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Notes

JURY SENTENCING IN NONCAPITAL CASES:AN IDEA WHOSE TIME HAS COME (AGAIN)?

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In a celebrated decision, Jerome Frank criticized the jury system for conferring on laymen “a vast power to commit error and do mischief by loading it with technical burdens far beyond its ability to perform.”¹ Since then, confidence in the ability of juries to perform their duties has only declined. Scholars frequently question the capacity of juries to understand the complex and technical issues that commonly arise in civil actions,² and social science research has cast doubt on the ability of criminal juries to perform their primary function of assessing credibility.³ The one task that juries indisputably perform better than judges is to reflect the “conscience of the community” and to express public outrage at the transgression of community norms.⁴ Juries are involved in the determination of capital punishment in every state that retains the death penalty, and just three *1776 decades ago over one-quarter of the states provided for jury sentencing in noncapital cases.⁵

Jury sentencing in noncapital cases is widely perceived to be an outdated remnant of the postcolonial period. This Note argues that jury sentencing may in fact provide the most effective means of implementing contemporary sentencing goals. I do not offer here a theoretical argument for assigning a greater role to juries in the determination of punishment. Rather, I offer a practical alternative to the current rudderless drift in sentencing policy. Eager to win a reputation as “tough on crime,” legislators have enacted piecemeal mandatory sentencing laws guided by no coherent policy. A survey of social science research indicates that the “reform” legislation exceeds the severity favored by public opinion.

Part I discusses the decline of the rehabilitative ideal in criminal punishment and the trend away from reliance on sentencing expertise in favor of more populist, retributive, and politically-driven decisionmaking procedures. This Part also presents evidence from the social sciences indicating that there is a disjuncture between, on the one hand, the public’s call for harsher penalties to which politicians respond with increasingly severe determinate sentencing provisions and, on the other, the public’s more lenient response when confronted with detailed descriptions of specific cases. These studies demonstrate that when mock jurors are asked to sentence defendants, they generally recommend penalties significantly below the statutory minimum in their jurisdiction. I argue that jury sentencing would permit a more direct and less distorted expression of public sentiment than the current system of legislatively and administratively enacted penalties and would avoid some of the unintended consequences of determinate sentencing, such as jury nullification in the face of harsh mandatory penalties. Part II addresses the traditional arguments against jury sentencing. After a historical survey of the institution, this Part examines social science research comparing punishments set by judges and juries and demonstrates that, contrary to popular perceptions, there is little evidence indicating that juries impose harsher, more disparate, or more racially biased punishments than judges. In the Conclusion, I explore some of the implications of the proposed change for other aspects of the criminal justice system.

***1777 I. The Failure of Determinate Sentencing and the Potential of Jury Sentencing**

The determinate sentencing movement was a response to national disillusionment with the rehabilitative ideal and to evidence of widespread racism among individual sentencing judges. Determinate sentencing, it was hoped, would reduce racial disparity and reflect the shift toward retributive theories of punishment by transferring sentencing decisions from expert judges and criminologists to legislative and administrative bodies representing community sentiment.

This Part argues that the determinate sentencing movement has failed to achieve its own sentencing goals. Social science has revealed a serious flaw in the current system of legislatively-enacted penalties: Politicians eager to appear “tough on crime” pass increasingly harsh mandatory sentencing laws that far exceed the sentences the public would choose if presented with specific cases affected by the law. This pathology of the determinate sentencing system results in sentences that do not accurately reflect society’s desire for retribution and may encourage jurors to nullify in order to avoid the harsh mandatory penalties. Determinate sentencing has also failed to reduce racial disparity in sentencing, arguably the most compelling goal of the uniform sentencing movement. Jury sentencing would overcome the deficiencies of the current sentencing process while still providing substantial community input. Further, jury sentencing would offer the possibility of individualized penalty determinations favored by academics and judges who criticize determinate sentencing.

A. Shifting Sentencing Goals and Institutions

Since the mid-1970s, public attitudes toward punishment and the proper nature of institutions responsible for assigning penalties have changed dramatically. Frustration with the failure of penal science to rehabilitate offenders and to predict future criminal behavior, combined with a gradual shift from rehabilitation to retribution as the dominant theory of punishment, led to the dismantling of indeterminate sentencing regimes. The determinate schemes that currently dominate both state and federal criminal justice systems have shifted sentencing power from judges and expert criminologists to untrained and politically-driven legislatures and administrative agencies. With the abandonment of reliance on expertise in the determination of punishment, jury sentencing becomes a viable alternative. Jury sentencing may in fact be a more direct and more effective mechanism for expressing the recent populist and retributive trends in criminal punishment. As I will show, social science research indicates that *1778 determinate sentencing fails to enforce accurately community norms of proper punishment.

In the era of rehabilitative punishment, sentencing called for “professional and diagnostic”⁶ judgments focusing on the individual offender’s capacity for rehabilitation and treatment, rather than on “the gravity of the particular act for which an offender happens to be tried.”⁷ Parole boards and adult authorities were given wide discretion to adjust the length of time served based on the prisoner’s progress in treatment. Originally a product of the progressive era,⁸ the indeterminate sentencing movement was fueled by an optimistic belief in the potential of the then- young science of criminology. For example, two researchers constructed prognostic tables to predict future dangerousness of offenders on the theory that it is “possible to introduce scientific method into the work of criminal courts and parole boards.”⁹ The expert determinations required by this treatment model of punishment are beyond the capacities of lay jurors. In the mid-1970s, research indicating the failure of treatment programs to reduce recidivism led to the abandonment of the rehabilitative ideal.¹⁰ Martinson’s 1975 survey titled *The Effectiveness of Correctional Treatment*, which documented the disappointing results of 231 prison programs, seemed to confirm the failure of the treatment model.

The 1970s witnessed, besides the debunking of “scientific” penology, a theoretical shift from rehabilitative to retributive punishment. A key moment in this development was the 1976 publication of *Doing Justice*, a report of the Committee for the Study of Incarceration led by Andrew von Hirsch. *Doing Justice* argued for a “just deserts” approach to punishment that would focus on the nature of the crime rather than the offender.¹¹ Today, no single theory of criminal punishment commands the level of support formerly enjoyed by rehabilitation, but there is some indication that retribution is becoming increasingly predominant. The Federal Sentencing Guidelines, for example, make retribution rather than rehabilitation the primary penological goal.¹² Under California’s sentencing statute, “the *1779 purpose of imprisonment for crime is punishment.”¹³ As retribution is an expression of the community’s moral outrage at the transgression of social norms, a lay jury, which is drawn from the community, is better equipped than expert judges or legislators to impose retributive sanctions on offenders.

Around 1975, indeterminate sentencing began to give way to a variety of more “determinate” schemes, including mandatory minimum penalties.¹⁴ The dismantling of the indeterminate sentencing movement shifted the punishment decision from judges to legislatures and sentencing commissions. Both of these institutions are largely politically driven; contemporary sentencing decisions are hardly expert determinations that flow from a coherent, scientific system of assigning penalties. As Martin has pointed out, determinate systems are inherently unstable and vulnerable to popular pressures.¹⁵ Unlike determinate systems, indeterminate schemes permit legislators to “crack down on crime” symbolically by raising maximum sentences in response to public pressure without altering the sentences actually imposed.¹⁶ Many scholars have remarked that a lack of expertise and vulnerability to public opinion make legislators particularly ill-equipped to establish coherent sentencing policies.¹⁷ Although one might assume that Sentencing Commissions provide professional, coherent guidelines because they are more insulated from political pressure and more experienced than legislators, research indicates that the decisions made by Sentencing Commissions are also politically driven. For example, although the Minnesota Sentencing Commission is widely considered one of the *1780 more successful experiments in determinate sentencing,¹⁸ the guidelines produced by the Minnesota Commission reflect political pressures in their extreme severity toward drug crimes and extreme leniency toward other nonviolent felonies,¹⁹ and the Commission bowed to public pressure following the “crime wave of ‘88” by ratcheting up penalties for all levels of crime.²⁰ As the Chairman of the Federal Sentencing Commission has stated, “[p]ublic input has played a pivotal role in the formulation of the sentencing guidelines.”²¹ Contemporary sentencing decisions are thus far from the scientifically-based expert determinations envisioned by proponents of indeterminate sentencing and rehabilitative punishment.

B. The Public’s Wish and Determinate Sentencing: A Target Missed

Determinate sentencing is not the only option remaining in the wake of disillusionment with “scientific penology.” Jury sentencing would permit a more direct and less distorted expression of public sentiment than the current system of legislatively and administratively enacted penalties. Social science research suggests a worrying disjuncture between the public’s general call for harsher penalties, to which politicians respond with increasingly severe sentencing provisions, and the public’s more lenient response when confronted with specific cases.

The results of several social science studies indicate that the trend toward harsh determinate sentencing stems from a basic misunderstanding and “gross oversimplification”²² of public sentiments toward punishment. Public opinion polls and surveys designed to elicit general impressions of *1781 the criminal sentencing system have repeatedly found that respondents believe that courts are too lenient in their determinations of punishment.²³ These same polls fuel the drive among politicians for ever harsher penalties. Researchers who delve more deeply than general survey and poll questions have discovered a paradox: 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. For example, a study of Illinois residents presented with a description of a standard residential burglary found that fewer than seven percent of the subjects suggested a punishment equal to or greater than the two-year minimum.²⁴ Several studies have documented this effect of specificity on mock juror leniency.²⁵

Researchers explain this discrepancy between generalized attitudes and reactions to specific cases by positing that citizens respond to general questions about sentencing by conjuring up their own (distorted) image of typical crimes. One study reported that survey respondents who felt that judicial sentences were generally “too lenient” were more likely to be thinking about violent or repeat offenders than were respondents who indicated that court sentences were “about right.”²⁶ Research also has shown that laymen systematically imagine that the typical crime for a particular offense category is much more serious than it actually is; for example, laypeople falsely assume that burglars are commonly armed and that the average burglar has a longer criminal record and is more likely to inflict physical harm in the future than statistics indicate.²⁷ Lay misperceptions of the seriousness of typical crimes result in part from the *1782 media bias toward reporting the most heinous crimes and in part from a natural psychological tendency--known as the “availability heuristic”--that causes subjects to recall more easily atypically severe crime stories.²⁸

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The public's view of sentencing as reported in very general surveys and polls thus reflect lay misperceptions of the severity of typical crimes, while responses to specific case studies more accurately reflect community opinions of sentencing issues. Politicians' reliance on misleading general polls in their design of sentencing policy has led to "a significant degree of legislative overenthusiasm for harsh sentencing":²⁹ There is a serious disjuncture between the extreme severity of many determinate sentencing schemes and the public's view of proper punishment.

Though the introduction of jury sentencing is not the only means of resolving this difficulty, it would be a far more direct and effective means of enforcing community norms than politically-driven determinate schemes. Unlike judges and legislators, jurors are not burdened by a need to satisfy an electorate that reflexively expresses a preference for officials who are "tough on crime."³⁰ Undistracted by this extrinsic concern, the jury can consider the crime as a unique act provoked by unique circumstances. As the instantiation of the conscience of the community³¹--historically, temperamentally, and symbolically--the jury is best able to render a sentence accurately reflecting the intensity and nuances of moral outrage provoked in the community when it contemplates the case in all its particulars.

C. Juries That Know Too Much: The Problem of Nullification

The disjuncture between community sentiment and legislatively-enacted penalties gives rise to a secondary difficulty as well: the danger of jury nullification to avoid what jurors regard as the excessively harsh consequences of a guilty verdict. In fact, case studies have documented the *1783 tendency of jurors to nullify in the face of widely-known determinate sentencing statutes. Jury sentencing may alleviate this problem.

One unintended effect of mandatory sentencing laws is the transfer of sentencing responsibility from the judge to the jury; as Heumann and Cassak point out, "the mandatory sentencing scheme alters the traditional separation of judge and jury functions The jury decides both culpability and penalty because the penalty flows ineluctably from the threshold determination of guilt."³² To a lesser extent, guideline-based systems also enhance the influence of the jury on the sentencing decision. Under most sentencing guidelines, the jury's verdict of guilt establishes a base level penalty that can be enhanced or reduced depending on the circumstances of the offense and the offender's criminal history. Of course, under schemes such as the Federal Sentencing Guidelines, the judge still plays an important (and controversial) role in determining the punishment by including, among other things, uncharged conduct in the sentence calculation.³³ Nevertheless, the Federal Guidelines severely curtail judicial discretion by declaring "not ordinarily relevant" many personal characteristics of the offender previously considered by sentencing judges, such as employment record, family ties and responsibilities, age, mental and emotional conditions, socioeconomic status, and "lack of guidance as a youth and similar circumstances indicating a disadvantaged upbringing."³⁴ By eliminating these factors from the sentencing decision and focusing attention on the defendant's offense and prior record, the Guidelines convert the guilt phase of the trial into the defendant's primary opportunity to assert that his personal characteristics and other special circumstances make him undeserving of the standard penalty for the offense. The federal jury verdict is thus not just a determination of guilt but also the first phase of the sentencing process.

Recognizing the jury's role in punishment in the age of determinate sentencing, some commentators have argued that defendants should be permitted to provide information to jurors at trial about any applicable *1784 mandatory sentencing laws or guideline-based schemes.³⁵ Even when jurors are not informed about mandatory penalties in the course of the trial, there is evidence that some jurors are aware of determinate sentencing statutes and choose to nullify rather than condemn a guilty defendant to such a severe sentence. At a recent judicial conference, one juror reported that four jurors who "knew exactly what the sentencing guidelines called for" refused to convict because they believed that the punishment was too harsh.³⁶ The most dramatic example of jury nullification in response to severe determinate sentences is the experience of the Michigan Felony Firearms Statute.³⁷ Enacted in 1977, the law imposed a mandatory two-year minimum prison sentence for possession of a firearm while engaging in a felony. In the period immediately following the enactment of the law, only three of the forty-three cases in which defendants were tried by a jury for assault with a gun resulted in convictions on the gun count.³⁸ In more than 11% of cases, the jury convicted the defendant of felonious assault but acquitted on the gun count, presumably to avoid the two-year minimum.³⁹ The 1973 New York Rockefeller laws providing for strict mandatory sentences

for drug offenses and statutorily limited plea bargaining precipitated a similar decline in conviction rates.⁴⁰ Studies of Massachusetts's Bartley-Fox Amendment suggest that judges as well as jurors may be driven to nullify in the face of overly harsh mandatory penalties. That law called for a one-year minimum prison sentence for mere possession of an unlicensed firearm.⁴¹ Under the Boston court system, the defendant was first sent before the municipal court for a bench trial, from which he could appeal for a jury trial *de novo* if he was displeased with the disposition. Studies of court records before and after the enactment of the law found that acquittals at both the bench and jury stage increased;⁴² the *1785 percentage of defendants who avoided conviction entirely rose from 54% in 1974 to 80% in 1976.⁴³

Some jurors clearly recognize that the shift toward determinate sentencing, and in particular the introduction of mandatory minimum penalties, has expanded their responsibility for and control over a particular defendant's punishment, and they have accordingly begun to allow sentencing issues to affect their verdict. As mandatory penalties become more numerous, more severe, and more widely known among the general population, the frequency of jury nullification to avoid overly harsh determinate penalties is likely to increase. There appears to be a disjuncture between the widespread popularity of laws that are perceived to be "tough on crime" and juries' notions of just punishment when faced with individual defendants and specific cases. At best, current determinate sentencing schemes have failed to implement effectively the public's views of proper punishment. At worst, nullification may become widespread enough to topple the determinate sentencing movement. Jury sentencing would obviate the danger of this form of jury nullification.

D. Disparity vs. Uniformity in Sentencing Policy

The determinate sentencing movement was fueled not only by changing attitudes in penal philosophy but also by a desire to encourage more uniform sentences. Critics of sentencing policy in the 1970s expressed dismay at the wide disparity in the sentences imposed by judges for similar crimes.⁴⁴ In particular, reformers feared that racial bias influenced many judges' determinations of punishment.⁴⁵ The establishment of fixed sentences and legislatively enacted penalties, it was hoped, would reduce racial disparity by curbing the judge's discretion and shifting the sentencer's focus of attention from the offender to the criminal act.⁴⁶

Unfortunately, the current sentencing regime fails to implement this laudable goal of reducing discrimination in the criminal justice system. While sentencing guidelines and mandatory minimum penalties may reduce racial disparities in length of prison terms meted out by individual judges to *1786 offenders with similar charges and criminal records,⁴⁷ a number of scholars have argued that determinate sentencing is not nearly as successful at preventing racial bias from infecting the determination of punishment as might at first appear.⁴⁸ Rather, determinate sentencing merely shifts power and discretion from the sentencing judge to prosecutors and probation officers and may in fact lead to greater racial disparity.

In the shadow of the severe mandatory punishments provided in statutes and in sentencing guidelines, prosecutors exercise a great deal of discretion in the investigative, charging, and plea bargaining phases. Studies indicate that race may well play a factor in these decisions.⁴⁹ Indeed, as a percentage of total offenders sentenced, whites dropped from 66.3% before the introduction of the federal guidelines to 44.5% afterward, while Hispanics rose from 8.5% of total offenders sentenced pre-guidelines to 26.3%.⁵⁰ Similarly, the decision to reduce the charges or grant probation appears to be influenced by race.⁵¹ Finally, the emphasis placed on a defendant's prior record in guidelines-based systems has a disparate impact on minorities. Blacks are overrepresented in street crimes, perhaps in part because of disparate policing patterns, and thus they tend to have longer records when facing sentencing.⁵² A comparison of average federal sentence lengths for males aged eighteen to thirty-five before and after the guidelines illustrates that determinate sentencing has not eliminated racial disparity in the determination of punishment: While the average sentence *1787 for blacks before the guidelines was only 2 months longer than the average for whites, the differential was nearly 25 months under the guidelines; while the differential for average drug sentences before the guidelines was 7 months, it was 30 months under the guidelines; and while the differential for average penalties for violent crime was 6 months before the guidelines, it was 13 months afterward.⁵³ These numbers indicate that the determinate sentencing movement has failed to live up to its promise to eliminate racial prejudice from the determination of punishment. Jury sentencing does not promise to reduce sentencing disparity; in fact, it would necessarily result in more disparate (though not more racially prejudiced)⁵⁴ penalties than those imposed by the current regime. Considering that the

transition to jury sentencing would not require sacrificing any measure of racial equity in sentencing, the benefits of the proposed reform may outweigh the apparent disadvantage of producing less uniformity among punishments.

Thus far, this Note has criticized the current sentencing regime on its own terms by demonstrating that it has failed to meet its own objectives and arguing that a jury-sentencing regime would avoid some of the unintended consequences of the recent determinate sentencing legislation. In recent years, academics and judges have leveled an entirely different attack on determinate sentencing, one that rejects the call for uniformity and emphasizes the need for individualized sentencing determinations that take into account the nature and background of the offender and the specific circumstances of particular cases.⁵⁵ For these critics, determinate sentencing is unacceptable because it eliminates individualized, case-specific determinations by stripping the sentencing authority of discretionary power. These critiques generally advocate a return to judicial sentencing, but one scholar has pointed out that juries can perform the role of case-specific sentencing at least as well as judges:

When we cannot resolve fundamentally antagonistic ideals in an abstract way, we place the decision into the black box of the jury room. We also opt for juries over judges for decisions (such as findings of negligence in a tort case) that require application of a single abstract legal standard to a wide variety of specific settings.⁵⁶

The academic critique of determinate sentencing is unlikely to create a change in sentencing policy on its own. The call for individualized justice *1788 as a matter of fairness to individual criminal defendants does not resonate strongly with the public at large or with politicians eager to project a ferocious, crime-fighting image. However, the realization that the current scheme inaccurately reflects public opinion and results in expensive long-term incarceration might attract more attention from policymakers. In any event, jury sentencing would not only accurately reflect the current retributive and populist trend in punishment theories, but it would also provide for the individualized punishment determinations currently advocated by academics and judges.

II. Judge vs. Jury Sentencing: The Traditional Debate

Scholarly opposition to jury sentencing is nearly unanimous; I am aware of only one article, written in 1918, that supports the institution.⁵⁷ Jury sentencing in noncapital cases is widely perceived to be an outdated remnant of the postcolonial period. This Part demonstrates that the traditional arguments against jury sentencing rely on criticism of obsolete jury-sentencing schemes and impressionistic and uninformed assumptions about the quality of jurors' decisions on punishment.

Academic criticism of jury sentencing generally focuses on the issues of disparity, inadequate sentencing information, compromise verdicts, and lack of expertise, and it typically consists of impressionistic arguments based on anecdotal evidence rather than scientific data.⁵⁸ Criticism of jury *1789 sentencing has focused on specific aspects of some state statutes, such as the unitary trial format, without contemplating the full range of possibilities provided by jury-sentencing schemes. This Part opens with a brief examination of past and present jury-sentencing schemes indicating that some of the weaknesses traditionally cited by critics of jury sentencing have been overcome by improvements in state jury-sentencing statutes.

Unfortunately, few of the traditional arguments for and against jury sentencing lend themselves to verification through scientific analysis, and those that do have not been studied in sufficient depth to yield definitive results. Nevertheless, existing archival⁵⁹ and mock juror⁶⁰ studies shed some light on the relative merits of judge sentencing and jury sentencing. Drawing on social science research, the remainder of this Part discusses four of the major issues in the traditional debate between judge sentencing and jury sentencing: severity, disparity, compromise guilty verdicts, and racism.

Because jury sentencing is currently a Southern practice, regional attitudes toward criminal justice will inevitably affect any study of this *1790 institution.⁶¹ The ability to generalize from existing studies is further limited because the best data comes from a single state, Alabama. Further, the methodological complexities involved in isolating the differences between judge sentencing and jury sentencing⁶² make it impossible to draw definitive conclusions from any one study. Despite these

difficulties, one thing is clear: The studies do not support the popular assumption that juries mete out harsher, more disparate, and more racially biased punishments than judges.⁶³ The results of studies examining the relative disparity and racism of judges and juries are mixed, and the balance of evidence indicates that juries are not significantly harsher than judges. My aim in this Part is not to argue that juries are more lenient, less disparate, or less racially biased than judges, but simply to point out that social science research indicates that we must question our negative assumptions about jury sentencing.

A. A Brief History and Overview of Jury Sentencing in Noncapital Cases

Despite the popular perception that sentencing has always been the province of the trial judge, as recently as three decades ago more than one-quarter of U.S. states provided for jury sentencing in noncapital cases.⁶⁴ Five states continue to bestow significant sentencing responsibility on juries in noncapital cases.⁶⁵ Although jury sentencing is commonly discarded as a primitive anachronism, a brief history and overview of jury-sentencing statutes shows that the criticisms of this institution are directed to aspects of sentencing procedure, such as the unitary scheme and the suppression of defendants' criminal records at sentencing, that have been discarded by all surviving jury-sentencing states. Over the years, jury-sentencing states have also introduced safeguards to protect defendants from excessively harsh jury penalties. Modern jury-sentencing statutes have thus been repeatedly revised to meet current sentencing needs and bear little resemblance to the primitive jury-sentencing schemes of the early republic.

Jury sentencing in noncapital cases was a colonial innovation. In most states, jury sentencing was introduced almost immediately after entry into *1791 the Union and was included in the state's original criminal code.⁶⁶ Historians generally attribute the rise of jury sentencing in the early republic to the distrust of royal judges in colonial courts.⁶⁷ The common perception of jury sentencing as a static relic of the early republic may be misleading, however. Two states introduced jury sentencing well after their transition to statehood: Oklahoma began the practice in 1909, and Tennessee did so in 1829.⁶⁸ In these cases, distrust of a powerful judiciary and a desire for populist justice seem to have motivated the change.⁶⁹ Further, jury-sentencing statutes have undergone significant changes over the years; state legislatures have repeatedly revisited the issue and adjusted their procedures to suit their states' changing needs.⁷⁰ Indeed, as recently as 1994, the Arkansas, Virginia, and Missouri legislatures chose to substantially revamp their jury-sentencing schemes rather than abolish the institution.⁷¹

The most notable variation among jury-sentencing statutes is the choice between a unitary or bifurcated trial format. In a unitary scheme, the jury decides the issue of guilt and determines the sentence at the same time, while courts in bifurcated sentencing states hold a separate sentencing hearing before the same jury after the verdict. The unitary format presents *1792 serious difficulties in the handling of evidence. If the jury is informed of facts generally left to the sentencing phase, particularly prior convictions, its verdict on the question of guilt may be prejudiced. If, on the other hand, the trial jury is not presented with this information, it is forced to make a sentencing determination without all the evidence relevant to its decision. Bifurcation provides a clear solution to this difficulty. The articles advocating the abolition of jury sentencing for the most part predate the trend toward bifurcation in noncapital jury sentencing.⁷² Indeed, the truly unitary format has not survived in any state. Missouri, the only state that does not provide for a separate sentencing hearing, avoids the most serious pitfall of the unitary system by having the court sentence all prior offenders.⁷³ In the punishment phase in jury-sentencing states, evidence of prior convictions is usually limited to very general information about the nature of the crime.⁷⁴ This practice reduces the danger that jurors, inflamed by the details of the defendant's prior offenses, will place undue weight on the defendant's prior record when determining punishment.

The extent of jury autonomy in imposing punishment also varies among jury-sentencing states. The common requirement that jury sanctions fall within statutory limits⁷⁵ has the potential to curtail jury autonomy greatly, particularly in states like Virginia, which established a sentencing commission in 1994 for the express purpose of setting narrower ranges of prescribed punishments.⁷⁶ Perhaps the most significant check on the jury's sentencing authority is the power vested in most state judges to reduce or suspend the jury's sentence.⁷⁷ In Virginia, for example, the legislature and courts have repeatedly emphasized the limits of the jury's power to assess punishment. As a court of appeals in that state observed:

*1793 [T]he convicted criminal defendant is entitled to "two decisions" on the sentence, one by the jury and the other by the

trial judge in the exercise of his statutory right to suspend; his “ultimate sentence . . . does not [[[therefore] rest with the jury” alone but is always subject to the control of the trial judge. This procedure makes the jury’s finding little more than an advisory opinion or first-step decision.⁷⁸ Current jury-sentencing statutes are thus a far cry from the image conjured up by critics who describe jury sentencing as an “anachronism.”⁷⁹ This is no unfettered mob meting out punishment, with little or no information relevant to a rational sentencing determination, that somehow has managed to survive untouched by more than a century’s developments in criminal justice.

B. Are Juries Harsher or More Lenient than Judges?

Any public debate over the reintroduction of jury sentencing would inevitably focus on the comparative leniency of judges and juries. Scholars and practitioners tend to assume that juries would dole out harsher penalties than judges. For example, a survey conducted by the Virginia Crime Commission in 1977 found that 65% of Virginia defense attorneys favor judge sentencing, while 63% of the commonwealth’s attorneys are opposed to it.⁸⁰ The fact that very few Virginia defendants take advantage of their right to jury sentencing (4.5% of felony defendants in 1994)⁸¹ suggests that the defense bar believes that their clients will receive a more favorable disposition from judges. Although archival and mock-juror studies provide no definitive conclusions, it is at least clear that they do not support the common assumption that juries are significantly more severe in their punishments than judges.

The most comprehensive archival study of jury sentencing examines sentences imposed for robbery in six Southern states from 1957 to 1982.⁸² Three states (North Carolina, Louisiana, and Mississippi) utilized only judge sentencing, two states (Tennessee and Texas) used only jury *1794 sentencing, and one state (Alabama) changed from jury to judge sentencing during the period examined. Brent Smith and Edward Stevens focus on Alabama and use the data from other judge-sentencing states and jury-sentencing states in an attempt to isolate the effects of the policy change in Alabama from general trends in punishment over time.⁸³ While the mean punishment imposed by Alabama juries during the five years preceding the elimination of jury sentencing was 22.48 years, the mean judge-imposed sentence in the five years after the policy change was 35.95 years.⁸⁴ Juries imposed above-average sentences in thirty of their 120 cases (25%); judges imposed higher-than-average sentences in 50% of their cases.⁸⁵

Although these statistics suggest that juries are more lenient than judges, the data is difficult to interpret because the differences in sentencing after 1978 may reflect a general trend toward harsher criminal sanctions rather than differences in judge and jury leniency. An examination of other jury-sentencing states during this period does not clarify the source of the trend toward harsher penalties in Alabama after 1978.⁸⁶ Texas, which retained jury sentencing through the entire period studied, maintained a relatively constant mean sentence before and after 1978. If Texas is used as a control, the natural conclusion would attribute the harsher sentences to Alabama’s elimination of jury sentencing. Tennessee, on the other hand, experienced a rise in mean sentence between 1978 and 1982, even though they retained jury sentencing in this period. If Tennessee is used as a control, the increased severity in Alabama sentences would appear to be the result of a general trend toward harsher punishments rather than the adoption of judge sentencing. In any case, it is clear that the transition to punishment imposed by judges in Alabama did not result in more lenient sentences than those imposed by juries.

The difficulty in interpreting the steep rise in sentence length in Alabama after the introduction of judge sentencing illustrates the need for caution when using pre-post studies that focus on a single jurisdiction without comparative data from other states. One such study examined data from the Atlanta Judicial Circuit for the eighteen months preceding and seventeen months succeeding Georgia’s abandonment of jury sentencing in *1795 1974.⁸⁷ William Eckert and Lauri Ekstrand analyzed 129 jury sentences and 140 judge sentences subdivided by type of crime and by number of prior convictions, and they did not include guilty pleas or probation verdicts.⁸⁸ Statistical tests of the Georgia data showed no evidence of a significant difference in severity between sentences imposed by judges and juries in cases involving the sale of narcotics, armed robbery, burglary, aggravated assault, murder, and rape.⁸⁹

One archival study of sentencing patterns in El Paso County, Texas from 1973 to 1977 suggests that a complex relationship exists between punishments imposed by judges and juries within the same jurisdiction. Weninger found that the mean

punishments assigned by juries in El Paso County were longer than those imposed by judges for all offenses except armed robbery.⁹⁰ However, when guilty pleas are excluded from the sample, the data reveals that judges were less likely than juries to grant probation for defendants who were convicted at trial.⁹¹ Weninger argues that these results reflect a trial tariff: Judges may impose lighter sentences than juries in guilty plea cases and heavier sentences than juries in trial cases to encourage defendants to plead guilty.⁹² Interpreted in this way, the El Paso data (and any study comparing judge sentences and jury sentences within one jurisdiction) reveals little about the relative leniency of judges and juries; judges may simply increase or decrease the “price” set by juries.

Survey and mock jury studies present their own methodological difficulties,⁹³ but the results of existing studies do not support the common assumption that jurors are significantly more severe than judges in assigning penalties. The Virginia State Crime Commission conducted a study in which circuit court judges and former jurors read seven hypothetical cases and suggested sentences.⁹⁴ The average jury sentence was equal to or below the average judge sentence in three of the seven *1796 crime categories, while judges were more lenient in four of the crime categories.⁹⁵ Interestingly, in six of the seven crime categories some jurors sentenced the offender to a lighter sentence than the statutory minimum.⁹⁶ Shari Diamond and Loretta Stalans recently conducted a study in which 116 Illinois State Court judges, 154 jurors, and 55 college students were asked to impose sentences on four moderately severe criminal cases in which prison was a possible but not inevitable sentencing outcome.⁹⁷ The results indicated that sentences given by jurors and college students tended to be equal to or less severe than those given by judges.⁹⁸

The limitations of the available data and existing studies prevent reliable conclusions as to the *1797 relative leniency of judges and jurors. Nevertheless, all survey and mock jury studies and all but one (highly questionable)⁹⁹ archival study conclude that jurors are not significantly more severe than judges in assigning penalties. These studies should call into question the common assumption that juries are significantly more punitive than judges. Opponents of jury sentencing in noncapital cases must contend with the results of these studies if they wish to argue that defendants must be protected from unduly harsh sentencing juries.

C. Do Jurors Impose More Disparate Sentences than Judges?

The results of studies comparing the extent of sentencing disparity in punishments imposed by jurors and judges is mixed: Of the three studies addressing this issue, only one found evidence of greater variability in jury punishments.¹⁰⁰ Although these studies do not permit a conclusion as to the relative disparity in sanctions imposed by judges and juries, it is important to note that the data does not bolster the claim that jury sentencing results in significantly more sentencing disparity than judge-imposed sanctions. As discussed above in Part I, this comparison between judge-sentencing and jury-sentencing disparity is irrelevant in the era of determinate sanctions; there is no question that penalties determined at the discretion of judges or juries are more disparate than strict sentencing guidelines. The more pressing issue for contemporary policymakers is whether the disparity that inevitably results from individualized punishment is counterbalanced by the advantages of such a system.

D. Does Jury Sentencing Encourage Compromise Jury Verdicts?

One objection to jury sentencing is the possibility that juries will deliver “compromise verdicts” by resolving doubt as to guilt by compromising on the sentence.¹⁰¹ Critics claim that deadlocked juries will compromise by agreeing to a guilty verdict with a relatively light sentence and that jury sentencing may thus encourage convictions in close cases. Compromise verdicts thus would pose a danger to the reasonable doubt standard in criminal cases. Mock juror studies do indicate that individual subjects are more likely to convict in crimes drawing severe penalties if they know that they will control the level of punishment.¹⁰² It is important to point out that these studies focus on individual rather than group decisionmaking: These findings indicate that individual jurors are more likely to convict in a jury-sentencing regime, not that a jury that disagrees on the question of guilt is likely to compromise if they also control the penalty. An equally plausible interpretation of the mock juror findings is that control over penalty reduces the likelihood of jurors nullifying at the guilt stage in the face of severe

punishments beyond their control. Nevertheless, states that use or are considering implementing jury sentencing would be well-served by research that aims to determine whether jury sentencing would result in compromise jury verdicts.

***1798 E. Are Juries More or Less Susceptible to Prejudice and Racism than Judges?**

Perhaps the most important consideration in the debate over jury sentencing is whether lay participation in the sanctioning process makes sentencing determinations a more accurate reflection of popular norms by giving voice to traditionally underrepresented groups, or whether it simply provides a forum for racism and prejudice. Given the existing data, it is impossible to determine whether racism would be more prevalent in punishments determined by judges or jurors. While some studies do suggest that racism would play a part in jury-sentencing decisions, the evidence indicates that juror racism is more likely to have an effect on the two decisions that are currently entrusted to the jury: guilt determination and capital sentencing. If the benefits of popular participation in these two phases of trial are believed to outweigh the harms associated with the possibility of decisions tainted by racial bias, so too might the value of punishment by a representative group of lay citizens counterbalance the risk of biased sentencing decisions.

Social science research suggests that racial subgroups of the population hold very different views on sentencing issues. Alfred Blumstein and Jacqueline Cohen found that while there is general agreement within subgroups on appropriate sentence lengths for particular crimes,¹⁰³ there is considerable disagreement among subgroups.¹⁰⁴ Given the lack of diversity on state court benches,¹⁰⁵ there is reason to suspect (though there is insufficient data to conclude) that sentences set by juries would reflect a more representative set of sanctioning norms. Future studies examining the dynamics of group decisionmaking in the context of sentencing might shed light on the extent and manner in which minority jurors would influence the length of sentences meted out by juries.

The only study directly comparing the levels of sentence disparity based on race in judge-sentencing states and jury-sentencing states--Smith and Stevens's Alabama study--is inconclusive and difficult to interpret.¹⁰⁶ *1799 While it is impossible to determine whether judges or juries would produce more racist sentencing outcomes, it is at least clear that the danger of racial bias cannot be eliminated by entrusting the sentencing decision to a judge.

Although mock jury studies consistently find that race plays a part in the determination of guilt,¹⁰⁷ the results of studies investigating the possible influence of the defendant's race on the length of sentence imposed by mock jurors are far less clear. Mock juror studies have reached conflicting conclusions on this issue.¹⁰⁸ Sheri Lynn Johnson provides an intriguing interpretation of the findings that bias operates consistently at the guilt stage but only occasionally at the sentencing stage. Drawing on the literature discussing aversive racism, Johnson argues that most contemporary jurors are not openly and consciously hostile toward black defendants. Rather, subconscious "stereotypes concerning blacks' propensity to commit crimes subconsciously sway most white subjects' evaluations of a black defendant's guilt; these stereotypes have little or no effect on decisions concerning the harshness of the penalty to be imposed *1800 upon a defendant already determined to be guilty."¹⁰⁹ Johnson also notes that most of the studies finding racial discrepancies in sentencing are older, from Southern states, or involve rape cases.¹¹⁰ She argues that some of these studies date from a time when conscious racism was more prevalent, and that "[a] few subjects-- perhaps more frequently subjects from the South and perhaps particularly in rape cases--are also motivated by [conscious] hostility and therefore penalize black defendants at the sentencing stage as well as the guilt determination stage."¹¹¹ If Johnson's theory is correct, there is a much greater danger of bias in the jury's determination of guilt than in noncapital jury sentencing.

Capital sentencing is another responsibility traditionally left to juries that involves a greater risk of racist outcomes than noncapital jury sentencing. Courts often assume that because of the discretionary nature of the capital sentencing decision, the racial composition of the jury may have more of an impact on sentencing than on the verdict.¹¹² Several archival studies, most famously the Baldus study discussed in *McCleskey v. Kemp*,¹¹³ have demonstrated that race affects the administration of the death penalty.¹¹⁴ It is important to note that the racial disparities reported in these studies reflect discrimination by prosecutors in the decision to charge and to accept plea bargains, as well as by sentencing jurors. Many studies compare all reported homicides with homicides that resulted in death sentences without isolating the impact of race on jurors' decisions.¹¹⁵

Studies that *1801 have analyzed the effect of race on different stages in the criminal justice process have found that the data indicates that discrimination is more prevalent at the pretrial stage than at the jury-sentencing stage.¹¹⁶ For example, the Baldus study found no race-of-defendant effect on jury decisions, and determined that the victim's race appeared "to be a more systematic and important influence on prosecutorial decisions"¹¹⁷ than on those of juries. Although the racial disparities in capital sentencing patterns cannot be attributed entirely to jury decisionmaking, some archival and many mock juror studies do indicate that jurors are more likely to sentence black defendants to death than whites.¹¹⁸

Although the evidence for the influence of race on capital jurors should give us pause, race is likely to play less of a role in noncapital jury punishments. Two of the factors contributing to racial bias in capital sentencing are not present in noncapital jury-sentencing schemes. First, capital juries are significantly "whiter" than other juries because the process of death qualification tends to reduce the proportion of minorities selected for service.¹¹⁹ Social science research indicates the racial composition of the jury affects capital sentencing.¹²⁰ Second, in-group bias appears to be much less prevalent in noncapital sentencing decisions.¹²¹ Scholars have acknowledged the irony that capital sentencing decisions are more likely to be tainted by racial bias than noncapital juror sentencing; as Sweeney and Haney have stated, "the frequency of racially biased sentencing judgments is likely to be even greater in capital cases--where juries do sentence--than in others."¹²²

III. Conclusion

The abandonment of indeterminate sentencing and the rehabilitative ideal has left us without scholarly or popular consensus on a theory of sentencing or the most effective means to achieve the various competing *1802 goals of punishment. As a result, sentencing has increasingly become the province of inexperienced legislators and administrators who respond to political pressure and public opinion polls without developing a coherent system of criminal sanctions. Given these developments, jury sentencing may be the most direct and least distorting mechanism to conform criminal sanctions to community sentiment.

Jury sentencing in noncapital cases could take a variety of forms. I propose a scheme that provides for a waivable right to jury sentencing and a bifurcated trial format similar to that currently used in Virginia, in which evidence of prior convictions presented in the sentencing phase is limited to very general information about the nature of the previous crime. To insure that the sentence reflects community sentiment, I do not propose reinstating parole.¹²³

Inevitably, there would be difficult policy choices to make in determining the precise extent of discretion to be accorded the sentencing jury. To be meaningful, jury sentencing requires that there be a range of sentencing options. Nevertheless, states may limit the jury's discretion in appropriate ways. Presumably most states would adopt some form of statutory maximum penalties similar to those in force under judge-sentencing schemes. Maximum penalties might serve more as a symbolic and political device than as an effective limit on sentencing juries; legislators could symbolically "crack down on crime" by raising maximum sentences in response to public pressure without altering the sentences actually imposed. Effective protection from overzealous juries would come from statutes, similar to those already in force in the remaining jury-sentencing states, that permit the trial judge to reduce trial verdicts in certain circumstances.¹²⁴

The ability to install statutory safeguards also suggests why jury sentencing would, far from legitimating nullification or excessive leniency, actually protect the rule of law. States concerned that juries may refuse to impose penalties on convicted defendants, particularly in racially charged cases, could impose minimum sentences and entrust the decision to suspend the sentence to the judge--precisely to prevent such nullification. By contrast, some states might embrace broad jury discretion, including the right to impose a suspended sentence, as a mechanism that allows jurors to be merciful without eroding the rule of law: A bifurcated format would eliminate the need for juries to nullify the guilt verdict to avoid harsh penalties beyond their control.¹²⁵ For example, a broad jury-sentencing *1803 statute would encourage jurors to convict rather than to nullify in assisted suicide cases, thus preserving respect for the law and the integrity of the jury's determination of fact while still permitting the jury to impose a suspended sentence if it did not deem the defendant deserving of punishment under the particular circumstances of the case.

Regardless of the specific characteristics of individual state schemes, new jury-sentencing statutes would have little in common with the obsolete unitary formats widely criticized in the scholarly literature. Far from an outdated remnant of the postcolonial period, jury sentencing in noncapital cases may provide the most effective and practical means of implementing contemporary sentencing goals.

Footnotes

- ¹ [Skidmore v. Baltimore & O.R. Co.](#), 167 F.2d 54, 61 (2d Cir. 1948).
- ² See, e.g., Joel Cooper et al., [Complex Scientific Testimony: How Do Jurors Make Decisions?](#), 20 *Law & Hum. Behav.* 379, 390 (1996); Franklin Strier, [The Educated Jury: A Proposal for Complex Litigation](#), 47 *DePaul L. Rev.* 49, 51 (1997). The competence of juries in assigning damages in civil cases has been widely disputed. See, e.g., James K. Hammit et al., [Tort Standards and Jury Decisions](#), 14 *J. Legal Stud.* 751, 751-58 (1985); Harry Kalven, Jr., [The Jury, the Law, and the Personal Injury Damage Award](#), 19 *Ohio St. L.J.* 158, 158-64, 172-78 (1958); Neil Vidmar & Jeffrey J. Rice, [Assessments of Noneconomic Damage Awards in Medical Negligence: A Comparison of Jurors with Legal Professionals](#), 78 *Iowa L. Rev.* 883, 897 (1993); W. Kip Viscusi, [Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?](#), 8 *Int'l Rev. L. & Econ.* 203, 203-08, 214-19 (1988); Edith Greene, [On Juries and Damage Awards: The Process of Decisionmaking](#), *Law & Contemp. Probs.*, Autumn 1989, at 225, 232-38. Criticism of civil jury awards often occurs in the context of inflated damages assessed against well-insured, deep-pocket corporate defendants. Because such decisions differ greatly from the decision to incarcerate individual criminal defendants, this Note does not examine studies of civil jury behavior.
- ³ See, e.g., [H. Richard Uviller, Credence, Character, and the Rules of Evidence: Seeing Through the Liar's Tale](#), 42 *Duke L.J.* 776, 778, 827 (1993).
- ⁴ See, e.g., [Reid Hastie & W. Kip Viscusi, What Juries Can't Do Well: The Jury's Performance as a Risk Manager](#), 40 *Ariz. L. Rev.* 901, 901 (1998) (stating that one of the jury's traditional functions is to represent the "conscience of the community"). On the civil side, this notion underpins the doctrine of punitive damages. See, e.g., [Hall v. Ochs](#), 817 F.2d 920, 927 (1st Cir. 1987).
- ⁵ See *infra* note 64 and accompanying text. There is no constitutional right to jury sentencing. See, e.g., [McMillan v. Pennsylvania](#), 477 U.S. 79, 93 (1986) ("[T]here is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact."); [Cabana v. Bullock](#), 474 U.S. 376, 385 (1986) ("The decision whether a particular punishment...is appropriate in any given case is not one that we have ever required to be made by a jury."); [Spaziano v. Florida](#), 468 U.S. 447, 457-65 (1984) (upholding the constitutionality of the jury override in death penalty cases).
- ⁶ Sanford H. Kadish, [Legal Norm and Discretion in the Police and Sentencing Processes](#), 75 *Harv. L. Rev.* 904, 926 (1962).
- ⁷ Sheldon Glueck, [Principles of a Rational Penal Code](#), 41 *Harv. L. Rev.* 453, 469 (1928).
- ⁸ For discussions of sentencing reform in the progressive era, see David J. Rothman, [Conscience and Convenience](#) 43-66 (1980); and Thomas A. Green, [Freedom and Criminal Responsibility in the Age of Pound: An Essay on Criminal Justice](#), 93 *Mich. L. Rev.* 1915, 1949-2007 (1995).
- ⁹ Sheldon Glueck & Elanor Glueck, [500 Criminal Careers](#) 296 (1939).
- ¹⁰ See Michael H. Tonry, [Sentencing Reform Impacts](#) 6-9 (1987).

- ¹¹ For a discussion, see Samuel Walker, *Popular Justice* 217-18 (2d ed. 1998).
- ¹² See 28 U.S.C. §994(k) (1994) (“The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant....”). Compare *Mistretta v. United States*, 488 U.S. 361, 363-66 (1989) (stating that retribution is the primary penological goal underlying the guidelines), with *Williams v. New York*, 337 U.S. 241, 248 (1949) (discussing rehabilitation as the predominant theory of punishment at that time). For a discussion of the legislative history of the Guidelines, see generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 *Wake Forest L. Rev.* 223 (1993).
- ¹³ Cal. Penal Code §1170(a)(1) (West 1998).
- ¹⁴ At the state level, the movement toward determinate sentencing has brought fixed penalties, mandatory minimums, and a proliferation of repeat offender statutes. By 1983, 49 states had adopted mandatory sentencing laws, primarily for drug and violent offenses. See Tonry, *supra* note 10, at 25. At the federal level, Congress has passed more than 100 mandatory minimum penalty provisions since 1984. See, e.g., 21 U.S.C. §841(b)(1)(A) (establishing minimum penalties for the possession of various quantities of narcotics); Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §1005(a), 98 Stat. 2138 (1984) (codified as amended at 18 U.S.C. §924(c)(1)) (providing for mandatory enhancement of the sentence for use of a firearm in the commission of a violent felony). See generally Orrin G. Hatch, *The Role of Congress in Sentencing*, 28 *Wake Forest L. Rev.* 185, 192-93 (1993) (discussing the congressional enactment of mandatory minimum sentencing and its effectiveness in deterring crime).
- ¹⁵ See Susan E. Martin, *The Politics of Sentencing Reform: Sentencing Guidelines in Pennsylvania and Minnesota*, in 2 Panel on Sentencing Research, *Research on Sentencing: The Search for Reform* 265, 297 (Alfred Blumstein et al. eds., 1983) [hereinafter *Research on Sentencing*].
- ¹⁶ *Id.*
- ¹⁷ See, e.g., 1 *id.* at 134-35; Andrew von Hirsch, *The Sentencing Commission’s Functions*, in *The Sentencing Commission and Its Guidelines* 3, 6 (Andrew von Hirsch et al. eds., 1987).
- ¹⁸ See, e.g., Michael Tonry, *Sentencing Matters* 54-55 (1996) (mentioning the Minnesota Commission’s success in reducing racial and gender discrimination in sentencing); Andrew von Hirsch & Judith Greene, *When Should Reformers Support Creation of Sentencing Guidelines?*, 28 *Wake Forest L. Rev.* 329, 331-34 (1993) (discussing the early successes of the Minnesota guidelines).
- ¹⁹ See von Hirsch & Greene, *supra* note 18, at 337 (arguing that the “oddities” of the Minnesota guidelines reflect the fact that the Commission yielded to legislative pressures).
- ²⁰ Richard S. Frase, *The Role of the Legislature, the Sentencing Commission, and Other Officials Under the Minnesota Sentencing Guidelines*, 28 *Wake Forest L. Rev.* 345, 359-61 (1993). For discussions of the effect of political pressures on Sentencing Commissions in other states, see, for example, David Boerner, *The Role of the Legislature in Guidelines Sentencing in “the Other Washington,”* 28 *Wake Forest L. Rev.* 381, 382 (1993), which notes that the Washington State Sentencing Commission “has functioned as an agent of the Washington Legislature, not as an independent actor”; and Martin, *supra* note 15, at 295, which describes the influence of “law-and-order” politics on the Pennsylvania Commission. See generally von Hirsch & Greene, *supra* note 18, at 337 (noting the limited independence of all Sentencing Commissions).

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- ²¹ Julian V. Roberts & Loretta J. Stalans, *Public Opinion, Crime, and Criminal Justice* 197 (1997) (quoting U.S. Dep't of Justice, *Federal Sentencing Guidelines: Answers to Some Questions*, NIJ Rep. No. 205 (1987)).
- ²² Douglas R. Thomson & Anthony J. Ragona, *Popular Moderation Versus Governmental Authoritarianism: An Interactionist View of Public Sentiments Toward Criminal Sanctions*, 33 *Crime & Delinq.* 337, 354 (1987).
- ²³ For example, a 1994 poll found that 81% of respondents in the United States believe that sentences are not severe enough. See Roberts & Stalans, *supra* note 21, at 207; see also 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, 344 (1990) (reporting that 72% of the lay subjects in the study said that judges are too lenient in sentencing burglary); cf. Thomson & Ragona, *supra* note 22, at 337, 350-51 (finding a sample of Illinois citizens to be less "vengeful" than they often appear in public opinion polls).
- ²⁴ See Thomson & Ragona, *supra* note 22, at 348-49.
- ²⁵ See, e.g., Howard A. Parker, *Juvenile Court Actions and Public Response*, in *Becoming Delinquent* 252, 257-65 (Peter G. Garabedian & Don C. Gibbons eds., 1970) (identifying a similar phenomenon in Washington State); Loretta J. Stalans & Shari Seidman Diamond, *Formation and Change in Lay Evaluations of Criminal Sentencing*, 14 *Law & Hum. Behav.* 199, 211-13 (1990) (finding that while the majority of lay respondents said that judges are "too lenient" in their sentencing of burglary offenders, the respondents' own sentencing preferences were more lenient than the required minimum sentences for residential burglary). See generally Roberts & Stalans, *supra* note 21, at 219-20 (discussing a lenient sentence handed down by a Canadian jury that considered mitigating factors in a manslaughter defendant's background).
- ²⁶ Anthony N. Doob & Julian V. Roberts, *Social Psychology, Social Attitudes, and Attitudes Toward Sentencing*, 16 *Canadian J. Behav. Sci.* 269, 273 (1984).
- ²⁷ See Stalans & Lurigio, *supra* note 23, at 342 (comparing laypersons' beliefs with expert probation officers' beliefs about burglary characteristics and sentencing decisions).
- ²⁸ See Loretta J. Stalans, *Citizens' Crime Stereotypes, Biased Recall, and Punishment Preferences in Abstract Cases: The Educative Role of Interpersonal Sources*, 17 *Law & Hum. Behav.* 451, 453, 468 (1993).
- ²⁹ Thomson & Ragona, *supra* note 22, at 351.
- ³⁰ Perceived "softness" on crime and the death penalty often plays a major role in campaigns challenging the retention of state judges. These campaigns often do not describe the legal basis for the judges' reversal of conviction or penalty. See Stephen B. Bright, [Political Attacks on the Judiciary: Can Justice Be Done amid Efforts To Intimidate and Remove Judges from Office for Unpopular Decisions?](#), 72 *N.Y.U. L. Rev.* 308, 313-316 (1997) (discussing the examples of Justice Penny White and Judge Rosemary Barkett). Legislators voting to confirm federal judges are exposed to similar political attacks. See [Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases](#), 75 *B.U. L. Rev.* 759, 789-90 (1995) (discussing political attacks on senators who voted to confirm Judge Barkett to the Eleventh Circuit).
- ³¹ See *supra* note 4 and accompanying text.
- ³² Milton Heumann & Lance Cassack, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 *Am. Crim. L. Rev.* 343, 367 (1983).

- ³³ For a discussion of relevant conduct under the Guidelines, see [Daniel J. Freed, Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers](#), 101 Yale L.J. 1681, 1712-15 (1992); Marc Miller & Ronald Weich, [The Relevant Conduct Controversy](#), 2 Fed. Sentencing Rep. 150 (1989); and William W. Wilkins, Jr. & John R. Steer, [Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines](#), 41 S.C. L. Rev. 495 (1990). See also Symposium, [The Issue of Relevant Conduct](#), 2 Fed. Sentencing Rep. 129-60 (1989). Some state sentencing guidelines schemes, most notably Minnesota's, use a conviction offense rather than a real-offense system and therefore further limit the judge's role in sentencing. See Freed, *supra*, at 1713.
- ³⁴ [U.S. Sentencing Guidelines Manual](#), §§5H1.1, 3, 5, 6, 10, 12 (1998); see also [28 U.S.C. §994\(e\)](#) (1993) (requiring the Sentencing Commission to assure that its guidelines reflect "the general inappropriateness" of considering the defendant's employment record and family ties and responsibilities).
- ³⁵ See, e.g., Heumann & Cassack, *supra* note 32, at 389-92; Kristen K. Sauer, Note, [Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences](#), 95 Colum. L. Rev. 1232, 1246-47 (1995).
- ³⁶ Proceedings of the Fifty-Third Judicial Conference of the District of Columbia Circuit, Panel Discussion-Jury Nullification, [145 F.R.D. 149, 191](#) (1992); see also Harry Kalven, Jr. & Hans Zeisel, [The American Jury 306-12](#) (1966) (discussing jury nullification motivated by severe sentences).
- ³⁷ [Mich. Comp. Laws §750.227\(b\)](#) (1998).
- ³⁸ See Heumann & Cassak, *supra* note 32, at 352.
- ³⁹ See *id.* at 352 n.27.
- ⁴⁰ The conviction rate at trial declined from 86% in 1972 to 79% in 1976. See Joint Comm. on N.Y. Drug Law Evaluation, [Final Report, The Nation's Toughest Drug Law: Evaluating the New York Experience 95](#) (1978).
- ⁴¹ For an analysis of the effects of the Bartley-Fox Amendment, see David Rossman et al., [The Impact of the Mandatory Gun Law in Massachusetts](#) (1979); Tonry, *supra* note 18, at 154-55; and James A. Beha, II, "And Nobody Can Get You Out": The Impact of a Mandatory Prison Sentence for the Illegal Carrying of a Firearm on the Use of Firearms and on the Administration of Criminal Justice in Boston (pts. 1 & 2), [57 B.U. L. Rev. 96, 289](#) (1977).
- ⁴² See Tonry, *supra* note 18, at 155; Beha, *supra* note 41, at 126.
- ⁴³ Kenneth Carlson, U.S. Dep't of Justice, [Mandatory Sentencing: The Experience of Two States 8-10](#) (1982).
- ⁴⁴ See [S. Rep. No. 98-225, at 71-76](#) (1983); Stith & Koh, *supra* note 12, at 227-30; see also Michael H. Tonry, *supra* note 10, at 6-7 (discussing criticism of sentencing policy in the 1970s).
- ⁴⁵ See, e.g., [Placido G. Gomez, The Dilemma of Difference: Race as a Sentencing Factor](#), [24 Golden Gate U. L. Rev. 357, 358-59 & nn.12-14](#) (1994).

- ⁴⁶ See, e.g., Tonry, *supra* note 18, at 54 (“Every sentencing commission has included reduction or elimination of racial and gender discrimination in sentencing among its goals.”).
- ⁴⁷ For example, 82% of federal sentences are within the range prescribed by the guidelines. See [Gerald W. Heaney, The Reality of Guidelines Sentencing: No End to Disparity](#), 28 *Am. Crim. L. Rev.* 161, 189 (1991).
- ⁴⁸ See, e.g., Stephen P. Klein et al., *Racial Equity in Sentencing* 11 (1988) (arguing that while California courts are making equitable sentencing decisions, race may influence other steps in the punishment process); Margaret Farnworth et al., *Ethnic, Racial, and Minority Disparity in Felony Court Processing*, in *Race And Criminal Justice* 54, 61 (Michael J. Lynch & E. Britt Patterson eds., 1991) (reporting racial disparity in the choice between incarceration and probation and the decision to reduce the charges among males charged with possession of marijuana with intent to sell in California in 1988); Heaney, *supra* note 47, at 164 (arguing that there is “little evidence” that the federal guidelines have reduced racial disparity); Gerald W. Heaney, *Revisiting Disparity: Debating Guidelines Sentencing*, 29 *Am. Crim. L. Rev.* 771, 779 (1992) (reporting a racial disparity among sentences under the federal guidelines).
- ⁴⁹ See Heaney, *supra* note 47, at 202-03 (stating that Sentencing Commission data reveals significant disparities in arrest and prosecution rates among blacks and whites); Cassia Spohn et al., *The Impact of the Ethnicity and Gender of Defendants on the Decision To Reject or Dismiss Felony Charges*, 25 *Criminology* 175, 181-86 (1987) (finding that race was a factor in charging decisions in Los Angeles County).
- ⁵⁰ See Heaney, *supra* note 47, at 204.
- ⁵¹ See, e.g., Farnworth et al., *supra* note 48, at 61 (finding racial disparities in the reduction of charges and granting of probation); Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in *Ethnicity, Crime, and Immigration: Comparative and Cross-National Perspectives* 311, 350 (Michael Tonry ed., 1997) (discussing a Department of Justice survey that found that once convicted, blacks are more likely to be sentenced to prison than whites convicted of similar crimes by a margin of 51% to 38%).
- ⁵² See Heaney, *supra* note 47, at 205.
- ⁵³ See Heaney, *supra* note 48, at 779-80.
- ⁵⁴ See *infra* Section II.E.
- ⁵⁵ See, e.g., Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 11-14, 82-85 (1998); Freed, *supra* note 33, at 1739; Stephen J. Schulhofer, [Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity](#), 29 *Am. Crim. L. Rev.* 833, 858-61 (1992).
- ⁵⁶ Ronald F. Wright, [Rules for Sentencing Revolutions](#), 108 *Yale L.J.* 1355, 1376 (1999) (footnote omitted) (reviewing Stith & Cabranes, *supra* note 55).
- ⁵⁷ See Lewis McQuown, *Reformation of the Jury System*, 6 *Ky. L.J.* 182 (1918). See generally ABA Advisory Comm. on Sentencing and Review, *Standards Relating to Sentencing Alternatives and Procedures* 44 (1967) [hereinafter *ABA Standards*] (“[R]ecent

opinion has been nearly unanimous that jury sentencing in noncapital cases is an anachronism and that it should be abolished.”). For a recent treatment taking an agnostic view, see Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 Wash. U. J. Urb. & Contemp. L. 3, 37-40 (1994).

⁵⁸ See President’s Comm’n on Law Enforcement & Administration of Justice, *The Challenge of Crime in a Free Society* 356-57 (1968) (criticizing jurors’ lack of expertise and recommending that jury sentencing in noncapital cases be abolished); Charles O. Betts, *Jury Sentencing*, 2 Nat’l Parole & Probation Ass’n J. 369, 372-73 (1956) (emphasizing the disparity of jury verdicts); James P. Jouras, *On Modernizing Missouri’s Criminal Punishment Procedure*, 20 U. Kan. City L. Rev. 299, 300-01 (1952) (noting that the jury lacks the expertise to determine individualized sentences aimed at rehabilitating the offender); Charles Kerr, *A Needed Reform in Criminal Procedure*, 6 Ky. L.J. 107, 108 (1918) (arguing that judges’ superior experience and accountability insure fairer sentences); H.M. LaFont, *Assessment of Punishment--A Judge or Jury Function?*, 38 Tex. L. Rev. 835, 837 (1960) (arguing for the abolition of jury sentencing in Texas); Charles S. Potts, *Suggested Changes in Our Criminal Procedure*, 4 Sw. L.J. 437, 447-49 (1950) (supporting judge sentencing); Charles W. Webster, *Jury Sentencing: Grab-Bag Justice*, 14 Sw. L.J. 221, 230 (1960) (advocating the abolition of jury sentencing); Comment, *Consideration of Punishment by Juries*, 17 U. Chi. L. Rev. 400, 408 (1950) (arguing for judge sentencing); Note, *Jury Sentencing in Virginia*, 53 Va. L. Rev. 968, 1001 (1967) [hereinafter Note, *Jury Sentencing*] (“[T]he jury possesses neither the information nor the training necessary for drawing the inferences upon which a rational sentence must be based.”); Craig Reese, Note, *Jury Sentencing in Texas: Time for a Change?*, 31 S. Tex. L. Rev. 323, 324 (1990) (supporting judge sentencing); Note, *Statutory Structures for Sentencing Felons to Prison*, 60 Colum. L. Rev. 1134, 1154-57 (1960) [hereinafter Note, *Statutory Structures*] (advocating the abolition of jury sentencing). Critics of assessment of punishment by juries cite and dismiss the following traditional arguments supporting the institution without bothering to refute them: Jurors are less subject to corruption or public pressure than elected judges; jurors are less likely to become calloused to a defendant’s plight; jury sentencing would obviate the need for jurors to nullify to avoid severe penalties; jury sentences are more temperate and fair because a jury tends to level individual opinions and provides a reconciliation of varied temperaments; and jury sentencing diminishes popular distrust of official justice. See, e.g., Betts, *supra*, at 371.

⁵⁹ Each of the three approaches taken in archival studies of jury sentencing involve some methodological difficulties. An absolute comparison of mean sentences in judge-sentencing and jury-sentencing states is perhaps the most problematic because studies of criminal courts have repeatedly shown that jurisdictions vary substantially both in norms of appropriate sentencing (i.e., harshness) and practices (e.g., the use of probation). See Alfred Blumstein, Summary, in 1 *Research on Sentencing*, *supra* note 15, at 78. These differences, rather than the method of sentencing, may account for variation in mean sentence between states employing judge sentencing and those using jury sentencing. Comparing sentences meted out for similar crimes by judges and juries at the same time in the same jurisdiction involves the danger of sample bias: Where a defendant can choose the sentencing forum, every jury case in a study sample represents one in which the defendant believed that the jury would be more lenient, and every judge case represents one in which the defendant predicted that the judge would be more lenient. Finally, the variation of sentences within one jurisdiction before and after the abandonment of jury sentencing may result from changes in attitudes toward crime over time as well as the change in sentencing authority. However, these pre-post studies may minimize this difficulty by examining a number of crime categories in a relatively short period of time before and after the policy change and by using data from other jurisdictions to detect general sentencing trends over time.

⁶⁰ Researchers have repeatedly warned of the methodological difficulty of extrapolating from mock jury simulations to reality. Some of the pitfalls include the difficulty of recreating the psychological effects of making a decision that will seriously impact on another’s life; the tendency of studies to use shortened summaries of cases rather than full reenactments of testimony and argument; the tendency to analyze individual rather than group decisionmaking; and the prevalence of college students in study samples. See, e.g., Robert M. Bray & Norbert L. Kerr, *Methodological Considerations in the Study of the Psychology of the Courtroom*, in *The Psychology of the Courtroom* 287 (Norbert L. Kerr & Robert M. Bray eds., 1982).

⁶¹ For a discussion of the historical roots of North-South variation in criminal justice, see Edward L. Ayers, *Vengeance and Justice: Crime and Punishment in the 19th-Century American South* 270-76 (1984).

⁶² See *supra* note 59.

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- ⁶³ For references to articles preferring judge to jury sentencing, see *supra* note 58.
- ⁶⁴ See Note, Statutory Structures, *supra* note 58, at 1154 & nn.136-37 (citing jury sentencing statutes in 13 states).
- ⁶⁵ See [Ark. Code Ann. §16-90-107\(b\)\(1\)](#) (Michie 1997); [Ky. Rev. Stat. Ann. §532.055\(2\)](#) (Banks-Baldwin 1997); [Mo. Ann. Stat. §557.036](#) (West 1997); [Tex. Code Crim. P. Ann. art. 37.07 §2\(b\)](#) (West 1997); [Va. Code Ann. § 19.2-295](#) (Michie 1997).
- ⁶⁶ See Note, Jury Sentencing, *supra* note 58, at 971 n.14; see also, e.g., Betts, *supra* note 58, at 370-71 (explaining the introduction of jury sentencing in Texas); Note, *supra*, at 970-72 (providing a brief history of jury sentencing in Virginia).
- ⁶⁷ See, e.g., Betts, *supra* note 58, at 370; LaFont, *supra* note 58, at 836-37; Reese, *supra* note 58, at 325; Note, Jury Sentencing, *supra* note 58, at 970-71; Note, Statutory Structures, *supra* note 58, at 1155. Resentment of both Spanish colonial judges and Mexican judges led Texas to introduce jury sentencing in the first meeting of its legislature in 1846. See Betts, *supra* note 58, at 370.
- ⁶⁸ [Okla. Stat. Ann. tit. 22 §926](#) (West 1998) (citing 1907-1908 Okla. Sess. Laws 462); 1829 Tenn. Pub. Acts, ch. 23, §76.
- ⁶⁹ See, e.g., [State v. Mackey, 553 S.W.2d 337, 342 \(Tenn. 1977\)](#) (“In many jurisdictions, distrust of a powerful judiciary motivated a statutory transfer of the power of sentencing from the court to the jury.”).
- ⁷⁰ See, e.g., [Ky. Rev. Stat. Ann. §532.060](#) cmt. (Banks-Baldwin 1998) (stating that additions to the code in 1974 permitted judges for the first time to modify jury sentences and to substitute probation or conditional discharge for imprisonment); Dix & Dawson, Texas Criminal Practice and Procedure §38.12 (1995 & Supp. 1998) (stating that in 1966 Texas moved from a unitary to a bifurcated trial format for all cases but some misdemeanors and expanded the amount of evidence provided to the sentencing jury); David Louis Raybin, Tennessee Criminal Practice and Procedure §32.2 (1985) (describing changes in jury sentencing in Tennessee over time); Note, Jury Sentencing, *supra* note 58, at 971-72 (noting that, in Virginia, the original pattern of jury sentencing only for misdemeanors was temporarily reversed in the middle of the 19th century before jury sentencing for both felonies and misdemeanors was restored in 1882).
- ⁷¹ Arkansas and Virginia adopted bifurcated systems that became effective in 1994. See 1993 Ark. Acts 535, 551 §7 (codified at [Ark. Code Ann. §16-97-101](#)); 1994 Va. Acts, ch. 828, 860, 862, 881 (codified at [Va. Code Ann. § 19.2-295.1](#) (Michie 1997)); [Shifflett v. Virginia, 494 S.E.2d 163, 168 \(Va. Ct. App. 1997\)](#) (Annunziata, J., dissenting) (discussing the change to a bifurcated system). Missouri severely limited the role of the jury in sentencing by permitting the defendant to waive jury sentencing and prohibiting jury sentencing for prior, persistent, and dangerous offenders. See [Mo. Ann. Stat. §557.036](#) (West 1997).
- ⁷² See, e.g., President’s Comm’n on Law Enforcement & Admin. of Justice, *supra* note 58, at 356; Jouras, *supra* note 58, at 300-01; Kerr, *supra* note 58, at 108; LaFont, *supra* note 58, at 848.
- ⁷³ [Mo. Ann. Stat. §557.036-5](#) (West 1997).
- ⁷⁴ See [Va. Code Ann. §19.2-295.1](#) (Michie 1994) (allowing only copies of the record of conviction); [Rush v. State, 919 S.W.2d 933, 934-35 \(Ark. 1996\)](#) (interpreting the admissibility of evidence relating to the “nature of the previous convictions” to mean the general character of the pertinent crime) (quoting [Ark. Code Ann. §16-97-103\(2\)](#) (Michie 1997)); [Robinson v. Commonwealth, 926 S.W.2d 853, 855 \(Ky. 1996\)](#) (holding testimony by a victim of a prior crime inadmissible because the statute only contemplates general information of prior offenses).

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- 75 See Ark. Code Ann. §16-90-107(c)-(d) (Michie 1997); Ky. Rev. Stat. Ann. §532.055(2) (Banks-Baldwin 1997); Mo. R. Crim. P. 29.04, 29.06; Okla. Stat. Ann. tit. 22, §§926, 928 (West 1997); Va. Code Ann. §19.2-295 (Michie 1994).
- 76 See Va. Code Ann. §17-235.9 (Michie 1994).
- 77 See, e.g., Ark. Code Ann. §16-90-107(e) (Michie 1997) (giving the court the power to reduce the sentence “if, in the opinion of the court,...the punishment assessed is greater than, under the circumstances of the case, ought to be inflicted”); Ky. Rev. Stat. Ann. §532.070 (Banks-Baldwin 1997) (describing the judge’s power to modify an excessively harsh jury punishment); Okla. Stat. Ann. tit. 22, §955 (West 1997) (permitting judges to suspend jury sentences).
- 78 *Duncan v. Commonwealth*, 343 S.E.2d 392, 394 (Va. Ct. App. 1986) (quoting *Vines v. Muncy*, 553 F.2d 342, 349 (4th Cir. 1997)).
- 79 ABA Standards, supra note 57, §1.1 cmt.b. (“Recent opinion has been nearly unanimous that jury sentencing in noncapital cases is an anachronism and that it should be abolished.”).
- 80 Report of the Subcomm. To Study Sentencing for Va. State Crime Comm’n 2 (1977) [hereinafter Va. Comm’n Rep.]
- 81 See Brian J. Ostram & Neal B. Kander, Court Statistics Project, Examining the Work of State Courts 65 (1994).
- 82 Brent L. Smith & Edward H. Stevens, Sentence Disparity and the Judge-Jury Sentencing Debate: An Analysis of Robbery Sentences in Six Southern States, 9 Crim. Just. Rev. 1 (1984).
- 83 The analysis in Smith and Stevens’s study does not discuss absolute comparisons between mean sentences in judge states and jury states because of the methodological difficulties of such an approach. Cf. supra note 59. Indeed, the extent of regional variation in severity regardless of sentencing authority is highlighted by the fact that the mean robbery sentence in Texas was more than 10 years higher than both the mean sentence in Tennessee (the other jury-sentencing state studied) and the mean sentence during the period of jury sentencing in Alabama. Excluding Texas, the average jury punishments in Alabama and Tennessee were at times lower, at times the same, and at times higher than the average sentences in the three judge-sentencing states. See Smith & Stevens, supra note 82, at 4 tbl.1.
- 84 See Smith & Stevens, supra note 82, at 4.
- 85 See id. at 3.
- 86 See id. at 3 & 4 tbl.1.
- 87 William A. Eckert & Lauri E. Ekstrand, The Impact of Sentencing Reform: A Comparison of Judge and Jury Sentencing Systems (1975) (unpublished manuscript, on file with The Yale Law Journal).
- 88 See id. at 7.

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- ⁸⁹ See *id.* at 8-12. This result remained the same for first offenders in all crime categories and for defendants with prior convictions in all crime categories except murder. See *id.* at 10.
- ⁹⁰ See Weninger, *supra* note 57, at 31. It is important to note that Weninger's results may be tainted by sample bias. See *supra* note 59.
- ⁹¹ See Weninger, *supra* note 57, at 35 tbl.2, 36 (showing that for cases that went to trial, judges granted probation to first offenders 59% of the time while juries granted probation 69% of the time, and that 18% and 25% of repeat offenders were given probation by judges and juries, respectively).
- ⁹² See *id.* at 36. For discussions of the trial tariff in nonjury-sentencing jurisdictions, see David Brereton & Jonathan D. Caspar, *Does It Pay To Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 L. & Soc'y Rev. 45 (1981-1982); and Thomas M. Uhlman & N. Darlene Walker, "He Takes Some of My Time, I Take Some of His": An Analysis of Judicial Sentencing Patterns in Jury Cases, 14 L. & Soc'y Rev. 323 (1980).
- ⁹³ See *supra* note 60.
- ⁹⁴ See Va. Comm'n Rep., *supra* note 80, at 6-11.
- ⁹⁵ See *id.* at 9-11.
- ⁹⁶ See *id.* at 11-12.
- ⁹⁷ See Shari Seidman Diamond & Loretta J. Stalans, *The Myth of Judicial Leniency in Sentencing*, 7 Behav. Sci. & L. 73, 74-81 (1989).
- ⁹⁸ See *id.* at 80-81.
- ⁹⁹ Webster compared the mean prison sentence meted out by judges and jurors in Dallas County, Texas, during 1958 and 1959 and found that the average juror sentence was significantly higher in cases of narcotics, murder, and "assault-attempt murder." Webster, *supra* note 58, at 226 & chart III. There are several difficulties with this study, however. First, the data includes sentences imposed by judges following guilty pleas, and it is therefore possible that the sentencing difference reflects a trial tariff. Further, the data does not include probation or suspended sentence rates. Finally, since Texas used a unitary trial scheme in this period, the sentencing jury was not presented with evidence of the characteristics of individual offenders, including prior criminal history. It is possible that jurors in many cases, particularly those involving narcotics, falsely assumed that the defendant had a criminal record. This hypothesis is consistent with Webster's finding that the differential between judge sentences and jury sentences was greater in narcotics cases than in rape and assault-attempted murder cases. See *id.* at 226 chart III. In any case, Webster's findings are largely irrelevant since current jury-sentencing schemes are bifurcated.
- ¹⁰⁰ See Eckert & Ekstrand, *supra* note 87, at 8-10 (comparing sentences before and after Georgia introduced judge sentencing and finding no evidence of systematic jury-sentencing disparity in any of the crime categories studied except aggravated assault); Smith & Stevens, *supra* note 82, at 4 (finding a larger deviation from the mean in Alabama in the period of judge sentencing than in the jury sentencing years, although the standard deviation in all three jury states was higher than in the three judge-sentencing states studied). But see Weninger, *supra* note 57, at 31-32 (comparing judge sentences and jury sentences in El Paso County and finding greater variability between the jury sentences than between the judge sentences for six of the seven crimes studied). For a

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discussion of the methodological difficulties of these studies, see *supra* note 59.

- ¹⁰¹ See, e.g., Betts, *supra* note 58, at 372 (“Consideration of a light sentence, suspended sentence, or a quick parole may exert just the degree of influence necessary to persuade the doubtful juror to agree to a verdict of guilty.”).
- ¹⁰² See Martin F. Kaplan & Sharon Krupa, Severe Penalties Under the Control of Others Can Reduce Guilt Verdicts, 10 L. & Psychol. Rev. 1, 8 (1986) (reporting that college student mock jurors were more likely to convict when they controlled the punishment decision).
- ¹⁰³ See Alfred Blumstein & Jacqueline Cohen, Sentencing of Convicted Offenders: An Analysis of the Public’s View, 14 L. & Soc’y Rev. 223, 249 (1980).
- ¹⁰⁴ See *id.* at 243-48 (identifying five demographic subgroups: blacks, white males with and without secondary education, and white females with and without secondary education).
- ¹⁰⁵ For example, only 3.8% of all state court judges are African-American. In Georgia, only 6% of state judges are African-American, while 27% of the population is African-American. See Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95, 95 & nn.2, 3, 5 (1997).
- ¹⁰⁶ The study found that in Alabama’s jury-sentencing period (1957-1977), sentencing severity varied substantially by race (both in favor of and against whites) at various times, but that the aggregate difference over the whole period between the percentage of blacks and whites receiving above average sentences (30.9% and 22.8%, respectively) was not significant. When judges began to sentence, the fluctuation in the percentages of blacks and whites receiving high sentences stabilized somewhat (52.2% for blacks, 57.1% for whites). See Smith and Stevens, *supra* note 82, at 6. This study did not include data on the percentage of blacks and whites receiving above-average sentences for any state studied except Alabama. Studies examining the relationship between race and sentencing in judge-sentencing schemes are similarly inconclusive; while some studies have found that racial bias influences judge sentencing, others have suggested that the influence of race on sentencing can be attributed to other case-related attributes. See Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. Pa. L. Rev. 2245, 2319 & n.295 (1992) (summarizing studies).
- ¹⁰⁷ See Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 Mich. L. Rev. 1611, 1625-36 (1985) (providing an overview of studies indicating the prevalence of racism in jury verdicts); Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 Mich. L. Rev. 63, 75-99 (1993) (same).
- ¹⁰⁸ See Hubert S. Feild & Nona J. Barnett, Simulated Jury Trials: Students vs. “Real” People as Jurors, 104 J. Soc. Psychol. 287, 290-91 (1978) (finding no racial disparity in sentencing black and white offenders by mock jurors); Charlan Nemeth & Ruth Hyland Sosis, A Simulated Jury Study: Characteristics of the Defendant and the Jurors, 90 J. Soc. Psychol. 221, 226 (1973) (finding that some, but not all, student mock jurors sentenced white defendants more severely); Cheryl J. Oros & Donald Elman, Impact of Judges’ Instructions upon Jurors’ Decisions: The ‘Cautionary Charge’ in Rape Trials, 10 Representative Res. in Soc. Psychol. 28, 34 (1979) (finding no significant difference in sentences given to black and white rape defendants by white student subjects); Yvonne Hardaway Osborne & Neil B. Rappaport, Sentencing Severity with Mock Juries: Predictive Validity of Three Variable Categories, 3 Behav. Sci. & L., 467, 470 (1985) (finding that defendants of lower socioeconomic status were given longer sentences but that black defendants were not given harsher sentences than whites). But see Andrea DeSantis & Wesley A. Kayson, Defendant’s Characteristics of Attractiveness, Race, and Sex in Sentencing Decisions, 81 Psychol. Rep. 679 (1997) (finding that subjects asked to sentence burglary defendants sentence African Americans more harshly than whites); Hubert S. Feild, *Rape Trials and Jurors’ Decisions: A Psycholegal Analysis of the Effects of Victim, Defendant, and Case Characteristics*, 3 Law & Hum. Behav. 261, 271 (1979) (finding that mock jurors’ sentences varied greatly depending on an interaction among the defendant’s race, victim’s race, type of rape, victim attractiveness, and other factors); Kitty Klein & Blanche Creech, Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes, 3 Basic & Applied Soc. Psychol. 21, 28-29 (1982) (finding that white subjects

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sentence black rape defendants more harshly than white defendants).

- ¹⁰⁹ Johnson, *supra* note 107, at 1637. Some scholars argue, however, that subconscious racism would in fact have a greater effect on the sentencing decision than the determination of guilt. See, e.g., Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 *Behav. Sci. & L.* 179, 191 (1992) (arguing that the “ambiguous norms” of sentencing permits subconscious racism to play a greater role in sentencing than in the verdict).
- ¹¹⁰ See Johnson, *supra* note 107, at 1637.
- ¹¹¹ *Id.*
- ¹¹² See *Turner v. Murray*, 476 U.S. 28, 35-37 (1986) (holding that a capital defendant has the right to pose questions about racial bias to jurors who will sentence him, but not to jurors who will determine guilt); *Williams v. Chrans*, 945 F.2d 926, 944 (7th Cir. 1991) (“Because of the great discretion entrusted to a jury in a capital sentencing hearing, a unique opportunity exists for racial prejudice to operate but remain undetected.”).
- ¹¹³ 481 U.S. 279 (1987).
- ¹¹⁴ While the evidence for the influence of victim race on capital sentencing is fairly well established, the data on the impact of the defendant’s race is equivocal. See, e.g., GAO, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 5-6 (1990) (providing an evaluation synthesis of 53 post- Furman studies); David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* 401 (1990) (finding evidence of race-of-the-victim discrimination, discrimination against white defendants in urban areas, and discrimination against black defendants in rural areas, but no overall significant discrimination based on defendant’s race in post- Furman death penalty cases in Georgia); Samuel R. Gross & Robert Mauro, *Death & Discrimination: Racial Disparities in Capital Sentencing* 109 (1989) (finding discrimination based on the victim’s race in a study of capital sentencing in eight states).
- ¹¹⁵ See, e.g., Gross & Mauro, *supra* note 114, at 110 (noting that disparities based on victim race might be attributable to police or prosecutors); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 *Crime & Delinq.* 563 (1980) (suggesting that the statistical racial disparities in treatment of capital defendants might be attributable to pretrial discrimination).
- ¹¹⁶ See, e.g., GAO, *supra* note 114, at 271; Gross & Mauro, *supra* note 114, at 22 (discussing studies indicating racism by prosecutors).
- ¹¹⁷ Baldus, *supra* note 114, at 167.
- ¹¹⁸ For a review of the studies, see King, *supra* note 107, at 95-98.
- ¹¹⁹ See Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 *Law & Hum. Behav.* 31, 34-39, 46-48 (1984).
- ¹²⁰ See King, *supra* note 107, at 96 (discussing research indicating that “as the proportion of white jurors on the jury increases, the probability that the jury will impose the death penalty also increases”).

- ¹²¹ See *id.* at 96-97 (“[S]tudies have found that in-group bias disappears when jurors choose a term of years or probation....”).
- ¹²² Sweeney & Haney, *supra* note 109, at 192; see also Gross & Mauro, *supra* note 114, at 112 (“Something about capital cases makes them particularly susceptible to racial prejudice....”).
- ¹²³ On the incompatibility of parole and jury-sentencing schemes, see Wright, *supra* note 56, at 120-21.
- ¹²⁴ See *supra* notes 75-78 and accompanying text.
- ¹²⁵ For an analysis of this effect in the determinate sentencing context, see *supra* Section I.C.