Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?

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INTRODUCTION

In 2007, a jury found Daniel Sheldon guilty of two child pornography offenses. Little about Sheldon was sympathetic. In his twenties and married, Sheldon spent long hours downloading and viewing pictures and videos showing minor girls, some prepubescent, engaging in sex with adults. Some videos showed bondage, others masochism. Sheldon had also engaged in cybersex with individuals who purported to be young girls.

What punishment should follow such a crime? If society punishes in order to stand with victims and impose justified retribution, what amount of deserts is just? No easy calculus exists. Because I was unsure that the Federal Sentencing Guidelines accurately mirror community punishment beliefs, I asked each of the *Sheldon* jurors—who were a cross-section of the community and who actually heard the case, saw the terrible images and videos, and met the defendant—to recommend anonymously what punishment Sheldon should receive. I put their responses away without examining them. Months later, I sentenced Sheldon within the Guidelines range, but near the high end. Surprise came upon learning that my sentence was almost five times higher than the average of the jurors' sentence recommendations.[1]

The *Sheldon* jury—six males and six females—was a typical sample of Ohio citizenry. The jurors came mostly from suburban and rural areas. Among them were a small business owner, a paralegal, a college professor, a new car sales manager, and an independent insurance agent. These jurors were a cross-section of their community: they lived middle-class lives, they worked at middle-class occupations, and they had middle-class educations.[2]

[1] I sentenced Sheldon to a term of imprisonment that was 488% of jurors' mean recommendation.

[2] The jurors resided in zip codes with an average median family income of $45,084, somewhat less than the United States median of $50,046. American FactFinder, http://

If anything distinguished them, they were older than average citizens of the community, with seven jurors over 50 years old and three over 60.

While this case and the jury selected to hear it were unremarkable, the disparity between the punishment that the jury felt Sheldon should receive and the punishment recommended by the Guidelines was striking. The jurors' mean recommended sentence was 20 months imprisonment, and the median recommended sentence was 15 months.[3] The Guidelines recommended a sentence between 87 and 108 months. Even the low end of the Guidelines range was almost six times the jurors' median recommendation.

As Professor Stith and Judge Cabranes describe, "[T]he criminal justice system exists not only to protect society in a reasonably efficient and humane way, but also to defend, affirm, and, when necessary, to clarify the moral principles embodied in our laws."[4] For federal judges, the requisite punishment to serve these purposes is difficult to determine. Hopefully, we choose sentences that correlate with the values and principles of our country. Hopefully, citizens with knowledge of the offense specifics would believe we have neither underpunished nor overpunished the offender. Against this backdrop, some years ago I decided to sample my juries to see if my sentences, generally based on those recommended by the Guidelines, aligned with a representative community's values.

To test whether or not the Federal Sentencing Guidelines square with community sentiment on just punishment—a significant concern for a system of punishment centered on retribution—I conducted a jury study with the aid of several other district court judges. In general, we selected juries randomly and believed they reflected a fair cross-section of the community.[5] Those jurors then learned the actual details of the criminal conduct, the defenses, and any mitigating facts. They saw and heard from the actual victims of the criminal conduct. Better than anyone else, they were positioned to know the crime and to give a fair measure of the community's sense of appropriate punishment.

To date, our study has examined 22 criminal cases where the jury returned a guilty verdict. After receiving the verdict, we gave the jurors a description of the defendant's past criminal convictions. We then asked the jurors to recommend a punishment (in months) for the defendant. The jurors made individual sentencing recommendations; they did not discuss their recommendations or know what other jurors were recommending. Although the sample may not be comprehensive, the jurors, generally hailing from Ohio, provided reasonable indicia of American punishment sentiment. Ohio

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factfinder.census.gov/home/saff/main.html (follow "Fact Sheet" hyperlink) (on file with the Harvard Law School Library).

[3] The *Sheldon* jurors individually recommended sentences of 5, 6, 6, 12, 12, 12, 18, 18, 24, 32, 48, and 48 months. Their recommendations had a standard deviation of 15.

[4] KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 78 (1998).

[5] *See* U.S. DIST. COURT FOR THE N. DIST. OF OHIO, JUROR SELECTION PLAN 3 (2005), *available at* http://www.ohnd.uscourts.gov/Juror_Information/JurorSelectionPlan.pdf.

nearly perfectly mirrors the United States in age, employment levels, income, poverty levels, racial composition,[6] and even political sentiment.[7]

The sample results show a marked difference between the Guidelines ranges and the jurors' recommendations. Combining all of the cases, the median juror recommended sentence was only 19% of the median Guidelines ranges and only 36% of the bottom of the Guidelines ranges. The jury study, although limited, strongly suggests that the Guidelines are untethered to appropriate punishments as determined by jurors actually hearing the case.

This disconnect has important practical and theoretical implications for the effectiveness of the Guidelines. As a general matter, community sentiment must be an important part of any just system of sentencing. Without some connection to community values, sentencing results in public misunderstanding of the relative seriousness of criminal conduct, undermines the criminal law's moral standing, and diminishes the criminal law's normative force.[8] Because of their disconnect with societal values, unprincipled Guidelines also invite evasion by sentencing judges.

As I will describe, sentencing should treat similarly situated offenders in a like manner. But after establishing a system that treats similar offenders in a similar way, sentencing law should choose punishments that reflect community sentiment. Juror surveying provides notable benefits to gauging that sentiment. With a five-minute questionnaire, the U.S. Sentencing Commission could easily sample juror punishment opinions after each trial. This simple process could provide meaningful insight regarding society's beliefs

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[6] Ohio's reputation as a swing-state in close presidential elections illustrates its representativeness. Based on the 2000 Census, Ohio has 64.8% of its population in the labor force, compared to 63.9% of the total U.S. population. In Ohio, the median family income is $50,037, while the United States has a median family income of $50,046. Ohio residents have a median age of 36.2, and the median age of all U.S. residents is 35.3. In Ohio, 13.4% of the population is 65 years of age or older, compared to 12.4% for the United States as a whole. Of Ohio families, 7.8% live below the poverty level, compared to 9.2% of all families in the United States. While 11.5% of Ohio residents are African American, 12.3% of United States residents are African American. American FactFinder, http://factfinder.census.gov/home/saff/main.html (select "Ohio" from dropdown menu under "Fast Access to Information") (on file with the Harvard Law School Library).

[7] Politically, Ohio gives a good indicator of American sentiment. In the 2008 presidential election, President Obama won 52% of the Ohio vote and 53% of the national vote, and John McCain won 46% of the Ohio vote and 47% of the national vote. Election Center 2008, http://www.cnn.com/ELECTION/2008/results/president/ (on file with the Harvard Law School Library). In 2004, President Bush won 51% of both the Ohio and national vote, and John Kerry won 49% of the Ohio vote and 48% of the national vote. Election Results, http://www.cnn.com/ELECTION/2004/pages/results/ (on file with the Harvard Law School Library).

[8] *See* Paul H. Robinson et al., *The Disutility of Injustice* 60 (Univ. of Pa. Law Sch., Pub. Law Research Paper No. 09-24, 2009), *available at* http://ssrn.com/abstract=1470905 ("[R]espondents with criminal court experience who viewed their community courts as morally credible in dealing with . . . those involving violence, drugs/alcohol, and delinquency[ ] expressed a greater willingness to defer to the criminal justice system in the future."); *see generally* Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines,* 1996 Wis. L. Rev. 679 (1996); Richard S. Frase, *Punishment Purposes,* 58 Stan. L. Rev. 67 (2005); Paul H. Robinson & John M. Darley, *The Utility of Desert,* 91 Nw. U. L. Rev. 453 (1997).

about just punishments, and could remedy the lack of moral parallelism between community values and democratic system outcomes evidenced by the jury study.

Part I of this Article provides an overview of sentencing theory and history. After considering the structure, operation, and history of the Guidelines, I argue that the Guidelines elevate retribution as the focus for sentencing over rehabilitation, deterrence, and incapacitation. Part II then describes the results of the jury study. The study reflects large disparities between the punishment recommended by jurors and by the Guidelines. Finally, Part III suggests some possible ways to better harmonize sentences with actual community sentiment. Although jury sentencing has a long history in America, I conclude that it poses too great a risk of disparity between similarly situated defendants. Instead of adopting juror sentencing wholesale, this Article ultimately recommends that the Sentencing Commission should methodically sample juror sentiments regarding appropriate punishment. Juror sampling offers an easy and effective way to take measure of important community beliefs.

I.   Sentencing Theory and History

A.   The Four Purposes of Sentencing and the Intellectual Debate Between Retribution and the Utilitarian Purposes

Commentators have written extensively on the four traditional purposes of sentencing: deterrence, incapacitation, rehabilitation, and retribution. Here, I do not aim to break new ground, but instead provide a short overview of the topic. After considering the changed emphasis over time among these purposes, I argue that retribution, not deterrence, incapacitation, or rehabilitation, has dominated and should dominate sentencing.

In recent years, deterrence has played a major role in sentencing.[9] It functions in two ways: specifically and generally. Specific deterrence discourages the particular offender from future unlawful conduct.[10] General deterrence uses the offender's sentence as an example to dissuade others from engaging in similar conduct.[11] Incapacitation separates a defendant from society and physically prevents further crime.[12] Rehabilitation attempts to reform an individual through the adverse prison experiences joined with

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[9] *See, e.g.*, Ewing v. California, 538 U.S. 11, 28 (2003) (holding that a "three strikes" sentence of 25 years to life for shoplifting three golf clubs was not unconstitutionally disproportionate).

[10] Frase, *supra* note 8, at 70 ("Specific deterrence (also known as special or individual deterrence) seeks to discourage the defendant from committing further crimes by instilling fear of receiving the same or a more severe penalty in the future.").

[11] *Id.* at 71 ("General deterrence seeks to discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.").

[12] *See id.* at 70 ("This crime-control method assumes not only that such offenders can be reliably identified but also that they are not made worse by imprisonment, and that—while in custody—they are not replaced by other offenders.").

education, training, and treatment.[13] Deterrence, incapacitation, and rehabil-
itation look forward and ask: What amount and kind of punishment does
society need to make itself safe?[14] We characterize these purposes as utilita-
rian: they use criminal punishment as a tool to improve society's future.

The debate regarding the purposes of sentencing has generally been be-
tween retribution and the three utilitarian functions. In contrast to the for-
ward-looking purposes of deterrence, incapacitation, and rehabilitation,
retribution focuses on the offender's actual conduct and the harm occa-
sioned.[15] With retribution, society considers the offender's degree of blame-
worthiness and amount of harm done and imposes punishment accordingly.
Thus, the defendant's past culpable acts and the effects of those acts upon
victims and society determine the sentence.

However, in addition to providing the equalizing function of imposing a
comparable calamity upon an offender, retribution serves a wider social pur-
pose. Criminals harm not only their immediate victims but society as well
by breaching the trust that members of society have that others will comply
with the law. With retribution, society responds and conditions the of-
fender's reentry to society upon the exaction of punishment.

Immanuel Kant and Jeremy Bentham offer the classic competing justi-
fications for the retributive and consequentialist purposes of sentencing.
Kant argued that retribution provides the most just purpose for sentencing.[16]
To be just, a punishment must be commensurate with the offense. In a
much-cited passage, Kant explained:

> Juridical Punishment can never be administered merely as a means
> for promoting another Good either with regard to the Criminal
> himself or to Civil Society, but must in all cases be imposed only
> because the individual on whom it is inflicted has committed a
> Crime. For one man ought never to be dealt with merely as a
> means subservient to the purpose of another . . . .[17]

According to Kant, no societal benefit could justify a sentence untethered to
a defendant's conduct; a punishment used as a utilitarian tool to improve
future societal conditions would be unjust. In comparison, Bentham argued
that a punishment used as anything but a utilitarian tool to improve future
societal conditions would be unjust:

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[13] *See* Bowman, *supra* note 8, at 685.
[14] *See* Frase, *supra* note 8, at 70–73.
[15] *See* U.S. Sentencing Comm'n, Supplementary Report on the Initial Sentencing
Guidelines and Policy Statements 15 (1987); Paul J. Hofer & Mark H. Allenbaugh, *The
Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guide-
lines*, 40 Am. Crim. L. Rev. 19, 24 (2003); Michael Tonry, *The Functions of Sentencing and
Sentencing Reform*, 58 Stan. L. Rev. 37, 62 (2005).
[16] *See* Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punish-
ment*, 28 Oxford J. Legal Stud. 57, 63 (2008).
[17] Immanuel Kant, The Philosophy of Law ¶ 549 (William Hastie trans., Clark 1887)
(1796), *available at* http://oll.libertyfund.org/title/359/55842.

> General prevention ought to be the chief end of punishment, as it
> is its real justification. If we could consider an offence which has
> been committed as an isolated fact, the like of which would never
> recur, punishment would be useless. It would be only adding one
> evil to another.[18]

Thus, for Bentham, even long and extreme sentences would be justified if
they sufficiently improved future societal conditions.

Although differing in their recommendations, both Kant and Bentham
sought a moral polity. Kant, however, disapproved of both failures to im-
pose deserved punishment and impositions of undeserved punishment for
some greater social purpose. In contrast, Bentham thought that improved
societal conditions provided the lodestar, even if the individual did not de-
serve the punishment. For Bentham, otherwise-deserved punishment could
not be imposed where the punishment would serve no future social purpose.

B.   The History of American Sentencing Policy as Reflecting the Debate Among Sentencing Purposes

While the Federal Sentencing Guidelines identify incapacitation, deter-
rence, and retribution as sentencing goals, the theory behind American sen-
tencing policy has been shaped by competition between rehabilitation and
retribution.

1.   Sentencing Policy Before the Sentencing Reform Act of 1984

Before Congress's enactment of the Sentencing Reform Act of 1984,[19]
rehabilitation provided the predominant underpinning of federal sentenc-
ing.[20] Perhaps naively, America saw criminality as a disease-type condition
that could be cured with proper treatment. During this time, America con-
sidered rehabilitation the prime goal of punishment.[21] This rehabilitative
paradigm, however, focused upon individualized treatment of defendants
and necessarily produced sentencing disparities.[22] Additionally, parole
boards enjoyed nearly unfettered discretion in choosing actual release
dates—a discretion based upon the misbegotten confidence that parole
boards could accurately judge offenders' suitability for reentry into society.[23]
Sentences that individuals actually served varied wildly from the sentences

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[18] JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 20 (Adamant Media Corp. 2005)
(1830); *see also* Fish, *supra* note16, at 63–64.

[19] Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified as amended in scattered sec-
tions of 18 and 28 U.S.C.).

[20] *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative
History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

[21] *See* Frank O. Bowman III, *Fear of Law: Thoughts on Fear of Judging and the State of
the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 300–01 (2000).

[22] *See* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 327
(2003).

[23] *See* Frase, *supra* note 8, at 71.

announced by the sentencing judges.[24] Wholly apart from questions about whether a rehabilitative model focused on the correct issue, observers increasingly questioned whether the model could adequately predict future dangerousness or protect the public.[25]

The current American system of punishment largely abandons the rehabilitative model of sentencing.[26] Changes in the Model Penal Code reflect that shift.[27] The original Model Penal Code, adopted by the American Law Institute in 1962, disdained retribution and instead said that the purposes of sentencing were utilitarian: What sentences would "prevent the commission of offenses" and "promote the correction and rehabilitation of offenders"?[28] Reflecting the changed sentencing emphasis, the new Model Penal Code focuses on desert as the primary goal of sentencing. The offender's blameworthiness takes center stage even if rehabilitation, general deterrence, and incapacitation are also considered.[29] Stated otherwise, the new Model Penal Code proposes that retribution provides the outer limit of punishment, while allowing deterrence, rehabilitation, and incapacitation to play a role within that outer limit.

2. *The Sentencing Reform Act's Rejection of Rehabilitation and Discretion*

The Sentencing Reform Act of 1984 follows this change. In enacting the Sentencing Reform Act, Congress most wanted to reduce sentencing disparities and achieve honesty in sentencing.[30] With the Act, Congress ended parole and its accompanying focus on rehabilitation, and directed that rehabilitation should not control sentencing.[31] Driven by separate concerns that federal sentencing was not transparent, was too lenient, and was too disparate, the Sentencing Reform Act fathered the Federal Sentencing Guidelines. Concerned that sentences for similar crimes varied unreasonably, the Guide-

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[24] *See* Bowman, *supra* note 21, at 302.

[25] *See* JAMES Q. WILSON, THINKING ABOUT CRIME 164 (1983) ("As the scientific basis for the possibility of rehabilitation was shown wanting, the philosophical rationale for making that the chief goal of sentencing began collapsing."); *see also* Frase, *supra* note 8, at 71; Tonry, *supra* note 15, at 55.

[26] *See* ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING, at xix (3d ed. 1994); Marc Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 435 (1992); Tonry, *supra* note 15, at 46.

[27] *Compare* MODEL PENAL CODE § 1.02 (2007) *with* MODEL PENAL CODE § 1.02 (Proposed Official Draft 1962); *see also* Robinson et al., *supra* note 8, at 4.

[28] MODEL PENAL CODE § 1.02(2)(a)–(b) (Proposed Official Draft 1962).

[29] *See* Bowman, *supra* note 8, at 746.

[30] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which they Rest*, 17 HOFSTRA L. REV. 1, 4 (1988).

[31] 28 U.S.C. § 994(k) provides: "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 or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment." *See also* United States v. Sklar, 920 F.2d 107, 115 (1st Cir. 1990) ("It is crystal clear that Congress largely rejected rehabilitation as a direct goal of criminal sentencing under the guidelines.").

lines cabined judicial discretion in the service of consistency.[32] Although the Supreme Court has restored levels of discretion with its decisions in *United States v. Booker*,[33] *Kimbrough v. United States*,[34] and *Spears v. United States*,[35] the Guidelines appropriately reduce disparity among both sentencing judges and individual cases.[36]

3. *The Prioritization of Retribution by the Federal Sentencing Guidelines*

The Federal Sentencing Guidelines acknowledge the four typical purposes of sentencing—retribution, deterrence, incapacitation, and rehabilitation—but provide no explicit ordering among these sentencing purposes.[37] Despite this lack of ranking, the Guidelines' concern with offenders' blameworthiness—a combination of harm caused, state of mind, and to a lesser extent, personal circumstances—reveals their focus on retribution or just deserts.[38]

A brief description of the process for calculating a Guidelines range shows the importance of the retributive purpose to a sentencing determination. The offense of which the defendant is convicted provides the base offense level, assigning a general sentencing guidepost. This first calculation is inherently retributive because it is directly related to the seriousness of the crime, which, in turn, is measured by the harm caused by the crime and the offender's state of mind. Then, specific offense characteristics either raise or lower the offense level to reflect aggravating or mitigating factors specific to the offense, not to the defendant. Finally, judges consider adjustments to the offense level computation. These adjustments are also typically offense-related. Thus, the provisions that determine the offense level measure harm and, to a lesser extent, culpability.[39]

After determining a base offense level, the federal sentencing court calculates the defendant's criminal history category. In contrast to the offense

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[32] *See* United States v. Booker, 543 U.S. 220, 253 (2005) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

[33] *Booker*, 543 U.S. 220.

[34] Kimbrough v. United States, 552 U.S. 85 (2007).

[35] Spears v. United States, 129 S. Ct. 840 (2009).

[36] In considering the direction to avoid unwarranted disparities under 28 U.S.C. § 3353(a)(6), sentencing courts principally consider national disparities, not intra-case disparities. *See* United States v. Presley, 547 F.3d 625, 631 (6th Cir. 2008); United States v. Saez, 444 F.3d 15, 18 (1st Cir. 2006).

[37] According to the Sentencing Commission, "[T]his choice [between just deserts and crime control considerations] was unnecessary because in most sentencing decisions the application of either philosophy will produce the same or similar results." U.S. SENTENCING COMM'N, 2009 FEDERAL SENTENCING GUIDELINES MANUAL ch. 1, pt. A (2009), *available at* http://www.ussc.gov/2009guid/TABCON09.htm.

[38] *See* United States v. Brewer, 899 F.2d 503, 507 (6th Cir. 1990); United States v. McHan, 920 F.2d 244, 247 (4th Cir. 1990); United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir. 1989); Bowman, *supra* note 21, at 316.

[39] Hofer & Allenbaugh, *supra* note 15, at 24.

level calculation, the criminal history category calculation accommodates the goals of individual deterrence and incapacitation. These two calculations, offense level and criminal history, combine to set the Guidelines range. Yet when combined, the offense characteristics predominate over criminal history in suggesting the sentence. Each additional offense level generally raises the sentencing range equivalent to an additional criminal history category.[40] While moving up in offense levels is relatively easy, moving up in criminal history categories typically requires an additional "prior sentence of imprisonment exceeding one year and one month."[41] The recommended sentencing range only doubles for a defendant who has had four prior sentences of imprisonment that each exceeded 13 months.[42] In contrast, the recommended sentence for mail fraud, for example, doubles when the fraud loss was more than $70,000, instead of $10,000.[43] The Guidelines make sentence determinations principally dependent upon the nature and circumstances of the offense, the seriousness of the offense, and the need to provide just punishment—all retributive considerations.[44] The Guidelines' prioritization of offense conduct rather than offender characteristics is thus inherently retributive.

Sentencing judges enjoy discretion to depart or vary from the Guidelines.[45] The Guidelines, however, explicitly disfavor judges' consideration of factors that speak directly to rehabilitation or deterrence, thereby prioritizing retribution.[46] For example, except in unusual circumstances, federal sentencing judges should not consider the defendant's age, education, vocational skills, mental condition, or physical condition (including drug dependence, employment record, or family ties)—all factors related to the need for incapacitation and successful rehabilitation.[47]

The Guidelines' focus on the seriousness of the offense in lieu of other considerations reveals the importance of retribution to sentencing policy. We punish offenders for their bad acts and because they deserve it, not because of some misbegotten belief that we can predict their future dangerous-

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[40] For example, with an offense level of 15 and a criminal history category VI, the Guidelines recommend a sentence of 41 to 51 months. If the offense level is 16 but the criminal history category is V, the Guidelines recommend the same 41 to 51 month range. The one-level offense level increase is punished as much as an additional prior felony conviction involving a sentence greater than 13 months. U.S. SENTENCING COMM'N, *supra* note 37, § 4A1.1 and ch. 5 pt. A.

[41] *Id.* § 4A1.1.

[42] *Id.*

[43] *Id.* § 2B1.1(b)(1).

[44] *See* 18 U.S.C. § 3553(a); s*ee also* Hofer & Allenbaugh, *supra* note 15, at 51 ("[T]he content and structure of the [Guidelines] rules is most consistent with a philosophy that gives the lowest priority to rehabilitation, secondary importance to incapacitation of higher risk offenders, and the highest priority to proportionate punishment.").

[45] United States v. Booker, 543 U.S. 220, 233–34 (2005).

[46] The Guidelines also reduce disparities by restricting sentencing judges to considering factors involving offense characteristics. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 26, at xix.

[47] *See* U.S. SENTENCING COMM'N, *supra* note 37, §§ 5H1.1–5H1.6; *see also* 28 U.S.C. § 994(k).

ness. The Guidelines control federal sentencing, and retributive purposes dominate the Guidelines.

C.   The Successes and Failures of the Federal Sentencing Guidelines' Retributive Goals

Even if one disagrees with the premise that the Federal Sentencing Guidelines focus on retribution, I suggest that retribution *should* be the primary focus of a just system of punishment. Fundamentally, we punish criminals because of their criminal acts, not because we deign to say who among them are good and who among them are bad. We penalize acts, not personalities. In a society that treasures individual freedom, we avoid judgments on which citizens are worthy and which are not. Because retributive sentencing focuses on discrete acts and the punishment that should follow these discrete acts, it more likely leads to shorter sentences, is more effective in directly punishing criminal conduct, displays greater respect for the victim, and, most importantly, better reflects society's values than sentencing that focuses on deterrence, incapacitation, or rehabilitation.

First, although some commentators have suggested that a democratically-based and just deserts-centered sentencing scheme results in longer sentences, my results suggest they overstate jurors' demand for punishment.[48] In characterizing community sentiment as always demanding longer punishment, these commentators may draw their conclusions from Congress's forays into increasing criminal penalties. As Professor Robinson has stated, "[T]he modern crime-control doctrines are not a product of the community's sense of justice, but rather a product of the distortions inherent in American crime politics."[49] In 1994, the Sentencing Commission conducted a national survey to compare community sentiment regarding sentencing with the Guidelines recommended sentences.[50] The survey found great disparity between the median Guidelines sentences and the median respondent sentences for crack cocaine offenses, for example. Questionnaire respondents suggested a sentence almost 12 years less than the Guidelines recommended sentence.[51] This survey suggests that a punishment scheme focused on retribution as determined by true community rather than political sentiment will generally produce comparatively lower sentences than a scheme that equally weighs all four purposes of punishment.[52]

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[48] *See* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. Crim. L. & Criminology 1293, 1308 (2006) ("Instead, the remarkable consistency with which people speak of punishments as deserved, even as those punishments expand in scope and severity, suggests that the concept of desert is quite elastic.").

[49] Robinson et al., *supra* note 8, at 6.

[50] *See* U.S. Sentencing Comm'n, National Sample Survey: Public Opinion on Sentencing Federal Crimes (1997), *available at* http://www.ussc.gov/nss/jp_exsum.htm.

[51] *Id.* at 67 tbl.4.7.

[52] Because rehabilitation-focused punishments inherently depend upon when rehabilitation results, they potentially result in longer imprisonment when parole authorities do not judge a relatively low level offender to have corrected his or her behavior. *See* Andrew von Hirsch &

For example, societal retribution alone cannot justify a mandatory life sentence without the possibility of parole when an individual is caught possessing and intending to sell 50 grams of crack cocaine. Nevertheless, our society has recommended such a punishment when the offending individual has two previous felony drug offenses.[53] In these so-called three strikes cases, the principal consideration in the retributive calculation—the harm occasioned by such a crime—is low, as the "victims" of such drug crimes are typically other drug abusers. Such a severe punishment can only be justified by reference to whatever utilitarian benefit results if such sentences deter others and if that deterred conduct is egregious enough to warrant the cost.

Second, any emphasis on purposes other than retribution increases disparities. If individual deterrence becomes central, two defendants may receive markedly different sentences though their crimes and the resulting harm are nearly identical. Similarly, if incapacitation or rehabilitation becomes important, disparities result whenever similar criminals are seen as having different likelihoods for re-offense.

Moreover, incapacitation by its very nature will reduce recidivism during the term of imprisonment, but deterrence and rehabilitation fail to achieve the reduction in crime that undergirds their legitimacy.[54] Deterrence rests on the shaky philosophical foundation that imposing otherwise unwarranted punishment will serve as an example to others.[55] Stated otherwise, deterrence subjects one person to the purposes of others. Moreover, deterrence faces practical problems. Large majorities of even serious crimes go unreported, unsolved, or unpunished. Given the small chance that they will be caught, offenders reasonably discount the deterrence message.[56] In addi-

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Lisa Maher, *Should Penal Rehabilitationism Be Revived?*, *in* Principled Sentencing 45 (Andrew von Hirsch et al. eds., 1992).

[53] *See, e.g.*, 21 U.S.C. § 841(b)(1)(A).

[54] *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 Geo. L.J. 949, 951 (2003) ("But there is growing evidence to suggest skepticism about the *criminal law's* deterrent effect—that is, skepticism about the ability to deter crime through the manipulation of criminal law rules and penalties."). *But see* David S. Abrams, More Time, Less Crime? Estimating the Deterrent Effect of Incarceration Using Sentencing Enhancements 19 (April 2007) (unpublished manuscript), *available at* http://econ-www.mit.edu/files/2032 ("Across specifications there appears to be a consistent finding that gun robbery rates decline after add-on gun laws go into effect."). *See generally* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995) (finding recidivism rates between federal white collar offenders were not affected by those sentenced to prison terms and those given probation).

[55] *See* Robinson & Darley, *supra* note 54, at 953 ("The social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices."); s*ee also* Frase, *supra* note 8, at 71.

[56] *See* Robinson & Darley, *supra* note 8, at 458–60 ("The cumulative effect of the many escape hatches leaves a deterrent threat that looks like this: Homicide offers a 44.7% chance of being caught, convicted, and imprisoned for that offense. A person contemplating a rape faces a 12% chance of going to prison for that offense. Robbery presents a 3.8% chance. Assault, burglary, larceny, and motor vehicle theft are each a 100-to-1 shot. To put it mildly, our potential offender may not be entirely cowed by these threats.").

tion, with many similar offenses prosecuted in state court, any increases in federal sentences will have minimal effect upon deterrence. Rehabilitation can achieve some success, but it is nearly impossible to predict when and if rehabilitation has occurred with respect to any particular offender.[57] And while incapacitation does reduce crime in the short run, it is difficult to justify the human and financial costs associated with wholesale warehousing of potential recidivists amid staggering state and federal deficits, especially when its ability to foretell future recidivism is weak.[58]

Even if some small deterrent effect exists, utilitarian theory does not justify a punishment disproportionate to the offense. Even if an individual has two prior felony convictions, does a moral society sentence a petty thief to two consecutive sentences of 25 years to life for stealing $150 worth of videotapes?[59] Stated otherwise, does a just society use a moderately low-level drug dealer to "send a message" to other drug dealers by sentencing him to life incarceration without parole?[60] Is it just to send a message when we seriously question the effectiveness of that message? Given the federal budget deficit, should a rational society spend $26,000 per year housing a small time recidivist?

Third, a retributive sentence derives from society's right to impose moral blame for an offender's conduct. In imposing punishment, society gauges the seriousness of the offense and responds to that seriousness. Overall, the retributive calculus reflects respect for the victim's dignity, whether that victim is an individual, a group of individuals, or a wide swathe of society.[61] While properly emphasizing the harm occasioned to the victim, a retributive sentence avoids using a defendant for purposes unrelated to his own moral culpability.

Finally, and perhaps most importantly, retributive punishment also best reflects society's moral precepts. Professors Robinson and Darley argue persuasively that "every deviation from a desert distribution can incrementally undercut the criminal law's moral credibility, which in turn can undercut its ability to help in the creation and internalization of norms and its power to gain compliance by its moral authority."[62] But when properly calculated, the legitimacy of the punishment and the opprobrium that accompanies punishment reinforces important social behavior norms. And in fact, societal disapprobation may often be more effective at deterring future crime than picking an inordinate punishment with the hope that knowledge of that pun-

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[57] *See id.* at 464.

[58] *See id.* at 465–66 (arguing that tools used to predict recidivism are too inaccurate to be used in selecting between an individual's liberty or incarceration).

[59] *But see* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (finding that such a sentence "was not an unreasonable application of our clearly established law").

[60] *But see* United States v. Wimbley, 553 F.3d 455, 462 (6th Cir. 2009) (holding that mandatory life sentence without the possibility of parole for possessing with the intent to sell 143.2 grams of crack cocaine after two earlier felony convictions was not cruel and unusual punishment).

[61] *See* Ristroph, *supra* note 48, at 1300.

[62] Robinson & Darley, *supra* note 8, at 478.

ishment will be distributed and that it will deter other potential offenders. This edification function can be particularly important if actual arrest and punishment rates are low.[63] When punishment is seen as justly imposed, it better restates the conduct necessary for good moral standing within the community.[64] Thus, a retributive sentencing system might best accomplish other sentencing goals, too.

As a general matter, community sentiment must be an important part of any just system of sentencing. The Sentencing Reform Act reflects this necessity, instructing the Sentencing Commission to consider "the community view of the gravity of the offense"[65] when considering punishment levels. Sentences that do not reflect community values result in public misunderstanding of the relative criminal seriousness of offense conduct, undermine the criminal law's moral standing, and diminish the criminal law's normative force. They also invite sentencing judges to evade the Guidelines because of the Guidelines' disconnect with societal values.[66] To be seen as just, punishment must be consistent with community notions of punishment.

While the Guidelines theoretically focus on retribution, they do not align with community sentiment, leaving the necessary moral parallelism askew. From its inception, the Sentencing Commission failed to moor its proscribed sentences to community sentiment. In formulating the Guidelines sentencing ranges, Congress directed the Sentencing Commission to develop sentencing ranges consistent with the general sentencing purposes found in 18 U.S.C. § 3553(a)(2).[67] Rather than creating punishment levels from whole cloth, however, the Sentencing Commission analyzed the sentences imposed in 10,000 past cases.[68] During this process, the Sentencing Commission did not attempt independently to determine sentences that would accurately reflect community sentiment. Thus, the Commission relied on inputs distant from any meaningful measurement of community sentiment—past or present. Since then, Congressional forays into the establishment of mandatory-minimum sentences and the Sentencing Commission's reaction to those mandatory minimums have only further dimin-

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[63] *See* Frase, *supra* note 8, at 72 ("Such norms guide and restrain behavior even when the chances of detection and punishment are slight.").

[64] *See* Morris B. Hoffman, Booker*, Pragmatism and the Moral Jury*, 13 GEO. MASON L. REV. 455, 455 (2005); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 593 (1996) ("Punishment is not just a way to make offenders suffer; it is a special social convention that signifies moral condemnation.").

[65] 28 U.S.C. § 994(c)(4).

[66] Like a great majority of district court judges, I have questioned whether the Guidelines recommended sentences reflect just punishment. *See* LINDA DRAZGA MAXFIELD, SURVEY OF ARTICLE III JUDGES ON THE FEDERAL SENTENCING GUIDELINES, at ex. II-4, III-4 (U.S. Sentencing Comm'n ed., 2003) (conducting a survey of federal judges and finding that an extremely high percentage of judges felt that federal drug guidelines were unreasonably harsh); *see also* Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 412 (2005).

[67] *See* 28 U.S.C. § 994(m).

[68] *See* U.S. SENTENCING COMM'N, *supra* note 15, at 16–17; *see generally* Breyer, *supra* note 30.

ished the connection between community sentiment and criminal punishment.

One can argue that Congress, composed of popularly elected representatives, better reflects community sentiment than life-tenured Article III judges or the unelected Sentencing Commission. But as some have cautioned, congressmen and voters calling for high sentences often misunderstand the frequency of violent conduct and are not exposed to other information important to sentencing.[69] When asked open-ended questions, citizens rank crime low among the top priority issues the federal government should address.[70] But more importantly, community sentiment regarding just punishment could best be gleaned from a readily available source—juries who have heard the specific facts of a criminal offense.

II.   Sampling Community Sentiment Regarding Appropriate Sentencing

After more than 11 years as a federal district court judge, I have observed that jurors, almost without exception, suggest that the Federal Sentencing Guidelines sentencing ranges are too severe. Following guilty verdicts, judges typically meet with jurors to thank them for their service. Invariably, the jurors would ask what sentence the defendant they had just found guilty was likely to receive. After indicating that I could not accurately predict the sentence, I would frequently discuss the generally applicable Guidelines ranges. Responding, the jurors would nearly unanimously express surprise at the length of the likely sentence. Intrigued, I decided to undertake a jury study in order to formally test whether the Federal Sentencing Guidelines aligned with community sentiment regarding punishment.

A.   Overview of the Jury Survey and Methods

Do the Guidelines sentencing ranges reflect community beliefs regarding appropriate punishment? To test this question, with the help of some colleagues,[71] I asked jurors to complete a simple questionnaire after those

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[69] *See* Robinson et al., *supra* note 8, at 32 ("It appears likely that media accounts of crimes are the source that voters generally use to form their judgments on courtroom sentencing. By reading the newspaper or watching television news accounts – which cover a disproportionately high number of violent, as opposed to routine crimes, and which generally do not highlight extenuating circumstances or the judge's reasoning – readers and viewers quickly come to the conclusion that the sentences assigned are too lenient.").

[70] In recent national polls about the most important issue facing the country, pollsters have not even listed crime or sentencing as an option. In open-ended polls, crime registered less than two percent. *See* PollingReport.com, Problems and Priorities, http://www.pollingreport.com/prioriti.htm (on file with the Harvard Law School Library).

[71] Chief Judge Robert Pratt of the Southern District of Iowa polled jurors in three cases. Judges Donald Nugent, Patricia Gaughan, Sarah Lioi, Dan Polster, and Soloman Oliver from the Northern District of Ohio each polled jurors in one case. Judge Matthew Kennelly of the Northern District of Illinois polled two juries.

jurors delivered a guilty verdict. In the sampling, each juror completes the questionnaire anonymously and without any deliberation with other jurors. The questionnaire also provides a listing of the defendant's record of earlier convictions. We say nothing to the jurors about what the Guidelines or statutory sentencing ranges will be. The jurors complete the questionnaire before any informal discussion of the trial or the defendant. The questionnaire asks jurors for a single response: "State what you believe an appropriate sentence is, in months _____." After the jurors have completed the questionnaires, law clerks collect the questionnaires, and I do not see the jurors' recommendations until after I have sentenced the defendant.

All the sampled cases, except four, involved Ohio juries. As earlier described, an Ohio jury pool reflects American sentiment. In the cases assigned to my docket, I polled the jury in each criminal trial. Criminal cases resolve through trial rather than plea for various reasons. Sometimes the sentencing range produces the trial. A 55-year-old defendant facing a 20-year predicted sentence may rationally choose to go to trial. Other cases go to trial because of questioned proof. More typically, the uncertain proof does not relate to the sentencing ranges but on who should receive punishment at all.

B.   Overall Statistical Findings

In the broad majority of the sampled trials, after hearing the specific evidence regarding the offense, the jury recommended a sentence significantly lower than the Federal Sentencing Guidelines recommended range. Only in a few white-collar cases did the jurors recommend average sentences exceeding the Guidelines ranges.[72] In over 22 jury trials, the corresponding low end of the Guidelines range was almost three times higher than the median jurors' recommendation, on average. While some commentators suggest that a democratically based and just deserts-centered sentencing scheme results in longer sentences, this study suggests otherwise. These results indicate that jurors would impose significantly lower sentences than the Guidelines recommend, especially in drug, firearm, and pornography cases.

In several cases, the recommended median Guidelines range was more than 10 times greater than the median jurors' recommendation.[73] Averaged over more than 20 cases, jurors recommended sentences that were 37% of

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[72] In one case, a defendant was found guilty of embezzlement by a bank employee in violation of 18 U.S.C. § 656. The Guidelines recommended a sentencing range of 18 to 24 months. The jury gave a median recommendation of 33 months. In another case, a jury found a defendant guilty of concealment of assets in violation of 18 U.S.C. § 152 and gave a median recommended sentence of 30 months. The Guidelines recommended a sentence of 21 to 27 months.

[73] *See* United States v. Lewis, No. 1:07-CR-68-4 (N.D. Ohio July 16, 2007) (Guidelines median is 1113% of median juror recommendation); United States v. Ousley-Lee, No. 4:08-CR-38 (S.D. Iowa Apr. 30, 2007) (Guidelines median is 3250% of median juror recommendation).

the minimum Guidelines recommended sentences and 22% of the median Guidelines recommended sentences.[74] Stated another way, the Guidelines range median was 445% of the median jurors' recommendation, and the low end of the Guidelines range was 273% of the median jurors' recommendation. These differences are statistically significant.[75]

In total, we examined 261 juror recommendations.[76] As shown in the following table, jurors almost universally recommended sentences lower than the Guidelines recommended sentences:

TABLE 1: JUROR RECOMMENDATIONS COMPARED TO ACTUAL AND GUIDELINES SENTENCES

	Actual Sentence	Guidelines Minimum	Guidelines Maximum
Number of juror recommendations less than:	200	229	235
Number of juror recommendations greater than:	46	32	21
Number of juror recommendations equal to:	15	0	5

Jurors recommended sentences lower than the minimum Guidelines recommended sentences 229 times, while recommending sentences above the minimum only 32 times. Stated otherwise, 88% of the time jurors believed that the appropriate punishment was below the Guidelines recommended minimum for the offense. When measured against the Guidelines maximum-recommended sentences, jurors recommended lesser sentences 235 of 261 times, or 90% of the time.

To compare the length of jurors' recommended sentences against Guidelines recommended sentences, we averaged jurors' responses regarding recommended sentences and compared those responses. The table below describes these comparisons:

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[74] *See infra* tbl.2.

[75] These results are statistically significant at the p < .05 level based on a Wilcoxon Signed Rank Test. The p-value for comparing the juror recommendations against the Guidelines minima was < .0000. The p-value for comparing the juror recommendations against the Guidelines maxima was also < .0000.

[76] The study included 22 criminal trials, each with a 12-person jury. However, 3 of the sampled jurors did not respond, so the total sample size included 261 juror responses.

TABLE 2: AVERAGE JUROR-RECOMMENDED ACTUAL AND
GUIDELINES SENTENCES

	Average Sentence in Months	Difference from Juror Recommendations
Juror Sentence in Months (n=261)	65	—
Actual Sentence (n=261)	125	61
Guidelines Minimum (n=261)	138	75
Guidelines Maximum (n=261)	174	111

As shown by this chart, across 22 cases, the average juror-recommended sentence was 65 months, while the average Guidelines minimum was 138 months and the average Guidelines maximum was 174 months. The difference between the average juror-recommended sentence and the sentence imposed was also large. On average, the Guidelines-recommended minimum sentence was more than twice the juror-recommended sentence. Finally, the average Guidelines maximum is roughly three times the jurors' average recommended sentence.[77]

These results support the following findings. First, the overwhelming majority of jurors' recommended sentences are far less than the sentences imposed, the Guidelines minimums, and the Guidelines maximums. Interestingly, jurors' average recommended sentences were longer than the Guidelines recommended sentences only in white-collar cases. Second, and perhaps more importantly, the size of this difference between the jurors' and the Guidelines' recommendations is very large—the Guidelines sentences equaling between 200% and 300% of the jurors' sentences. With the high sentencing ranges of cases that go to trial in federal court, these percentage differences result in average increases of seven to twelve years from what jurors would recommend. The difference between juror-recommended penalties and actual penalties or Guidelines-recommended penalties is thus meaningful and large. The results of this study generally show that the recommended Guidelines sentences are not consistent with community sentiment on punishment.

C. Sample Cases

A significant portion of the cases included in the jury study involved either drug possession or distribution or firearm possession (felon in possession of a firearm). Along with immigration offenses, these types of cases monopolize federal district court dockets.[78] The difference between the Fed-

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[77] Each of these differences is statistically significant under the t-tests at the p < .05 level.
[78] In fiscal year 2008, drug, firearm, and immigration offenses made up 32.6%, 10.9%, and 28.2% of federal crimes, respectively. U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2008, at 40 fig.J (2008), *available at* http://www.ussc.gov/sc_cases/USSC_Quarter_Report_Final_FY2008.pdf.

eral Sentencing Guidelines ranges for these crimes and the recommendations provided by the jurors was staggering, likely due to the fact that the Guidelines punish drug crimes and felony gun possession harshly. Thus, the results of the jury study suggest not only that the Guidelines must be brought in line with community sentiment, but also that reform in drug and felony gun possession sentencing is necessary.

In *United States v. Pusey*, the jury convicted the defendant of possession with the intent to distribute approximately 16 grams of cocaine base, of using or carrying a firearm during a drug trafficking offense, and of being a felon in possession of a firearm.[79] With a significant criminal history placing him in criminal history category VI,[80] Pusey faced two statutory mandatory minimum sentences of five years each, to be served consecutively. The Guidelines recommended a range of 120 to 150 months of imprisonment on the drug offenses, again consecutive to the five years of mandatory incarceration for the use of a firearm during the drug trafficking charge.[81] In combination, the Guidelines recommended a period of incarceration of 180 to 210 months.[82]

When asked what sentence they believed appropriate after they received a listing of Pusey's convictions, the jurors gave a median recommended sentence of 36 months, with a standard deviation of 12.[83] Although each juror privately and anonymously completed his or her recommendation without any discussion with the other jurors, six jurors recommended a sentence of 36 months. This recommendation stands in stark contrast to the median Guidelines recommendation of 195 months.

The jurors making these recommendations were a cross-section of American citizens. The jury included four males and eight females. Three jurors came from Cleveland, and the other nine jurors came from suburban areas or outlying counties. Ten of the jurors were Caucasian and two were African American; defendant Pusey was African American. Several jurors worked in construction; others included a home equity loan closer for a national bank, a pediatric nurse, a Wal-Mart lawn department manager, and a tailor for an exclusive men's store. The jurors lived in zip code areas with a higher average median family income than the national average, for some jurors much higher.[84] The Pusey jurors were a cross-section of the American

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[79] United States v. Pusey, 189 F. App'x 475, 478 (6th Cir. 2006).

[80] Pusey had 18 final criminal history points.

[81] 18 U.S.C. § 924(c)(1)(A). Pusey was associated with 15.47 grams of cocaine base. Under the drug quality table found in Guidelines § 2D1.1(c)(7) (2006 version), he scored a base offense level of 26 and a final offense level of 26.

[82] With a total offense level of 26 and a criminal history category of VI, the Guidelines recommended imprisonment for 120 to 150 months, consecutive to the 60 months imposed under 18 U.S.C. § 924(c)(1)(A).

[83] The mean recommendation was 35 months. *See infra* app. tbl.3.

[84] The average median family income of the zip code areas that the jurors were drawn from was $55,398. *See* American FactFinder, http://factfinder.census.gov (in the "Fast Access" box, separately insert zip codes 44040, 44052, 44055, 44094, 44102, 44104, 44108, 44128, 44133, 44134, 44137, and 44212) (on file with the Harvard Law School Library). The

population and they recommended a sentence markedly different than the Guidelines.

Other drug cases support the suggestion that representative citizen jurors support sentences that are decidedly lower than congressional and Guidelines recommended sentences. In *United States v. Rice*, defendant Tommy Rice was found guilty of possessing with the intent to distribute 10 kilograms of cocaine, violating 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).[85] Given the quantity of cocaine, Rice received the 20-year mandatory minimum sentence, a sentence greater than the 188 months he would have otherwise faced under the Guidelines.[86] After receiving information regarding Rice's past criminal convictions, his jurors recommended various lengths of punishments, all significantly below the 20-year mandatory minimum sentence that Rice received. The jurors' median recommended sentence was 54 months.[87]

Again, the five male and seven female jurors came from a cross-section of community locations and occupations. Only one juror resided in Cleveland, and the others lived in outlying suburban areas or counties. Two were homemakers; one was a personal banker; two worked in construction; one acted as a public service operations manager; and another served as a sales manager for a computer company. Rice is African American; 11 of the jurors were Caucasian. The jurors were representative of the community, yet their belief regarding appropriate punishment differed significantly from the punishment Congress requires. The minimum Guidelines recommendation was almost four and a half times the median jurors' recommendation.[88]

The disconnect between recommended Guidelines sentences and jurors' recommended sentences goes beyond drug cases—it extends to firearm cases as well, which also make up a significant portion of federal court criminal dockets. In fiscal year 2008, federal courts decided 8,212 firearms cases,[89] representing the largest category of cases excepting immigration and drug cases. Federal courts sentence defendants in firearm cases to sentences much longer than corresponding state sentences.[90]

United States median family income is $50,046 in 1999 dollars. *See* American FactFinder, http://factfinder.census.gov, *supra* note 2.

[85] United States v. Rice, No. 5:05-CR-42 (N.D. Ohio Apr. 12, 2005).

[86] Rice scored a criminal history category V.

[87] The Rice jury gave recommendations that resulted in a mean recommended sentence of 50 months with a standard deviation of 30. *See infra* app. tbl.3. Rice's jurors individually stated that they believed an appropriate sentence would be 2, 6, 24, 36, 36, 48, 60, 60, 72, 84, and 100 months.

[88] *See infra* app. tbl.3.

[89] U.S. SENTENCING COMM'N, *supra* note 78, at 8 tbl.3.

[90] Under OHIO REV. CODE ANN. § 2923.13 (West 2009), the possession of a firearm by a felon is a third degree felony, punishable by a prison term of 1, 2, 3, 4, or 5 years. *See* OHIO REV. CODE ANN. § 2929.14(A)(3) (West 2009). By contrast, under federal law, a felon in possession of a firearm can be sentenced to up to 10 years of incarceration under 18 U.S.C. § 922(g)(1). On average, Ohio incarcerates inmates convicted of having weapons under disability for 1.14 years. *See generally* OHIO DEP'T OF REHAB. AND CORR., TIME SERVED REPORT (2007), *available at* http://www.drc.ohio.gov/web/Reports/Time/Time%20Served%202007.pdf. In sharp contrast, the average sentence imposed by federal judges for having been a felon

In *United States v. Ballard*, a jury convicted Ballard of having been a felon in possession of a firearm violating 18 U.S.C. § 922(g)(1).[91] Having previously been convicted of various offenses, including robbery and conspiring to violate federal drug laws, Ballard's Guidelines range sentence was 100 to 120 months.[92] I sentenced Ballard to 105 months of incarceration.[93]

Consistent with the procedure described above, I asked jurors what they believed an appropriate sentence was for Ballard, in months. Possessing information on Ballard's past convictions and having heard during the trial the specific evidence regarding the crime, the jurors gave a median recommended sentence of 60 months.[94] Although the *Ballard* jurors showed greater variety as between their recommendations, the median Guidelines range was nearly twice the jury's median recommendation.[95] Again, the *Ballard* jurors reflect a cross-section of American citizenry. One lived in Cleveland; all the others lived in surrounding suburban areas or surrounding counties. Five were males. Ten were married. All of the jurors were Caucasian. Three were retired, while the remaining jury members included a consultant, two nurses, a parts manager, a typesetter, an office manager, an engineer, a teacher, a homemaker, and a waitress. The average family income of persons living in these jurors' zip code areas was 14% higher than the national average.[96]

Across data collected from 22 jury trials, I found the median Federal Sentencing Guidelines recommended sentence is four and a half times the median juror-recommended sentence. As suggested, the sampled jurors reflect typical American backgrounds and experiences. By this measure, the Guidelines ranges poorly reflect community values regarding what punishment is appropriate. For both practical and theoretical reasons, this disconnect undercuts arguments that the Guidelines reflect appropriate punishment. Community sentiment must be an important part of any just system of punishment and it is particularly significant in a retributive punishment scheme.

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in possession of a firearm under 18 U.S.C. § 922(g)(1) was 58 months for the 1,926 cases sentenced in fiscal year 2008 where the 922(g)(1) conviction was the only offense. *See* E-mail from Timothy Drisko, Data Research Coordinator, Office of Research and Data, U.S. Sentencing Comm'n, to James Gwin, U.S. District Court, N.D. Ohio (April 29, 2009) (on file with the Harvard Law School Library); *see also* U.S. Sentencing Comm'n, Final Quarterly Data Report: Fiscal Year 2007 31 tbl.19 (2007), *available at* http://www.ussc.gov/sc_cases/Quarter_Report_Final_07.pdf (indicating that for fiscal year 2007, the average mean sentence for a firearms offense was 80.2 months and the median sentence was 55 months).

[91] United States v. Ballard, 280 F. App'x. 468, 469 (6th Cir. 2008).

[92] The maximum term of imprisonment was 10 years under 18 U.S.C. § 922(g)(1).

[93] *See infra* app. tbl.3.

[94] The mean juror recommended sentence was 64 months, with a standard deviation of 49. In Ballard's case, the individual juror recommendations were: 12, 12, 12, 16, 18, 60, 60, 96, 120, 120, 120, and 120 months.

[95] *See infra* app. tbl.3.

[96] *See* American FactFinder, http://factfinder.census.gov/home/saff/main.html (in the "Fast Access" box, separately insert zip codes 44094, 44011, 44130, 44060, 44203, 44109, 44215, 44041, 44024, 44140, 44052, and 44012) (on file with the Harvard Law School Library).

III. Recommendations for Reform

If sentencing should reflect community sentiment, jury sentencing could be one possible answer. But because of the potential for greater disparity with jury sentencing, some modification to our current punishment system provides a better solution. This study suggests that the Sentencing Commission should continually conduct juror sampling and should use the data from such sampling to better align federal sentencing levels with community sentiment.

Jury sentencing offers a different way to bring sentencing into agreement with community values. But given jurors' limited universe of experience with sentencing, jury sentencing threatens greater disparities between defendants convicted of similar crimes. Disparate sentencing, a major impetus to the Sentencing Reform Act, undercuts the legitimacy of the criminal justice system. Unless cabined, this variability could repeat or even exacerbate the disparity that Frankel and others have criticized.[97] Because juror sentencing implicates greater potential for disparity, including racial disparity,[98] a system that uses community sentiment less directly would be more favorable.

Although jury sentencing implicates too many issues involving disparities, the philosophical underpinning for jury participation remains: "In respect to retribution, jurors possess an important comparative advantage over judges. . . . [T]hey are more attuned to the community's moral sensibility."[99] By its nature, sentencing is "a weighing of moral judgment in the context of specific facts."[100] And "individual sentencing juries are, by design, better suited than courts at evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."[101] As Henry Louis Gates described, citizenry participation is an important part of sentencing:

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[97] *See* Marvin E. Frankel, Criminal Sentences: Law Without Order 5 (Hill & Wang 1973) ("[My] first basic point is this: the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law."). *But see* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 Yale L.J. 1775, 1790 (1999) (contending that available procedures, especially heightened judicial review of jury-imposed sentences, mitigate disparity, and finding: "[t]he studies do not support the popular assumption that juries mete out harsher, more disparate, and more racially biased punishments than judges").

[98] Lanni, *supra* note 97, at 1787 ("Jury sentencing does not promise to reduce sentencing disparity; in fact, it would necessarily result in more disparate (though not more racially prejudiced) penalties than those imposed by the current regime.").

[99] Ring v. Arizona, 536 U.S. 584, 615 (2002) (Breyer, J., concurring).

[100] Iontcheva, *supra* note 22, at 343.

[101] Atkins v. Virginia, 536 U.S. 304, 322–25 (2002) (Rehnquist, J., dissenting); *see also Ring*, 536 U.S. at 616 (Breyer, J., concurring) ("[T]he jury remains uniquely capable of determining whether, given the community's views, capital punishment is appropriate in the particular case at hand."). Chief Justice Rehnquist gives the legislature important responsibility for determining appropriate sentencing. However, *Kimbrough v. United States*, 128 S.Ct. 558,

> As a symbol of popular and local sovereignty, citizen juries confer legitimacy upon the most invasive thing a state can do: strip a person of life, liberty, or property. By interposing itself between crime and punishment, the citizen jury—when it works as it was intended to—makes the state's actions something ordinary people feel they own.[102]

In discussing jury sentencing in death penalty cases, Chief Justice Rehnquist echoed the same importance of juror sentiment. While suggesting that we typically "ascribe primacy to legislative enactments [ ] in expressing policy of a State," he recognized that "juries are . . . better suited than courts in evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."[103]

Additionally, the jurors reflect community and national sentiments regarding what punishment is appropriate because the nature of voir dire questioning and, more importantly, peremptory challenges, facilitates the selection of jurors who are representative of a cross-section of the community. But not only do jurors ideally reflect community values, they have also heard the specific evidence that supported the conviction. They best know the offense conduct, and they have been told about the defendant's record of criminal convictions.

Juror sampling, unlike juror sentencing, does not implicate individual case disparities. The Sentencing Commission could easily ask trial courts to sample jurors who return guilty verdicts. Each sampling would take less than five minutes. District courts already report sentencing decisions to the Sentencing Commission. These reports could easily incorporate juror sentencing recommendations. The Commission currently assembles information that allows it to state the number, the mean and the median sentence for any crime, any offense level for that crime, and any criminal history category for that crime. The collection of juror sampling would pose only a minor additional task.

Potentially, juror sampling could better justify the shocking disparities that exist between state and federal sentencing for similar conduct. 18 U.S.C. § 3553(a)(6) tells federal sentencing courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty of similar conduct*."[104] Tellingly, Congress did not direct sentencing judges to avoid disparities among defendants found guilty of violating similar state criminal law provisions.

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575 (2007), says that in sentencing, judges need to defer less to Guidelines ranges when those ranges result from legislative action rather than from the Sentencing Commission's so-called empirically-based Guidelines ranges.

[102] Henry Louis Gates, Jr., *Marketing Justice: What, Really, Are Jury Trials For?*, NEW YORKER, Feb. 24, 1997, at 11.

[103] *Atkins*, 536 U.S. at 324 (Rehnquist, J., dissenting).

[104] 18 U.S.C. § 3553(a)(6) (emphasis added).

If used nationally, such juror sampling could provide the Sentencing Commission with real insight into community sentiment regarding appropriate retributive punishment. Because retribution stands at the core of federal sentencing purposes—and any appropriate sentencing scheme—this endeavor is fundamentally needed. Perhaps then, consistent with the proposed Model Penal Code, punishment could be "within a range of severity sufficient but not excessive to reflect the gravity of offenses and the blameworthiness of offenders."[105]

CONCLUSION

Retributive purposes should dominate sentencing, and we should ensure that such punishments approximate society's values regarding just punishment. Punishment that is at odds with community sentiment, that is either too lenient or too harsh, undercuts the legitimacy of the criminal law. This Article has questioned how well the Federal Sentencing Guidelines reflect community notions of just punishment. It presents study results that, though limited, suggest the Guidelines do not accurately reflect community sentiment. The Guidelines and congressionally directed ranges are significantly harsher than community sentiment recommends. Because our system—and any just system of punishment—focuses on the retributive purpose of punishment, and because community sentiment is especially important in such a system, these results raise serious questions about the efficacy of the Guidelines. I offer these results as a starting point for discussion, and I urge the Sentencing Commission to take up further study of this issue through a similar system of juror sampling.

Because Guidelines sentencing serves the salutary need of providing equal justice to all, it deserves our support. But having chosen a system to cabin judicial variability, we need to take the next step and ensure that the punishments are consistent with community sentiment. The jury polling described in this Article could be easily performed and should be the central consideration when sentencing levels are provided. If appropriately used, retribution can again be tied to community values.

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[105] MODEL PENAL CODE § 1.02(2) (2007).

APPENDIX

TABLE 3: JURY SURVEY RESULTS

United States v. Jamal Pusey, 4:03-CR-237

Convicted Crime(s)		Guidelines Range◊		Guidelines Median*	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean		
21 USC 841(a)(1) and (b)(1)(B)	Possession with Intent to Distribute Crack Cocaine	120	150	195	36	35	667%	542%
18 USC 924(c)(1)(A)(i)	Using/Carrying Firearm During Drug Trafficking*	60						
18 USC 922(g)(1)	Felon in Possession of a Firearm							

United States v. Tommy W. Rice, 5:05-CR-42

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean		
21 USC 841(a) and (b)(1)(A)	Possession with Intent to Distribute Cocaine	240	Life°	240	54	50	444%	444%

United States v. Daniel Sheldon, 1:05-CR-209

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean		
18 USC 2252(a)(2)	Receipt of Child Pornography	87	108	97.5	15	20	580%	650%
18 USC 2252(a)(4)(B)	Possession of Child Pornography							

◊ In all cases, data in the "Guidelines Median" and "Jury Results" columns represents the total sentence for all crimes of which the jury found the Defendant guilty. In cases in which there is no applicable mandatory consecutive sentence, the "Guidelines Range" columns similarly represent the total guidelines sentence for all counts. In cases in which one count has a statutory mandatory consecutive sentence, the guidelines range in the first row represents the total guidelines range for all other counts.

* Statutory mandatory consecutive sentence applicable. Guidelines Median calculated by adding mandatory consecutive sentence to median of Guidelines Range.

° Where "life" is guidelines sentence or juror response, average life expectancy data used to calculate statistics.

United States v. David Garner, 1:05-CR-392

Convicted Crime(s)		Guidelines Range◊		Guidelines Median*	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean	Jury Median	Jury Median
18 USC 2119(1) and 2	Carjacking	63	78	154.5	60	63	105%	258%
18 USC 924(c)(1)(A)(ii) and 2	Brandishing a Firearm During a Crime of Violence*	84						

United States v. Eric Ballard, 4:06-CR-106

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	100	120	110	60	64	167%	183%

United States v. Gionne V. Smith, 5:06-CR-310

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results†		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	46	57	51.5	18	21	256%	286%

United States v. Rajah Baylor, 1:06-CR-168

Convicted Crime(s)		Guidelines Range◊		Guidelines Median*	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean	Jury Median	Jury Median
18 U.S.C. 1951(a)	Interference with Commerce by Robbery	51	63	141	84	87	161%	168%
18 U.S.C. 924(c)(1)(A)(ii)	Use of a Firearm in Relation to a Crime of Violence*	84						

United States v. William F. Harbour, 1:06-CR-374

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum		Median	Mean	Jury Median	Jury Median
18 U.S.C. 2252(a)(2)	Attempted Receipt of Child Pornography	70	87	78.5	54	59	130%	145%
18 U.S.C. 2252(a)(5)(B)	Possession of Child Pornography							

† Jury poll includes fewer than twelve responses.

United States v. Anthony Greer, 1:07-CR-17

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
21 U.S.C. 841(b)(1)(A)	Possession with Intent to Distribute Crack Cocaine	135	168	151.5	36	51	375%	421%

United States v. Gerald Taylor, 1:07-CR-68

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
21 U.S.C. 846	Conspiracy to Distribute PCP	188	235	211.5	24	28	783%	881%
21 U.S.C. 841(b)(1)(A)	Possession with Intent to Distribute PCP							

United States v. Maurion Lewis, 1:07-CR-68

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
21 U.S.C. 846	Conspiracy to Distribute PCP	188	235	211.5	19	26	989%	1113%
21 U.S.C. 841(b)(1)(A)	Possession with Intent to Distribute PCP							

United States v. Randy Delano, 1:07-CR-566

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
21 USC 841 (b)(1)(A)	Possession with Intent to Distribute Crack Cocaine	168	210	189	60	60	281%	316%
21 USC 841 (b)(1)(C)	Possession with Intent to Distribute Cocaine							

United States v. Robert Anthony Ousley-Lee, 4:08-CR-38

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	41	51	46	3	10	1367%	1533%

United States v. James Allen Stenger, 4:07-CR-228

Convicted Crime(s)		Guidelines Range◊		Guidelines Median*	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median*	Median	Mean	Jury Median	Jury Median
18 USC 2113(a) and (d)	Bank Robbery	360	Life°	444	240	262	150%	185%
18 USC 924(c)(1)(A)(ii)	Use of a Firearm in Relation to a Crime of Violence*	84						

United States v. Michael Rowan Knutson, 4:07-CR-228

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 2113(a),(d), 3559c	Bank Robbery	Life°	Life°	N/A	300	328	N/A	N/A
18 USC 924(c)(1)(A)(ii)	Use of a Firearm in Relation to a Crime of Violence*	Life°						

United States v. Thomas Raver, 4:08-CR-334

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	21	27	24	15	21	140%	160%

United States v. Divine Knowledge, 1:08-CR-476

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	188	235	212	36	76	522%	588%

United States v. Charles Pullen, 4:08-CR-431

Convicted Crime(s)		Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
		Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 922(g)(1)	Felon in Possession of a Firearm	70	87	79	18	21	389%	436%

United States v. Harold Jones, 1:08-CR-168

Convicted Crime(s)	Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
	Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 1341 Mail Fraud	37	46	41.5	0	7	N/A	N/A
18 USC 1341 Mail Fraud							
18 USC 1347 Health Care Fraud							

United States v. Nakisha Winfrey Winters, 4:08-CR-85

Convicted Crime(s)	Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
	Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 1623 Perjury	21	27	24	0	2	N/A	N/A

United States v. Douglas Anthony Dale, 5:09-CR-33

Convicted Crime(s)	Guidelines Range◊		Guidelines Median	Jury Results†		Guidelines Min / Jury Median	Guidelines Median / Jury Median
	Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 152(3) False Statement	21	27	24	30	32	70%	80%
18 USC 152(3) False Statement							
18 USC 152(3) False Statement							
18 USC 152(3) False Statement							
18 USC 152(2) False Oath							
18 USC 152(1) False Statement							

United States v. Paulette Gladwell, 5:09-CR-190

Convicted Crime(s)	Guidelines Range◊		Guidelines Median	Jury Results		Guidelines Min / Jury Median	Guidelines Median / Jury Median
	Minimum	Maximum	Median	Median	Mean	Jury Median	Jury Median
18 USC 656 Theft/Embezzlement/Misapplication by Bank Officer	18	24	21	33	66	55%	64%
18 USC 1001(a)(2) False Statement							
18 USC 1001(a)(2) False Statement							