in mitigating the harsh effects of the criminal laws was especially critical, as Barkow notes:

The jury trial is where the law meets the individual, and the particular facts and circumstances of the individual’s case are evaluated not by an impersonal lawmaker, but by her peers. Here is where nuance can make the difference. Here is where the law can yield to community values. Here is where government abuse can be checked by the people. If rigid and predictable application of the law were the goal, the criminal jury trial would never have been mandated by the Constitution in the first place, and

³³ Blackstone called the jury practice of convicting of a lesser charge to mitigate against the death penalty a “pious perjury.” 4 WILLIAM BLACKSTONE, COMMENTARIES *239. Rachel Barkow writes: “The power to mitigate or nullify the law . . . is no accident. It is part of the constitutional design—and has remained part of that design since the Nation’s founding.” Barkow, *supra* note 16, at 36; *see also* Irwin A. Horowitz, et al., *Jury Nullification: Legal and Psychological Perspectives*, 66 BROOK. L. REV. 1207, 1209 (2001) (“[N]ullification power does not abrogate statutes or precedents (thereby creating new law), but rather it ‘perfects’ the application of current law by adding a much needed touch of mercy.”).

³⁴ *See* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 (1999) (“Jury sentencing in noncapital cases was a colonial innovation.”). Lanni reports that as recently as three decades ago more than one-quarter of U.S. states provided for jury sentencing in noncapital cases. *Id.* Cassak and Heumann describe the states that provided for jury sentencing in the early republic. *See* Cassak & Heumann, *Old Wine in New Bottles*, *supra* note 12, at 447. *But see* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) (“American juries at the time of the adoption of the Bill of Rights played a minor role in sentencing.”).

³⁵ *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

³⁶ Amar, *supra* note 30, at 1185. Indeed, Amar notes that the jury was a political institution. *Id.* at 1189. The Legislature was charged with making the laws, the judicial branch with implementing them. *Id.* But the latter was bicameral—the judge like the upper house of a legislature, the jury like the lower (the “democratic branch of the judiciary power”). *Id.*

we would have long ago dispensed with the unreviewable general verdict of acquittal.³⁷

The jury was designed to bring lay judgment to bear in tempering the law in its application to an individual, something which no other institutional player could do as easily.³⁸ And it was able to perform that role pre-independence and in the early days of the Republic, one might argue, precisely because it knew what the punishments were.

II. THE ERA OF INDETERMINATE SENTENCING

Over the next century, the jury sphere remained the same, but the sentencing sphere dramatically changed. A different division of labor evolved as between judges and juries (both *de facto* and *de jure*) which was the consequence of a number of factors. The turn of the nineteenth century brought scalable punishments—penitentiaries and, in time, reformatories—and thus, a more complex set of sentencing outcomes.³⁹ The jury could no longer as a practical matter link conviction to a particular sentence even if it still had the power to sentence or decide questions of law—and it did not. Now, jurors were explicitly instructed to find only the facts; judges determined the applicable law.⁴⁰

The composition of the jury changed, particularly after the Civil War. It became more diverse. Barriers to jury service were lifted as the suffrage was extended, ending property restrictions and discrimination against minorities and women.⁴¹ With more and more access to education, a professional class

³⁷ Barkow, *supra* note 16, at 78.

³⁸ *See id.* at 36 (citing Roscoe Pound, *Law in Books and in Action*, 44 AM. L. REV. 12, 18 (1910) (praising the jury's power to mitigate or temper the letter of the law in the name of justice as "the great corrective of law in its actual administration"))).

³⁹ *See* NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 4–5 (1974); *see also* Hoffman, *supra* note 24, at 956 (arguing that, with "well-developed limitations," jurors are better than judges at imposing the appropriate sentence).

⁴⁰ *See* Gertner, *Circumventing Juries*, *supra* note 24, at 431–32.

⁴¹ *See, e.g.*, 18 U.S.C. § 243 (2006) (original version at ch. 645, § 1, 62 Stat. 696 (1948)) (specifically establishing African-Americans' right to serve on state juries); 42 U.S.C. §§ 1981, 1982 (originally enacted as Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27) (guaranteeing to every person the full and equal benefit of the law); *J.E.B. v. Alabama*, 511 U.S. 127, 131–34 (1994) (holding that the exclusion of women from jury service violated the Equal Protection Clause of the Fourteenth Amendment and recounting the history of women's exclusion); *see also* Kenneth S. Klein, *Unpacking the Jury Box*, 47 HASTINGS L.J. 1325, 1326–27 (1996) (describing the growing diversity of juries after the Civil War); Andrew D. Leipold, *Constitutionalizing Jury Selection in Criminal Cases: A Critical Evaluation*, 86 GEO. L.J. 945, 945–47 (1998) (critically evaluating constitutional doctrines which address participation in the jury by minorities and women).

of judges and lawyers evolved, and with it, the power of the lay jury declined.⁴² Mechanisms for jury selection sought to insure that the jury would be selected in direct proportion to what they did *not* know about the issues or the parties.⁴³ That was not too difficult in an urbanizing, more and more heterogeneous country.⁴⁴ Juries became more and more passive, deferring to the professional judge at trial when they were admonished that they had to follow the judge's instructions on the law.⁴⁵ They had no role in sentencing.⁴⁶

This was especially true by the early twentieth century, when the dominant penal philosophy was rehabilitation and an indeterminate sentencing regime took hold.⁴⁷ Criminal statutes proscribed broad sentencing ranges, maximizing judicial discretion.⁴⁸ "The judge's role was essentially therapeutic, much like a physician[']s."⁴⁹ Crime was a "moral disease," whose cure was "delegated to 'experts' in the criminal justice" field, one of whom was the judge.⁵⁰ Different standards of proof and of evidence evolved between the trial stage and the sentencing stage, reflecting the very different roles of judges and juries.⁵¹ The trial stage was the stage of constitutional rights, formal evidentiary rules, and proof beyond a reasonable

⁴² See Mark DeWolfe Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582, 591 (1939) (noting that after independence, colonial judges exercised limited power largely because they were laymen); Gary J. Simpson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 504 (1976) (noting that the death of the jury's right to determine issues of law can be understood in part, in terms of the disparity between the professional qualifications of judge and jury); see also Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 103 (1990) (arguing that conflict over the respective roles of the judge and the jury exists because the judges represent a professional class while the juries consist of laypeople).

⁴³ See, e.g., NANCY GERTNER & JUDITH MIZNER, *THE LAW OF JURIES* §§ 3.15, 3.27 (1997).

⁴⁴ With urbanization, the juries lost their "proximity to the persons and events of the cases brought before them," and "lost their capacity to inform themselves." JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 64 (2003).

⁴⁵ See *id.*

⁴⁶ See Barkow, *supra* note 16, at 71.

⁴⁷ See Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 570, 571 (2005) [hereinafter Gertner, *Sentencing Reform*].

⁴⁸ *Id.* at 573.

⁴⁹ *Id.* at 571.

⁵⁰ Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. REV. 1179, 1186 (1993).

⁵¹ See *Williams v. New York*, 337 U.S. 241, 246–47 (1949) (describing the different evidentiary standards at trial and at sentencing); William J. Kirchner, *Punishment Despite Acquittal: An Unconstitutional Aspect of the Federal Sentencing Guidelines?*, 34 ARIZ. L. REV. 799, 810–11 (1992) (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)).

doubt.⁵² At the sentencing stage, the rules of evidence did not apply; the standard of proof was the lowest in the criminal justice system, a fair preponderance of the evidence.⁵³ In order to maximize the information available to the judge, to allow the judge to exercise her clinical judgment, and to minimize constraints on her discretion, sentencing procedures were far less formal than trial procedures.⁵⁴ In part, what the judge was doing was what the jury had been doing before indeterminate sentencing, namely individualizing punishment, sometimes countering the “overzealous prosecutor” with a more lenient sentence, tempering the harsh effects of criminal laws of general application to the individual case.⁵⁵

Significantly, the jury was hardly mentioned in connection with sentencing during this period.⁵⁶ There was not the remotest concern about judges usurping the jury’s role.⁵⁷ Their roles were specialized, each critically important in its own sphere, each bringing their unique competence to bear.⁵⁸ The judge was the expert at sentencing; the jury was the fact-finding expert at trial.⁵⁹

⁵² The first stage was the “definition of culpable conduct and the adjudication of guilt.” Gerald E. Lynch, *The Sentencing Guidelines as a Not-So-Model Penal Code*, 7 FED. SENT’G REP. 112, 112 (1997). The second stage was the “consequences of conviction for the offender.” *Id.*

⁵³ See *Williams*, 337 U.S. at 246–47; Kirchner, *supra* note 51, at 810–11.

⁵⁴ In *Williams*, for example, a jury convicted the defendant of first degree murder, and recommended life imprisonment. 337 U.S. at 241. The judge disagreed and sentenced the defendant to death. *Id.* at 242. While *Williams* had no criminal record, the judge relying on the presentence report, which contained information inadmissible at trial, concluded that the defendant had committed a string of uncharged burglaries, that he had a “morbid sexuality,” and was a “menace to society.” *Id.* at 244. “Retribution is no longer the dominant objective of the criminal law,” the Court declared. *Id.* at 248. Rather, “reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.” *Id.* Any restrictions upon a trial judge’s ability to obtain pertinent information “would undermine modern penological . . . policies.” *Id.* at 249–50; see Gertner, *Circumventing Juries*, *supra* note 24, at 421 (“Like a social worker or a doctor, the judge exercised his or her clinical judgment to arrive at a sentence. In order to maximize the information available to the judge, and to minimize constraints on her discretion, sentencing procedures were less formal than trial procedures.”).

⁵⁵ Barkow, *supra* note 16, at 74.

⁵⁶ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 561 (2000) (Breyer, J., dissenting) (questioning why there were no constitutional objections made to the indeterminate sentencing system where a jury can find a defendant guilty of a crime, subject to a wide range of penalties, where the actual sentence was left entirely to the judge’s discretion, but there is constitutional objection for a legislature to guide the judge’s discretion within the penalty range).

⁵⁷ See *id.*

⁵⁸ See Gertner, *Circumventing Juries*, *supra* note 24, at 431–32.

⁵⁹ *Id.*

III. DETERMINATE SENTENCING

With the enactment of the Sentencing Reform Act (SRA),⁶⁰ bringing with it so-called “guidelines” that became more and more mandatory, and also with the passage of mandatory minimum statutes, the division of labor between judge and jury changed dramatically—because *judging* changed, while the jury remained as it had in the indeterminate era.⁶¹ As I noted in 1999, several years before *Apprendi*:

[T]he sentencing guidelines regime enacted by the SRA runs the risk of substantially changing the balance between judge and jury. The SRA created a new set of experts, the Sentencing Commission, directed by Congress to formulate guidelines to structure judicial discretion. But to the degree that the Guidelines are mechanistically enforced, the “Commission” experts supplant, rather than supplement, the “old” experts—the judges. And to the degree that the judge’s role is transformed to “just” finding the facts, now with Commission-ordained consequences what the *judge* does begins to look precisely like what the *jury* does, only with fewer safeguards, less formality, and far less legitimacy.⁶²

And the impact of the SRA on the judge-jury balance applied even more to mandatory minimum statutes.

How did this happen? First, with regard to the SRA: federal sentencing reform followed the failure to enact substantive federal criminal law reform, the law that juries were supposed to apply, the law that comprised the elements of the federal offenses.⁶³ The federal substantive law was chaotic, with overlapping offense categories, amended willy-nilly depending upon Congress’ determination of the crime du jour. At the same time, punishment provisions continued to reflect the indeterminate sentencing approach, with a broad imprisonment range for each offense.⁶⁴

Had substantive reform of the federal criminal law succeeded, at the very least, the criminal code would have been broken down into smaller and presumably more rational offense categories for juries to apply. For example, the jury would have had to determine whether aggravating factors were present in the commission of the offense, factors like the presence of a weapon or the vulnerability of the victim. In effect, *they* would have been asked to consider many—although not all—of the factors that were

⁶⁰ 28 U.S.C. §§ 991–98 (1994) (establishing the United States Sentencing Commission).

⁶¹ See Gertner, *Circumventing Juries*, *supra* note 24, at 421–22.

⁶² *Id.*

⁶³ See Gertner, *Sentencing Reform*, *supra* note 47, at 573–74.

⁶⁴ See *id.*

subsequently embodied in the federal guideline regime for *judicial* determination.⁶⁵

Rather, “the goal [of the SRA] was to rationalize ‘what judges do,’” leaving “what juries do” unchanged.⁶⁶ Juries would continue to decide guilt or innocence, as they had before—yes or no to bank robbery broadly defined, or mail fraud, or gun charges.⁶⁷ Judges were now to find facts within the wide punishment ranges using the “guidelines”—code-like categories, with determinate and often onerous consequences.⁶⁸ Under these guidelines, a defendant found with a gun would receive a number of points; if found with a vulnerable victim, he would receive more points; and so on.⁶⁹ As the points mounted, so did the sentence.⁷⁰ Furthermore, judges were charged with making these determinations in a setting which had not materially changed from the relative informality of the indeterminate days.⁷¹ As one scholar noted, one consequence of retaining statutes “built for broad discretion” while creating an ostensibly “rigid” sentencing code, was that “what are now perceived to be critical issues of culpability” were pushed “into a second-string fact-finding process.”⁷²

To be sure, the SRA provided only an outline of these changes. The first United States Sentencing Commission made policy choices that exacerbated the impact of the Guidelines on the division of labor between judges and juries.⁷³ The Commission opted for a “modified real offense system,” under which the offense of conviction, notably *the offense that the jury found*, was just the starting point.⁷⁴ The sentencing “score” would be adjusted depending upon the judge’s determination of additional facts that may—or may not—have been screened by the jury.⁷⁵ The Commission chose to key the Guidelines mainly to objective factors to minimize judicial discretion, even

⁶⁵ Gertner, *Circumventing Juries*, *supra* note 24, at 427.

⁶⁶ *Id.*

⁶⁷ *See id.* at 431.

⁶⁸ *Id.* at 428.

⁶⁹ *See* Todd E. Witten, *Sentence Entrapment and Manipulation: Government Manipulation of the Federal Sentencing Guidelines*, 29 AKRON L. REV. 697, 703 (1996).

⁷⁰ *See id.* at 703–04.

⁷¹ Gertner, *Circumventing Juries*, *supra* note 24, at 432.

⁷² Lynch, *supra* note 52, at 114.

⁷³ *See* Gertner, *Circumventing Juries*, *supra* note 24, at 428.

⁷⁴ *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 11–12 (1988).

⁷⁵ “Relevant conduct,” for example, involved characteristics of the offense, including factors particular to the type of crime, such as the quantity of drugs (for narcotics crimes), or the dollar amounts of the loss (for fraud), as well as general offense characteristics like leadership role or harm to the victim. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.3 (2004).

though that meant ignoring entirely or restricting the consideration of the kinds of factors judges had taken into account in the past.⁷⁶ Rather than evaluating such things as *mens rea*, or addiction, or family background, the Commission's guidelines put overarching emphasis on the quantity of the drugs, or the value of the loss in a fraud case.⁷⁷

Not only was the judge to focus on "objective" facts as well as facts outside of the offense of conviction, whatever facts she found had very specific punishment consequences.⁷⁸ The sentence was determined by a relatively complex grid with the adjusted offense level on the one hand, and the criminal history of the defendant on the other.⁷⁹ The sentence rested in that narrow range unless the judge found a basis for a departure from the established guidelines, a decision that would be carefully scrutinized on appeal.⁸⁰ Over time these policy decisions, together with other factors led to rules that were "guidelines" in name only.⁸¹ They were, for all intents and purposes, obligatory.⁸²

United States v. Watts was the coup de grace.⁸³ With *Watts*, the division between trials and sentencing—and the jury's diminished role—became even more apparent. The Court held that the jury's acquittal is irrelevant to the sentencing decision, so long as the defendant was convicted of something to

⁷⁶ See Gertner, *Circumventing Juries*, *supra* note 24, at 428.

⁷⁷ See *id.*; Gertner, *Sentencing Reform*, *supra* note 47, at 575–76.

⁷⁸ Gertner, *Circumventing Juries*, *supra* note 24, at 428.

⁷⁹ See KATE STITH & JOSE CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 179–83 (1998)

⁸⁰ See Kevin R. Reitz, *Sentencing Guideline Systems and Sentencing Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV 1441, 1466 (1997).

⁸¹ See Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 529–31, 533 (2007) (evaluating why federal judges at all levels enforced the Federal Sentencing Guidelines with a rigor not required by either the language of the manual or the SRA).

⁸² See *id.*

⁸³ 519 U.S. 148 (1997). The defendant, Watts, was convicted of possessing cocaine with intent to distribute under 21 U.S.C. § 841(a)(1) and acquitted of using a firearm in the course of a drug offense under 18 U.S.C. § 924(c); see *United States v. Watts*, 67 F.3d 790, 793 (9th Cir. 1995). Despite his acquittal on the firearms charge, the district court increased his sentence because of the firearm possession. See *Watts*, 519 U.S. at 150. The Guidelines, the Court found, required an upward increase in the sentencing range if the court found by a preponderance of the evidence that "the defendant did, in fact, use or carry . . . the weapon in connection with a drug offense." *Id.* at 157. See U.S. SENTENCING MANUAL § 2D1.1(b)(1) (2004) (raising the sentence if "a dangerous weapon (including a firearm) was possessed" during the offense of conviction); see also Nancy Gertner, *Apprendi and the Return of the Criminal Code*, 37 CRIM. L. BULL. 553, 554 (2001) [hereinafter Gertner, *Apprendi and the Return*].

which the acquitted conduct was relevant.⁸⁴ In effect, roles of the judge and jury were not specialized at all; “the judge was directly second-guessing the jury.”⁸⁵

In addition to (and arguably inconsistent with) the sentencing guidelines, Congress continued to enact mandatory minimum statutes and mandatory sentencing enhancements.⁸⁶ Such statutes bypassed the new “expert” Commission.⁸⁷ In effect, Congress was issuing a direct order to the courts—sentences for this offense will be no less than five or ten or whatever term of years if the jury finds the defendant guilty.

As in the indeterminate sentencing era but unlike the colonial period when the jury found the general facts made relevant by the “elements of the offense,” they did so not knowing what the punishment was.⁸⁸ And if they happened to find out—as when a codefendant, facing the same charge as the defendant, and cooperating with the government, was cross examined about his deal—the jury was expressly told they could not take the punishment into account in deciding the defendant’s culpability.⁸⁹

To be sure, with mandatory sentencing, the judge’s role was *also* diminished. While she *knew* the punishments, she lacked the authority to make the punishment fit the crime. If she found facts that were not supported by the record—if she did what the colonial juries had done when they found the value of the larceny to be less than charged to affect the punishment—she would be appealed and reversed.⁹⁰ Sentencing was now all about formal fact-finders, applying a guideline or statutorily-determined number to the facts found by a preponderance of the evidence, adding up the column of figures that resulted, and picking a number in the grid, no matter how unfair the

⁸⁴ See *Watts*, 519 U.S. at 154 (citing approvingly to U.S. SENTENCING MANUAL § 1B1.3 (1995) (defining “relevant conduct” to encompass a wide range of activity related to the offense of conviction, including similar offenses that were part of the “same course of conduct or common scheme or plan as the offense of conviction”)).

⁸⁵ Gertner, *Circumventing Juries*, *supra* note 24, at 422.

⁸⁶ See Gertner, *Sentencing Reform*, *supra* note 47, at 576; *United States v. Harris*, 536 U.S. 545, 570 (2002) (Breyer, J., concurring) (“Mandatory minimum statutes are fundamentally inconsistent with Congress’[s] simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines.”).

⁸⁷ See Gertner, *Sentencing Reform*, *supra* note 47, at 576.

⁸⁸ See, e.g., *Shannon v. United States*, 512 U.S. 573, 587 (1994) (reiterating “the rule against informing jurors of the consequences of their verdicts” and rejecting a proposed exception).

⁸⁹ See *id.* at 578.

⁹⁰ See Witten, *supra* note 69, at 705 & n.46.

outcome.⁹¹ Only the prosecutor had any meaningful discretion with respect to mandatory statutes: he could decline prosecution altogether or opt for a lesser charge.⁹²

Notwithstanding these very profound changes, until *Apprendi* and its progeny, the Supreme Court continued to ratify, with few exceptions, the distinction between sentencing “enhancements”—which were for the judge to decide—and “elements of the offense”—which were for the jury to consider—even as Guidelines and statutory enhancements were fast outstripping the significance of the “elements.”⁹³ Congress and the Commission could package the punishment virtually without limitation—putting facts in one category rather than the other, and thereby changing not just the decisionmaker, but also the procedural protections.⁹⁴

IV. APPRENDI, BLAKELY, BOOKER, AND BEYOND

Apprendi was a watershed. After years of affirming harsh sentences under the guidelines and mandatory minimum statutes, with few procedural safeguards, the *Apprendi* majority found a case that simply went too far.⁹⁵ The sentencing judge in *Apprendi*—not the jury—had decided issues that seemed like jury issues with a considerable impact on the sentence.⁹⁶ Moreover, he had done so under the usual sentencing procedures—minimal evidentiary standards, the lowest burden of proof.⁹⁷ The pattern had begun to be clearer: What the judge did in a determinate sentencing regime began to look exactly like what the jury did, only with fewer safeguards.

Charles C. Apprendi, Jr. was charged with numerous state law crimes relating to several incidents in which shots were fired at the home of an African-American family who had moved into a previously all-white New

⁹¹ See Jack B. Weinstein, *The Role of Judges in a Government Of, By and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 193–95 (2008).

⁹² See, e.g., *United States v. Bringham*, 977 F.2d 317, 320 (7th Cir. 1992) (remarking that a defendant can only avoid a mandatory sentence if a prosecutor declines to bring the corresponding change).

⁹³ See Gertner, *Circumventing Juries*, *supra* note 24, at 430.

⁹⁴ See *id.* at 429–30 (citing to *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), as an example of a statute which reserved certain factual issues for a judge to decide on sentencing and to *Jones v. United States*, 526 U.S. 227 (1999), as an instance in which the Court interpreted the statute to require all facts to be found by a jury).

⁹⁵ See generally Nancy Gertner, *Apprendi and the Return*, *supra* note 83; Nancy Gertner, *What Has Harris Wrought?*, 15 FED. SENT’G R. 83 (2002) [hereinafter Gertner, *What Has Harris*].

⁹⁶ See *Apprendi v. New Jersey*, 530 U.S. 466, 476–77, 479 (2000).

⁹⁷ See *id.* at 481–82 (citing *Williams v. New York*, 337 U.S. 241, 246 (1949)).

Jersey neighborhood.⁹⁸ He pled guilty to two firearms possession counts, carrying a possible sentence of five to ten years each, and one bomb possession count, carrying a possible sentence of three to five years.⁹⁹ At the plea hearing, the trial judge, after hearing conflicting evidence (including Apprendi's testimony that alcohol abuse, not racial bias, explained his conduct), found by a preponderance of the evidence that the crimes were committed with a purpose to intimidate, the kind of factor, intent or motivation, that a jury might be expected to consider.¹⁰⁰ The judge then sentenced Apprendi, under the New Jersey hate crime law, to a twelve-year enhanced sentence on one of the firearms possession counts, and to shorter concurrent sentences on the other two counts.¹⁰¹ The New Jersey appellate court affirmed.¹⁰²

One can evaluate *Apprendi* as reflecting the majority's concern about the lax procedures used to sentence the defendant. And that concern could have led to a more general due process approach, with the extent of the process reflecting the impact that a given factor has on the sentence—in effect, sliding scale due process.¹⁰³ But such an approach would not have been as palatable to Justice Scalia as was grounding the right on a particular constitutional institution, the jury.¹⁰⁴ It was all or nothing—jury or no jury—nothing in between. Still, while the Sixth Amendment does not mention sentencing, the *Apprendi* result, according to Justice Scalia, was the only way to give “intelligible content” to it:

Justice Breyer proceeds on the erroneous and all-too-common assumption that the Constitution means what we think it ought to mean. It does not; it means what it says. And the guarantee that “in all criminal prosecutions, the accused shall enjoy the right to . . . trial by an impartial jury” has no intelligible content unless it means that all the facts which must

⁹⁸ *State v. Apprendi*, 731 A.2d 485, 486 (N.J. 1999).

⁹⁹ *Id.* at 487.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 497.

¹⁰³ “[D]ue process is flexible and calls for such procedural protections as the particular situation demands . . . Its flexibility is in its scope once it has been determined that some process is due . . .” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

¹⁰⁴ See, e.g., Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 24–25 (2007) (noting Justice Scalia's desire to ground the exercise of personal jurisdiction over a nonresident transient in the Fourteenth Amendment by arguing that that exercise “dates back to the adoption of the Fourteenth Amendment and is still generally observed” and so “unquestionably meets the standard” (quoting *Burnham v. Superior Court*, 495 U.S. 604, 622 (1990) (Scalia, J., plurality opinion))).

exist in order to subject the defendant to a legally prescribed punishment *must* be found by a jury.¹⁰⁵

But two questions about how far giving “intelligible content” to the jury trial extended remained unanswered. The first was what triggers the Sixth Amendment right? Was it a sentencing enhancement that seemed to create a new statutory maximum as in *Apprendi*? Or, more broadly, was it any fact that seemed to have a substantial impact on the sentence as Justices Thomas and Scalia suggested in their *Apprendi* concurrences?¹⁰⁶ By *Blakely* and then *Booker*, it was clearly the latter: any fact which “the law makes essential to [the] punishment.”¹⁰⁷

Blakely resulted in a finding that the state trial judge’s sentence of more than three years above the fifty-three month statutory maximum assigned to the offense to which the defendant pled, on the basis of the sentencing judge’s conclusion that the defendant acted with deliberate cruelty (which was disputed), violated the Sixth Amendment.¹⁰⁸ The result of *Blakely* was that juries were now required to make factfindings “essential to [the] punishment,” factfindings that the Washington state statute had required judges to make.¹⁰⁹ In *Booker*, the majority¹¹⁰ made a comparable finding with regard to the Federal Sentencing Guidelines: to the extent that the Federal Sentencing Guidelines mandated federal judges to find facts that increased a defendant’s sentence beyond the sentence required by the offense of conviction (which a jury found) or the plea, they too violated the Sixth Amendment.¹¹¹ But the remedy for the constitutional violation fashioned by the Court was different from *Blakely*: a different majority concluded that by excising the provisions of the Sentencing Reform Act which made the Federal Sentencing Guidelines mandatory, the constitutional violation was

¹⁰⁵ *Apprendi v. New Jersey*, 530 U.S. 466, 499 (2000) (Scalia, J., concurring) (alteration in original).

¹⁰⁶ See Gertner, *Apprendi and the Return*, *supra* note 83, at 568 n.83.

¹⁰⁷ *United States v. Booker*, 543 U.S. 220, 232 (2005) (citing *Blakely v. Washington*, 542 U.S. 296, 301 (2004)).

¹⁰⁸ See *Blakely*, 542 U.S. at 314. The only kind of fact-finding excluded from this requirement was a fact-finding concerning a prior conviction. See *id.* at 301.

¹⁰⁹ *Id.*

¹¹⁰ The majority opinion in *Booker* consisted of two parts: the first part was written by Justice Stevens, in which Justices Scalia, Souter, Thomas, and Ginsburg joined, *Booker*, 543 U.S. at 225–26; and the second part was written by Justice Breyer, in which Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Ginsburg joined, *id.* at 244.

¹¹¹ See *id.* at 244 (Stevens, J., delivering the opinion of the Court in part). Again, as in *Blakely*, the only kind of fact-finding excluded from the jury requirement was a fact-finding concerning a prior conviction. See *id.*

cured.¹¹² To the extent the judge was doing something different from what the jury was doing—something more akin to the judge’s role pre-Guidelines—the Sixth Amendment was not implicated at all.¹¹³ The jury would decide the facts comprising the elements of the offense; the judge would consider facts comprising sentencing enhancements under the Federal Sentencing Guidelines but they were not obliged to increase sentences even if they found the required facts; the Guidelines were advisory.

But the second problem, which the Court has not had an opportunity to address, involves the implications of these decisions for the conduct of the jury trials in mandatory minimum punishment cases. Broadly speaking, there are two kinds of mandatory minimum statutes, those in which judges are required to make the predicate fact-findings, and those in which juries make them. The Court addressed the former in *Harris v. United States*, deciding whether the *Apprendi* rule should apply to judicial fact-finding that increases the minimum sentence rather than the maximum sentence.¹¹⁴ The Court found it did not, in a decision which many believe has been made vulnerable by those that followed it.¹¹⁵ But many statutes in fact give the power to make mandatory minimum fact-findings to juries, such as gun charges under 18 U.S.C. § 924(c); arson charges under 18 U.S.C. § 844(a)(1); and pornography cases under 18 U.S.C. § 2251(c)(1)(A). And when they do, when their role is comparable to that of the colonial jury, should they be told of the

¹¹² *Id.* at 246 (Breyer, J., delivering the opinion of the Court in part) (excising 18 U.S.C. §§ 3553(b)(1), 3742(e) of the Federal Sentencing Guidelines).

¹¹³ See *supra* notes 56–61 and accompanying text.

¹¹⁴ Justice Scalia was part of the majority in both *Apprendi* and *Harris*. See *Harris v. United States*, 536 U.S. 545, 547–48 (2002); *Apprendi v. New Jersey*, 530 U.S. 466, 468 (2000). In *Harris* he did not file a separate opinion and his position is less than comprehensible. As one scholar noted, “It is difficult to understand Justice Scalia’s switch in *Harris*, and it does not seem supported by any claim to originalism.” Rachel Barkow, *Originalists, Politics, and Criminal Law on the Rehnquist Court*, 74 GEO. WASH. L. REV. 1043, 1057 n.89 (2006). Even Justice Breyer, an *Apprendi* dissenter, acknowledged that there was no meaningful way of distinguishing *Apprendi* and *Harris*. See *Harris*, 536 U.S. at 569–70 (Breyer, J., concurring in part and dissenting in part). Justice Scalia’s vote in *Harris* appears to be an instance where the attitudinalists would be correct to note the failure of legal methodology to explain the outcome and where political preference or ideology seems to be driving the decision. See Barkow, *supra*, at 1076–77.

¹¹⁵ See *Harris*, 536 U.S. at 568–69. The Court had gone from holding that the Sixth Amendment is implicated in the determination of facts that increase a statutory maximum, *Apprendi*, 530 U.S. at 497, to applying the Sixth Amendment to all facts “essential to [the] punishment,” *Booker*, 543 U.S. at 232 (citing *Blakely*, 542 U.S. at 301). At the very least, facts essential to a mandatory minimum should fit into the latter category. See Douglas Berman, *Tweaking Booker: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341, 360 (2006).

punishment?¹¹⁶ In such cases, respected judges have concluded that the jury ought to be informed of the consequences of its decision on the policy and indeed, Sixth Amendment grounds.¹¹⁷

First, there is the practical concern that jurors will inevitably speculate about the consequences of their verdict, and may well do so erroneously. Judge Gerald Lynch used this rationale in *United States v. Pabon-Cruz*.¹¹⁸ Jorge Pabon-Cruz was tried for, among other charges, advertising child pornography in violation of 18 U.S.C. § 2251(c)(1)(A), a charge which carried a ten-year mandatory minimum sentence.¹¹⁹ He was also charged with distributing child pornography in violation of 18 U.S.C. § 2252A(a)(2)(B),¹²⁰ which carried a possible sentence of five years in prison—not a mandatory one.¹²¹ Using file-sharing software, Pabon-Cruz participated in a chat room and advertised child pornography.¹²² On the one hand, the offense was quite serious: 2,857 people had responded to Pabon-Cruz's advertisement; he had distributed over 11,000 images, some of which were quite graphic.¹²³ On the other hand, there were mitigating factors: He made no money from his activities,¹²⁴ nor had he participated in making the images or had contact with any of the children whose pictures he distributed.¹²⁵ In addition, Pabon-Cruz was a teenager at the time of the offense.¹²⁶ Moreover, he had been raised by a mentally-disabled mother.¹²⁷

¹¹⁶ In *Oregon v. Ice*, the Court found that a judge may find post-verdict facts to justify ordering a defendant to serve consecutive rather than concurrent sentences, fact-findings that surely have a material impact on punishment. 129 S. Ct. 711, 716–20 (2009). The Court did so in part based on the prevailing historical practice under the common law. *Id.* Because juries historically played no role in the determination of consecutive versus concurrent sentencing, since the decision was not a common law jury function, the Court reasoned that Oregon's scheme posed no threat to the jury's role as a bulwark between the accused and the state that the Sixth Amendment embodied. *Id.* at 718–19. But colonial juries *did* play a significant role in other punishment decisions as has been described above, and did so knowing the implications of their verdict. *See supra* Part I.

¹¹⁷ *See, e.g., United States v. Polizzi*, 549 F. Supp. 2d 308, 404 (E.D.N.Y. 2008) (Weinstein, J.); *see also infra* note 122.

¹¹⁸ 255 F. Supp. 2d 200, 204–19 (S.D.N.Y. 2003), *aff'd in part and remanded*, 391 F.3d 86 (2d Cir. 2004).

¹¹⁹ *Id.* at 204, 209 n.6.

¹²⁰ *Id.* at 204.

¹²¹ *See* 18 U.S.C. § 2252A(b)(1) (2006).

¹²² *Pabon-Cruz*, 255 F. Supp. 2d at 212.

¹²³ *Id.* at 213.

¹²⁴ *Id.* at 210 n.7.

¹²⁵ *See Benjamin Weiser, A Judge's Struggle to Avoid Imposing a Penalty He Hated*, N.Y. TIMES, Jan. 13, 2004, at A1.

¹²⁶ *United States v. Pabon-Cruz*, 391 F.3d 86, 87 (2d Cir. 2004).

At the time of his arrest he was a computer student on scholarship at the University of Puerto Rico.¹²⁸

Pabon-Cruz's defense counsel wanted the jurors to be told the possible consequences of a guilty verdict, at least in part based on the belief that a jury might erroneously believe that it was *distribution* of child pornography, rather than *advertising* its distribution, that carried the harsher penalty.¹²⁹ (Given the still chaotic criminal code, this was not an unreasonable concern.) It might opt to convict on the advertising charge and acquit on the distribution charge believing it was sparing Pabon-Cruz a harsh sentence.¹³⁰ The prosecution objected.¹³¹ Judge Lynch proposed to tell the jury of the consequences in part to avert errors in their understanding.¹³²

But Judge Lynch also suggested a broader argument, namely deriving from the jury's historical role. He noted:

[T]hat a jury is inevitably engaged in something more than a "linear scheme of reasoning" and inevitably must confront the difficult moral project of deciding "to face the findings that can send another human being to prison [or] to hold out conscientiously for acquittal" . . . also supports the view that jurors should be aware of the moral consequences of their decisions. This is especially the case where, as here, the average juror might well not remotely imagine that advertising child pornography not only carries a harsher penalty than actually delivering it, but that the penalty is a mandatory ten years in prison, even for a defendant who is little more than a child himself.¹³³

He also instructed the jury that they were not to engage in nullification, nor allow the defense to argue it, but to understand their historical role in mitigating punishment.¹³⁴ He said that "I think there is a difference between saying that the court does not and cannot approve of nullification, and ignoring the fact that juries have historically played this role."¹³⁵ Although he insisted that jurors should not be encouraged to engage in nullification, he noted that "[h]istorically jurors have sometimes done that, and the judgment of history is sometimes that when they do that, they are in effect lawless and evil, and at other times the judgment of history is that they've done the right

¹²⁷ *Id.* at 88.

¹²⁸ *Id.*

¹²⁹ *See Pabon-Cruz*, 255 F. Supp. 2d at 210.

¹³⁰ *See Pabon-Cruz*, 391 F.3d at 89.

¹³¹ *Id.* at 88.

¹³² *Id.* at 89–90.

¹³³ *Pabon-Cruz*, 255 F. Supp. 2d at 214.

¹³⁴ *See id.* at 214–15.

¹³⁵ *Pabon-Cruz*, 391 F.3d at 90.

thing.”¹³⁶ Pabon-Cruz was convicted and sentenced to ten years.¹³⁷ The sentence was later overturned by the Second Circuit on a ground unrelated to informing the jury about punishment.¹³⁸ His final sentence was four years.¹³⁹

There is precedent for instructions whose goal was to clarify a juror’s potential misperceptions of the law. In part, battered women’s syndrome evidence was introduced to deal with juror misapprehension of the dynamics of domestic violence.¹⁴⁰ That a woman who claimed to have been battered stayed with her abuser did not undermine the credibility of her claim of abuse; indeed, the psychological syndrome explained her passivity in the face of brutality.¹⁴¹ In many states, jurors are also told about the consequences of a not guilty by reason of insanity plea.¹⁴² And there is or should be concern of the opposite sort—that some jurors will know the consequences of their verdict while others will not. As described above, a cooperating witness facing the same charges as the defendant, may be cross-examined about the potential risk of a mandatory punishment. In any case, it is not unreasonable to assume that juries are making assumptions about punishment, assumptions which may well affect their decisions and which may well be wrong.

The Court addressed a similar question about informing the jury about punishment consequences in *Shannon v. United States*.¹⁴³ In a majority opinion authored by Justice Thomas, the Court concluded that the Insanity Defense Reform Act,¹⁴⁴ did not require that the jury be informed of the consequences of a not guilty by reason of insanity verdict.¹⁴⁵ While the decision rests principally on the IDRA statute, not the Constitution, Justice

¹³⁶ *Id.*

¹³⁷ *Id.* at 86.

¹³⁸ *See id.* at 105 (interpreting the plain language of the statute to not require the imposition of a mandatory term of imprisonment).

¹³⁹ *See* Julia Preston, *Sentence Cut for Student in Child Pornography Case*, N.Y. TIMES, May 28, 2005, at B3.

¹⁴⁰ *See* *People v. Torres*, 488 N.Y.S.2d 358, 362–63 (1985) (finding battered women’s syndrome testimony to be admissible to correct juror misperceptions about the behavior of battered women).

¹⁴¹ *See* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Batterers Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN’S STUD. 219, 235 (1992) (describing rationale for a provision of the California Evidence Code permitting the introduction of Battered Women’s Syndrome testimony); Charles P. Ewing & Moss Aubrey, *Battered Women and Public Opinion: Some Realities About the Myth*, 2 J. FAM. VIOLENCE 257, 263 (1987).

¹⁴² *See* *Shannon v. United States*, 512 U.S. 573, 592 & n.3 (1994) (Stevens, J., dissenting).

¹⁴³ *Id.* at 573.

¹⁴⁴ 18 U.S.C. §§ 17, 4241–4247 (2006).

¹⁴⁵ *See Shannon*, 512 U.S. at 587.

Thomas also found that instruction was not necessary, in the light of the jury's customary role as the determiner of guilt or innocence.¹⁴⁶ And his view of the jury's "customary role" in *Shannon* vis a vis the judge was straightforward, far more straightforward than in his *Apprendi* concurrence: the jury finds facts; judges sentence, he noted.¹⁴⁷ The consequences of the verdict are "irrelevant to the jury's task."¹⁴⁸ And this was so even if there was a strong possibility that some jurors would be mistaken about the outcome of "not guilty by reason of insanity," believing that the defendant will go free.¹⁴⁹ The question, not an unsubstantial one, is whether the majority position needs to be revisited in cases involving mandatory minimum sentences.

Looking to Justice Scalia's stirring language in *Apprendi* and its progeny, Judge Weinstein suggested the broader constitutional ground for informing the juries, akin to the one suggested here. In *United States v. Polizzi*, Judge Weinstein explicitly recognized a defendant's constitutional right to inform the jury of mandatory sentencing consequences in certain cases based in part on the jury's historic role, citing to the practices described above—juries convicting of a lesser offense to avoid the death penalty, aware of the consequences of their acts either because they were veteran jurors or because the presiding judge told them.¹⁵⁰ And if the Supreme Court were true to its approach to give "intelligible content" to the jury trial right, that content should include this instruction.¹⁵¹ The Second Circuit again disagreed, although the Court noted that there may be instances in which a judge would do so, namely to correct a misstatement by a prosecutor or a witness.¹⁵² The Supreme Court has not had the opportunity to decide the issue of informing the jury about mandatory punishment after *Apprendi* and its progeny.

The Court should do so. Jury decision-making is contextual, not linear. Juries are not professional judges; we do not want them to be. As Justice Scalia said in *Ring v. Arizona*:

¹⁴⁶ *Id.* at 580.

¹⁴⁷ *Id.* at 579.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 587.

¹⁵⁰ 549 F. Supp. 2d 308, 414–17, 443 (E.D.N.Y. 2008).

¹⁵¹ *Id.* at 427.

¹⁵² *United States v. Polizzi*, 564 F.3d 142, 161–62 (2d Cir. 2009). On remand, Judge Weinstein reaffirmed his order granting Polizzi a new trial, albeit on other grounds. *See United States v. Polizzi*, 262 F.R.D. 160, 161–62 (E.D.N.Y. 2009) (restricting retrial on five rather than twenty-three counts because the additional counts were multiplicitous). The Second Circuit vacated the Judge's grant of a new trial and remanded again. *See United States v. Polouizzi*, No. 09-4594-cr, 2010 U.S. App. LEXIS 19680, at *1 (2d Cir. Sept. 22, 2010).

The Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness or efficiency of potential factfinders. Entrusting to a judge the finding of facts necessary to support a death sentence might be “an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights. It has never been efficient; but it has always been free.”¹⁵³

Juries’ contextual decision-making has been recognized and respected in other areas. For example, on the civil side, the law permits juries to hear evidence of both damages and liability.¹⁵⁴ It does not mandate bifurcation.¹⁵⁵ This is so even if the damages discussion affects the liability determination, if sympathy for the victim colors the jury’s view of the facts.¹⁵⁶ In a similar vein, in criminal cases, the Supreme Court has allowed inconsistent verdicts to stand, acquitting on one charge and convicting on another, because they “reaffirm the jury’s power to exercise leniency by limiting punishment to sentence upon only one of many counts.”¹⁵⁷

Significantly, prosecutors have the power to mitigate punishment when they decline prosecution under a mandatory minimum statute, where the circumstances of the offender or the offense suggest lenient treatment is appropriate.¹⁵⁸ In contrast, judges in a mandatory minimum regime, lack the power to do so, the kind of power they had had in the past under indeterminate sentencing.¹⁵⁹ And while the modern jury arguably has the constitutional authority to do so under recent sentencing law, and the practical ability to do

¹⁵³ 536 U.S. 584, 607 (2002) (alteration in original) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring)).

¹⁵⁴ See Stephen Landsman et. al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 337 (1998) (“[I]n [a] unitary trial, the jury makes one decision, after hearing all the evidence.”). At the same time, Rule 42(b) of the Federal Rules of Civil Procedure permits, but does not require, the separation of liability from damages. See FED. R. CIV. P. 42(b).

¹⁵⁵ See FED. R. CIV. P. 42(b).

¹⁵⁶ See Steven S. Gensler, *Bifurcation Unbound*, 75 WASH. L. REV. 709–10 (2000); see, e.g., *In re Beverly Hills Fire Litigation*, 695 F.2d 207, 217 (6th Cir. 1982) (“There is a danger that bifurcation may deprive plaintiffs of their legitimate right to place before the jury the circumstances and atmosphere of the entire cause of action which they have brought into the court, replacing it with a sterile or laboratory atmosphere in which causation is parted from the reality of injury.”).

¹⁵⁷ Barkow, *supra* note 16, at 81.

¹⁵⁸ See generally Bennet L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 408 (1992).

¹⁵⁹ See *supra* Part II.

so because of the general verdict, it lacks the tools. For juries, unlike prosecutors, and even judges, history teaches that this deficiency may well be more significant, implicating the jury's unique role in the constitutional structure. As Judge Bazelon once noted, Congress cannot possibly anticipate every case in which a defendant's conduct is "unlawful," but not "blameworthy" any more than it can identify a bright line rule for what is an accident and what is negligence.¹⁶⁰ "It is the jury . . . that must explore that . . . boundary," with its common sense, its intuitions and its compassion.¹⁶¹

¹⁶⁰ *United States v. Dougherty*, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

¹⁶¹ *Id.*; see also STITH & CABRANES, *supra* note 79, at 169 ("[N]o system of formal rules can fully capture our intuitions about what justice requires.").