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4. *Sixth Amendment — Allocation of Factfinding in Sentencing.* — *Apprendi v. New Jersey*<sup>1</sup> spawned a series of Supreme Court sentencing decisions which, when viewed together, are at best confusing and at worst contradictory. Commentators and courts have struggled to find a coherent governing principle uniting *Apprendi*, *Blakely v. Washington*,<sup>2</sup> and *United States v. Booker*.<sup>3</sup> The holding in *Apprendi*, originally described as a “bright-line rule,”<sup>4</sup> has proved anything but. Last Term, in *Cunningham v. California*,<sup>5</sup> the Court added another chapter to the *Apprendi* saga when it declared unconstitutional California’s Determinate Sentencing Law (DSL). Justice Ginsburg authored the majority opinion that overturned the California Supreme Court’s determination that the DSL did not differ in any constitutionally relevant way from the Federal Sentencing Guidelines, as revised by *Booker*.<sup>6</sup> Although at first blush *Cunningham* seems to be an ode to meaningless formalism,<sup>7</sup> reading between the lines of its opinions exposes a substantive debate about what the Sixth Amendment means and why it matters. The Court’s decision implicitly protects the role of the jury, so that the voices of individual citizens may serve as a

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Act of 1996 (AEDPA). See *Carey v. Musladin*, 127 S. Ct. 649 (2006) (rejecting appellant’s habeas petition). Under AEDPA, the petitioner is not entitled to habeas relief unless adjudication of the claim “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1) (2000).

<sup>77</sup> Of course, overruling *Saucier*, implicitly or otherwise, would raise general concerns of stare decisis. However, such concerns are unconvincing here given the procedural nature of the *Saucier* test, as well as its relative novelty. See *Harris*, 127 S. Ct. at 1781 (Breyer, J., concurring).

<sup>1</sup> 530 U.S. 466 (2000).

<sup>2</sup> 542 U.S. 296 (2004).

<sup>3</sup> 543 U.S. 220 (2005).

<sup>4</sup> See *Apprendi*, 530 U.S. at 525 (O’Connor, J., dissenting).

<sup>5</sup> 127 S. Ct. 856 (2007).

<sup>6</sup> In *Cunningham*, Justice Ginsburg broke her *Apprendi* silence. She had not since authored an opinion about sentencing under the Sixth Amendment, although her crucial votes in *Booker* gave rise to a paradox in the *Apprendi* line: that a sentencing judge cannot be required to consider facts not proved to a jury, but if he is given the choice to do so or not, he may do so with (more or less) impunity. Justice Ginsburg was the only Justice to vote for both *Booker* opinions, suggesting that the logical overlap between them, if there was any, could be found in the mind of Justice Ginsburg. Jurists and critics have therefore waited with bated breath for Justice Ginsburg to write about her Sixth Amendment vision, and *Cunningham* provided that opportunity.

<sup>7</sup> Starting as early as *Apprendi*, dissenters have lambasted the Court’s emphasis on statutory maximums as overly formalistic. See *Apprendi*, 530 U.S. at 539 (O’Connor, J., dissenting) (“[I]t is possible that the Court’s ‘increase in the maximum penalty’ rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights it seeks to effectuate.”); *Blakely*, 542 U.S. at 321 (O’Connor, J., dissenting) (“[I]t is difficult for me to discern what principle besides doctrinaire formalism actually motivates today’s decision.”); *id.* at 333 (Breyer, J., dissenting) (“While ‘the judge’s authority to sentence’ would formally derive from the jury’s verdict, the increase in the maximum penalty . . . is not a ‘bright-line rule.’” (quoting *Apprendi*, 530 U.S. at 525)).

check against the legislature when it diverges from the will of the people.

A jury convicted John Cunningham of continuous sexual abuse of a child under age fourteen.<sup>8</sup> Under California's DSL, Cunningham faced a sentence of either six, twelve, or sixteen years in prison. The judge was required to impose the twelve-year sentence unless he found one or more additional facts in aggravation or mitigation by a preponderance of the evidence.<sup>9</sup> Finding that the aggravating factors outweighed the one mitigating factor, the trial court sentenced him to the "upper term" of sixteen years.<sup>10</sup> The California Court of Appeal affirmed the conviction.<sup>11</sup>

The California Supreme Court denied review of *Cunningham*, presumably because it had upheld the application of the DSL in a nearly identical case nine days earlier. In that ruling, *People v. Black*,<sup>12</sup> the court concluded that California's DSL resembled Justice Breyer's remedy for the Federal Sentencing Guidelines in *Booker*.<sup>13</sup> The *Black* court navigated the DSL through the perils of *Apprendi* and *Blakely* by distinguishing the DSL from the sentencing structures in those cases. *Apprendi*, the *Black* court explained, freed prosecutors from having to prove to a jury some elements of a crime by characterizing them as factors authorizing sentencing enhancements.<sup>14</sup> *Apprendi* was inapposite because the DSL involved only "judicial factfinding that traditionally has been a part of the sentencing process."<sup>15</sup> In turn, the *Black* court distinguished *Blakely* by concluding that the DSL permitted, but did not require, the trial judge to impose the longer sentence for *any* aggravating factor, and not only for one from an exhaustive list.<sup>16</sup>

Having distinguished *Apprendi* and *Blakely*, the *Black* court turned to the remedial opinion of *Booker* and concluded that Justice Breyer's excision of the mandatory language from the Federal Sentencing Guidelines rendered the Guidelines constitutionally indistinguishable from California's DSL.<sup>17</sup> The *Black* court maintained that both the DSL and the Guidelines preserved judicial discretion in sentencing, striking a balance that optimized both retributive and utilitarian goals

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<sup>8</sup> *People v. Cunningham*, No. A103501, 2005 WL 880983, at \*1 (Cal. Ct. App. Apr. 18, 2005).

<sup>9</sup> *Cunningham*, 127 S. Ct. at 860-61 (citing CAL. PENAL CODE § 288.5(a) (West 2006)).

<sup>10</sup> *Id.* at 861.

<sup>11</sup> *Cunningham*, 2005 WL 880983, at \*8-10.

<sup>12</sup> 113 P.3d 534 (Cal. 2005).

<sup>13</sup> *See id.* at 542-48.

<sup>14</sup> *Id.* at 539-40.

<sup>15</sup> *Id.* at 545.

<sup>16</sup> *Id.* at 544.

of punishment.<sup>18</sup> And since Justice Breyer's remedial plan in *Booker* implied that the only constitutional flaw of the Federal Guidelines was that they were mandatory,<sup>19</sup> then the fact that the DSL gave discretion to judges to choose among sentencing options placed it beyond constitutional reproach.

Following the California Supreme Court's opinion in *Black* and its refusal to hear *Cunningham*, the United States Supreme Court granted certiorari in *Cunningham* to determine the constitutionality of the DSL under its recent line of Sixth Amendment cases.<sup>20</sup> Justice Ginsburg, writing for the Court,<sup>21</sup> overruled *Black* and declared the DSL a violation of a defendant's right to a jury trial. She began by describing the DSL's statutory scheme for determining sentences, explaining that "[f]or most offenses, including *Cunningham's*, the DSL regime . . . prescribes three precise terms of imprisonment — a lower, middle, and upper term sentence."<sup>22</sup> The text specifies that "the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime."<sup>23</sup> Justice Ginsburg observed that the state's Judicial Council's Rules provide examples of mitigating or aggravating circumstances, which are tellingly described as "*facts* which justify the imposition of the upper prison term."<sup>24</sup>

Justice Ginsburg then surveyed the relevant Supreme Court law, providing glosses of the holdings of *Apprendi*, *Blakely*, and *Booker*. *Apprendi*, Justice Ginsburg explained, stood for the notion that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>25</sup> Next, according to Justice Ginsburg, *Blakely* clarified the definition of "statutory maximum":

[T]he relevant "statutory maximum" is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts that "the law makes essential to the punishment . . . ."<sup>26</sup>

<sup>18</sup> *Id.* at 547.

<sup>19</sup> See *United States v. Booker*, 543 U.S. 220, 245 (2000) (Breyer, J., delivering the opinion of the Court in part).

<sup>20</sup> See *Cunningham*, 127 S. Ct. at 860.

<sup>21</sup> Chief Justice Roberts and Justices Stevens, Scalia, Souter, and Thomas joined the opinion.

<sup>22</sup> *Cunningham*, 127 S. Ct. at 861 (citing CAL. PENAL CODE § 288.5(a) (West 2006)).

<sup>23</sup> *Id.* (quoting CAL. PENAL CODE § 1170(b) (West 2006)) (internal quotation marks omitted).

<sup>24</sup> *Id.* at 862 (quoting CAL. R. CT. 4.405(d)) (internal quotation marks omitted).

<sup>25</sup> *Id.* at 864 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)) (internal quotation marks omitted).

<sup>26</sup> *Id.* at 862 (quoting *Blakely v. Washington*, 542 U.S. 296, 303 (2004)) (citations omitted).

Finally, Justice Ginsburg discussed both of *Booker's* controlling opinions, explaining that Justice Breyer rescued the Guidelines from the constitutional dustbin by excising their mandatory language.<sup>27</sup>

In reversing the California Court of Appeal, Justice Ginsburg primarily argued against the reasoning in *Black*. The *Black* court erroneously concluded that the upper term, and not the middle term, was the statutory maximum for Sixth Amendment purposes. She identified two flaws in *Black's* reasoning that produced this error. First, *Black* ignored *Blakely's* holding that “[i]f the jury’s verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.”<sup>28</sup> Second, Justice Ginsburg faulted the *Black* court for downplaying the mandatory language of the DSL as a “reasonableness constraint.”<sup>29</sup>

This last rhetorical move of the *Black* court was crucial to its analogy between the DSL and the post-*Booker* Guidelines. As that prong fell, so did the *Black* court’s ability to buttress the DSL with Justice Breyer’s constitutional remedy for the Guidelines. Justice Ginsburg rejected outright the *Black* court’s analogy: “The attempted comparison is unavailing. . . . Under California’s system, judges are not free to exercise their ‘discretion to select a specific sentence within a defined range.’”<sup>30</sup>

Justice Kennedy dissented,<sup>31</sup> arguing against both the majority’s reading of the *Apprendi* line of cases and the wisdom of upholding them at all. Kennedy expressed the view that if *Apprendi* and its progeny are not to be overturned, then at least their harms (stated by Justice Kennedy in vivid if hyperbolic terms) should be cabined:

In my view the *Apprendi* line of cases remains incorrect. Yet there may be a principled rationale permitting those cases to control within the central sphere of their concern, while reducing the collateral, widespread harm to the criminal justice system and the corrections process now resulting from the Court’s wooden, unyielding insistence on expanding the *Apprendi* doctrine far beyond its necessary boundaries.<sup>32</sup>

That limiting principle, according to Justice Kennedy, would be the boundary between “sentencing enhancements based on the nature of the offense, where the *Apprendi* principle would apply, and sentencing enhancements based on the nature of the offender, where it would

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<sup>27</sup> *Id.* at 866–67 (stating that under Justice Breyer’s solution, “judges would no longer be tied to the sentencing range indicated in the Guidelines”).

<sup>28</sup> *Id.* at 869 (citing *Blakely*, 542 U.S. at 305 & n.8).

<sup>29</sup> *Id.* at 870 (citing *People v. Black*, 113 P.3d 534, 548 (Cal. 2005)).

<sup>30</sup> *Id.* (quoting *United States v. Booker*, 543 U.S. 220, 233 (2005) (Stevens, J., delivering the opinion of the Court in part)).

<sup>31</sup> Justice Breyer joined the dissent.

not.”<sup>33</sup> Justice Kennedy pointed out that juries are incompetent to apply consistent standards or take a broad view of correctional systems. Consistency and vision, he argued, are in the province of judges, repeat players who are more likely have coherent and realistic ideas about punishment.<sup>34</sup> To Justice Kennedy, facts about the offender are more salient to decisions about punishment and facts about the offense are more salient to decisions of guilt. Therefore Justice Kennedy would subject the latter, but not the former, to *Apprendi* protections.<sup>35</sup>

Justice Alito wrote a separate dissent,<sup>36</sup> restating and expanding the argument in *Black*. He argued that the DSL is virtually identical to the post-*Booker* Guidelines because it allows broad discretion in sentencing.<sup>37</sup> In raising a sentence, the judge may take into account factors that are not facts at all, including policy considerations such as restitution and uniformity.<sup>38</sup> The check that the DSL provides on a judge’s sentencing determination — that it be “reasonable” — is precisely the same as that imposed by the post-*Booker* Guidelines. That the DSL requires a judge to find particular facts in aggravation in order to enjoy a presumption of reasonableness for an upper term sentence does not make it constitutionally different from the reasonableness requirement of *Booker*. Thus Justice Alito concluded that “[u]nless the Court is prepared to overrule the remedial decision in *Booker*, the California sentencing scheme at issue in this case should be held to be consistent with the Sixth Amendment.”<sup>39</sup>

What is most remarkable about the *Apprendi* line of cases is what they do not say, and *Cunningham* is no exception. *Cunningham* evades the question made obvious by *Blakely* and *Booker*: if the Sixth Amendment provides criminal defendants the right to have their guilt determined beyond a reasonable doubt by a jury, and if a sentence is inextricable from the notion of guilt, then how may a sentencing judge constitutionally consider *in any way* a fact not proved to the jury? Why does this right only adhere in reference to a statutory maximum? Instead of answering these questions, Justice Ginsburg offered what at first glance seems to be a purely formalistic focus on *Blakely*’s definition of “statutory maximum,” which she referenced four times in her opinion.<sup>40</sup> She spoke disapprovingly of using standards or balancing interests,<sup>41</sup> and she ignored her colleagues’ equivocating references to

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<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 872–73.

<sup>36</sup> Justices Kennedy and Breyer joined the dissent.

<sup>37</sup> See *Cunningham*, 127 S. Ct. at 873 (Alito, J., dissenting).

<sup>38</sup> *Id.* at 879.

<sup>39</sup> *Id.* at 881.

<sup>40</sup> *Id.* at 860, 865, 868, 869 (majority opinion).

<sup>41</sup> *Id.* at 860.

policy and pragmatism.<sup>42</sup> It seems that for Justice Ginsburg, *Blakely* announced the meaning of the Sixth Amendment, and that was the end of the matter.

But a closer examination of the negatives of Justice Ginsburg's argument reveals an important substantive view of Sixth Amendment jurisprudence. Justice Ginsburg's seemingly formalistic rejection of the dissenters' state-oriented and defendant-oriented models may in fact signal the reemergence of an antiquated theory about one of the Sixth Amendment's purposes: to preserve meaningful citizen participation in the judicial process. According to this view, citizens in the jury box must affirm that statutory sentences, which derive their legitimacy from citizens acting as the electorate, are consistent with justice in the individual case. Such a view of the Sixth Amendment comports with both original intent and contemporary values and indeed would go a long way in restoring the criminal jury to its original luster. But this restoration requires changes in evidence practice: it is time to reconsider the current tendency to keep juries in the dark about sentencing.<sup>43</sup>

Justice Ginsburg's homage to the "statutory maximum" bright line of *Blakely* can also be inferred from her flat rejection of the dissenters' policy arguments. She tersely rejected Justice Kennedy's notion that the Sixth Amendment could support a sentencing scheme that distinguishes between facts related to the offense and those related to the offender: "*Apprendi* itself . . . leaves no room for the bifurcated approach Justice Kennedy proposes."<sup>44</sup> Justice Kennedy identified several policy considerations in support of his approach, including uniformity in sentencing, coordination between judges and correctional institutions,<sup>45</sup> and the idea that punishment ought to serve retribution and effect rehabilitation.<sup>46</sup> By refusing to engage in this debate on Justice Kennedy's terms, Justice Ginsburg rejected a defendant-oriented view of the Sixth Amendment.

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<sup>42</sup> See *id.* at 872 (Kennedy, J., dissenting); *id.* at 879 (Alito, J., dissenting).

<sup>43</sup> This view was advocated by Professor Michael T. Cahill in 2005, in an article that presaged the majority opinion of *Cunningham*. See Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91 (2005). Professor Cahill suggested that "[t]he jury should have enough information for its first-cut determination about punishment to reflect an actual decision, not an unknown consequence of some other deliberation." *Id.* at 94. Only when armed with knowledge about the relevant statutory maximum sentence could a jury fulfill its "proper mission" of imposing community norms where they differ from those reflected in the legislature. *Id.* at 96.

<sup>44</sup> *Cunningham*, 127 S. Ct. at 869 n.14.

<sup>45</sup> *Id.* at 872 (Kennedy, J., dissenting).

<sup>46</sup> By listing among the relevant "offender" characteristics "remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community," Justice Kennedy implied that the defendant's deserts and prospects for rehabilitation are

Likewise, when Justice Ginsburg challenged Justice Alito's recasting of "facts" as "factors," she rejected a state-oriented view of the Sixth Amendment. Again she dismissed a policy argument by using formalism: "In [Justice Alito's] view, a policy judgment, or even a judge's 'subjective belief' regarding the appropriate sentence, qualifies as an aggravating circumstance."<sup>47</sup> But for Justice Ginsburg, the word "fact" is used too often in the DSL to allow Justice Alito to evade the Sixth Amendment ramifications by invoking the term "factors."<sup>48</sup> What Justice Ginsburg failed to take head-on was Justice Alito's claim that the DSL is buoyed by its furthering of the state's legitimate interests in punishment.<sup>49</sup> By ignoring this argument, Justice Ginsburg implied that Justice Alito also had the terms of the debate wrong, and that the weighing of a state's interests in determining the constitutionality of a sentencing scheme has no place among *Blakely's* bright lines.

Justice Ginsburg thus rejected not only the dissenters' solution to the *Apprendi* enigma, but also the way they framed the problem. She stated her reasoning entirely in the negative: the Sixth Amendment is *not only* about a defendant's rights, and it is *not at all* about balancing the state's interests against the defendant's. This argumentative structure implies that there is at least one other interest that belongs in the Sixth Amendment conversation. Although she never directly addressed the issue, Justice Ginsburg provided at least one affirmative hint, albeit in a parenthetical, that the rights of the jury provided a normative principle behind her formalism. She quoted *Harris v. United States*<sup>50</sup> paraphrasing *Apprendi*: "*Apprendi* said that any fact extending the defendant's sentence beyond the maximum authorized by the jury's verdict would have been considered an element of an aggravated crime — and thus the domain of the jury — by those who framed the Bill of Rights."<sup>51</sup> A Sixth Amendment scheme that focuses on statutory maximums would allow "the people" on a jury to serve as a check against "the people" of the electorate. According to this view, the Sixth Amendment is not only about a defendant's right to a fair trial, but also about the right of the people to have the final word authorizing the imposition of their will as expressed through the legislature.

<sup>47</sup> *Id.* at 862 (majority opinion) (quoting *id.* at 879–80 (Alito, J., dissenting)).

<sup>48</sup> *See id.* at 862–63.

<sup>49</sup> *See id.* at 877 (Alito, J., dissenting) ("A California trial court can also consider the '[g]eneral objectives of sentencing,' including protecting society, punishing the defendant, [and] encouraging the defendant to lead a law abiding life." (first alteration in original) (quoting CAL. R. CT. 4.410(a))).

<sup>50</sup> 536 U.S. 545 (2002).

<sup>51</sup> *Cunningham*, 127 S. Ct. at 864 (quoting *Harris v. United States*, 536 U.S. at 550 (quoting *Blakely*)).



Although now largely symbolic, the criminal jury's role as the voice of the community was once thought to be its essence. The very notion that facts are the province of the jury and law that of the judge is a relatively recent axiom.<sup>52</sup> A verdict was thought to be more than a statement about *what happened*; it was a pronouncement of blame by the community on the individual. For example, Chief Justice John Marshall instructed the jury members in the case against Aaron Burr to "find a verdict of guilty or not guilty as [their] own consciences may direct."<sup>53</sup>

The founding generation saw the jury as a check on governmental tyranny.<sup>54</sup> The ascendancy of the criminal jury was one of the few examples of harmony between the Federalists and Antifederalists; both agreed that "the people should have another check on government action in the criminal context, an area in which the government's power is at its apex."<sup>55</sup> Thomas Jefferson placed jury trials above popular elections as instruments of democracy: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative."<sup>56</sup>

Such a view of the jury as community conscience and check on tyranny may still exist in rhetoric, but it has disappeared from practice. Professors Douglas Berman and Stephanos Bibas, in an article advocating an Alito-esque solution to *Cunningham*, epitomize the modern conception of the criminal jury: "Trials are backward-looking, offense-oriented events. Typically, trial disputes center on particular issues of historical fact."<sup>57</sup> Community wisdom, according to this contemporary

<sup>52</sup> For a survey of the history of the fact-law divide between jury and judge, as well as recent difficulty distinguishing between the two, see Ronald J. Allen & Michael S. Pardo, *The Myth of the Fact-Law Distinction*, 97 NW. U. L. REV. 1769 (2003); Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 902-21 (1994); and Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895 (2005).

<sup>53</sup> Alschuler & Deiss, *supra* note 52, at 915 (quoting *Sparf v. United States*, 156 U.S. 51, 67 (1895)).

<sup>54</sup> See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 54 (2003) (giving John Adams's view that the common people, acting through juries, should have "as compleat a Controul, as decisive a Negative, in every Judgment of a Court of Judicature" as the legislature should have in its power to veto executive action (quoting JOHN ADAMS, *Diary Notes on the Right of Juries* (Feb. 12, 1771), in 1 LEGAL PAPERS OF JOHN ADAMS 228, 229 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965))); Kirgis, *supra* note 52, at 901 ("The abridgment by imperial judges of the right to a jury trial was one of the key grievances leading to the American Revolution.").

<sup>55</sup> Barkow, *supra* note 54, at 55.

<sup>56</sup> Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 282, 283 (Julian P. Boyd ed., 1958).

<sup>57</sup> Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM.

view, is less useful for making moral judgments than it is for making epistemological ones. The wisdom that Jefferson had hoped would rein in a tyrannical government has now been relegated to finding facts.

Among its other defects, this modern view of the jury relies on the fallacy that guilt and sentence are fundamentally different kinds of judgments. In the era before determinate sentencing, most crimes carried definite sentences.<sup>58</sup> These sentences were common knowledge, and so a jury's verdict necessarily expressed a judgment, although an implicit one, about whether the defendant deserved the punishment. Today, the link between verdict and sentence is more complicated, but still recognized. In *Apprendi*, Stevens rejected the government's argument that since any guilty verdict makes the defendant subject to incarceration and social stigma, a sentence *enhancement* does not implicate the Sixth Amendment.<sup>59</sup> Thus, a jury's determination of guilt was inevitably also a *judgment* about the charged behavior.<sup>60</sup>

Since every juror can intuit that some consequence will flow from his verdict,<sup>61</sup> he knows that his vote, although ostensibly only about what *has* happened, is as much about what *will* happen. Thus, when a jury returns a guilty verdict, it is making a *de jure* determination of guilt and a *de facto* determination of sentence, in that a sentence will be imposed. In so doing, the jury serves as a check on both the executive branch (by holding the prosecution to its burden of proof) and the legislative branch (by affixing a statutory sentence only if it serves justice in the individual case).

This latter role protects against the tyranny of the legislature,<sup>62</sup> which is a very real threat in the case of sentencing. In the modern era of determinate sentencing, legislatures at both the state and the federal levels have constructed complex statutory sentencing schemes

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<sup>58</sup> Kirgis, *supra* note 52, at 907.

<sup>59</sup> *Apprendi v. New Jersey*, 530 U.S. 466, 485 (2000); see also *id.* (explaining that criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability" as manifest in the sentence (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 697-98 (1975)) (internal quotation marks omitted)).

<sup>60</sup> Indeed, this is the premise of jury nullification. See Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1256-57 (1995) (identifying a trend in seventeenth- and eighteenth-century England of juries nullifying harsh sentences by refusing to convict — a phenomenon that "contributed to the development of more humane sentencing laws").

<sup>61</sup> Professor Michael Cahill sees a verdict as a first-order sentence:

[T]wo punishment decisions are made in the course of establishing a criminal defendant's liability. The first occurs at conviction, where the available punishments are narrowed to the range defined by the conviction offense's statutory grade. The second occurs at sentencing, when the sentencing body makes a more refined decision and selects a punishment within that range.

Cahill, *supra* note 43, at 91.

that articulate a range of prison time for a crime, as well as a formula for where a defendant might fall in that range. The aim of determinate sentencing was to curb judicial discretion and promote uniformity across jurisdictions. The (perhaps unintended) result has been to make the criminal justice system much more punitive. To the extent that this increase in sentence length reflects a public interest in being "tough on crime," it is hard to see it as tyrannical, but the electorate's actual views on punishment may be distorted by collective action problems and the inefficiencies of politics. The political expedience of a candidate appearing anti-crime may cause the public's condemnation of criminals to be overstated in the legislature.<sup>63</sup> In addition, even if sentencing statutes accurately reflect the public's views on the proper punishment for a crime *in general*, they may overstate the punishment it is willing to impose *in a particular case*.<sup>64</sup>

But for a jury to serve as an effective check against an overly punitive electorate, the individuals on the jury must know the statutory consequences of a guilty verdict. In other words, the notion that *Blakely's* focus on statutory maximums closes a circuit between the jurors' and the voters' judgments depends on those jurors knowing the previous decisions of voters.

In fact, citizens cannot predict the statutory maximum faced by a defendant, partly because determinate sentencing schemes are notoriously complex, but also because the schemes take into account defendant characteristics that would prejudice the jury if they were presented at trial. Further, most courts exclude information about potential sentences as *per se* prejudicial.<sup>65</sup> But perhaps *Cunningham* signals that it is time to consider informing criminal juries about the maximum punitive consequences of a guilty verdict.

The modern jury is an anemic second cousin to that envisioned by the Founders. Once thought an engine of normative judgment, local wisdom, and democracy, today the criminal jury presides over a storytelling contest: it decides who presents the more logical or narratively satisfying account of "what happened." This erosion is lamentable, but

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<sup>63</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 525-26 (2001); Sauer, *supra* note 60, at 1240-41 ("[M]andatory penalties are often extremely harsh because they are ordinarily adopted as a passionate political response to a few highly publicized offenses or to a perceived generalized frustration with crime.").

<sup>64</sup> Researchers have shown that people are willing to affix a harsher punishment to a particular crime in the abstract than they are when presented with an actual defendant. See Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1781 (1999); cf. Barkow, *supra* note 54, at 59 ("[A]s a rule of law only takes account of broadly typical conditions and is aimed on average results, law and justice every so often do not coincide." (quoting John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUD. SOC'Y 166, 170 (1929)) (internal quotation marks omitted)); Sauer, *supra* note 60, at 1255 ("[L]egislative determinations will often be overinclusive.").

not, perhaps, irreversible. The seeds of revival may be buried in the most obscure corner of modern Supreme Court jurisprudence: *Apprendi* and its progeny. *Cunningham* has advanced this agenda, but it does not go far enough. A jury verdict will meaningfully reflect the community's conscience and rein in an overly punitive legislature only when it is the product of knowledge, not ignorance, about sentencing.