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**IS PUNISHMENT RELEVANT AFTER ALL?  
A PRESCRIPTION FOR INFORMING JURIES OF THE  
CONSEQUENCES OF CONVICTION**

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*The American jury, once heralded as “the great corrective of law in its actual administration,” has suffered numerous setbacks in the modern era. As a result, jurors have largely become bystanders in a criminal justice system that relies on increasingly severe punishments to incarcerate tens of thousands of offenders each year. The overwhelming majority of cases are resolved short of trial and, even when trials occur, jurors are instructed to find only the facts necessary for legal guilt. Apart from this narrow task, jurors need not, in the*

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*eyes of the law, concern themselves with whether a conviction and subsequent punishment is fair or just.*

*Coupled with the proliferation of harsh, mandatory sentencing regimes, this diminution of the jury's role has led to a system that not only tolerates, but arguably encourages, injustice. A defendant charged with a relatively minor offense may be convicted and sentenced to a lengthy prison term without any neutral figure (either judge or jury) determining that the punishment is proportionate to the crime.*

*For years, reformers have argued – without success – that this recipe for inequity should be altered by new statutory or constitutional rights that would guarantee that jurors are informed whenever an unusually severe punishment would follow upon a guilty verdict. The jurors, applying community norms of fairness and justice, could then vote to acquit despite proof of guilt, or at least steadfastly hold the prosecution to its burden of proof.*

*Central to the reformers' arguments has been the widely-shared assumption (borne out by the overwhelming weight of the case law) that the current legal framework does not permit defendants to inform juries of pertinent sentencing provisions. This Article challenges that assumption, suggesting a novel theory of relevance that could permit a significant number of defendants to present applicable sentencing provisions at trial, without any change to existing statutory or constitutional law. The admission of such evidence would have implications beyond the trials directly affected. Widespread introduction of punishment evidence, in concert with juries' likely adverse reaction to that evidence, could alter the terms of the smoldering debate concerning this nation's harsh sentencing laws and the appropriate role of juries in enabling their application.*

#### INTRODUCTION

Imagine yourself as a juror, taking two days out of a busy schedule to hear the following evidence in a crowded county courthouse:

Two security guards apprehended a homeless man, Gregory Taylor, in the alcove of St. Joseph's Church at 4:30 a.m. The guards observed Taylor using a piece of wood in an apparent effort to pry open the church's kitchen door. Taylor frequently received free food from a priest living in the church's friary, which was located near the kitchen door.<sup>1</sup>

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<sup>1</sup> These facts are paraphrased from the opinion of the California Court of Appeal affirming Taylor's conviction. *People v. Taylor*, 83 Cal. Rptr. 2d 919, 920-21 (Cal. Ct. App. 1999). Taylor did not raise, and the majority did not address, any challenge to the twenty-five year to life sentence he received under California's Three Strikes Law. *Id.* at 920-23. As this fact suggests, the sentence is not particularly anomalous. See *Ewing v. California*, 538 U.S. 11, 28-31 (2003) (rejecting constitutional challenge to twenty-five year to life sentence for defendant, with lengthy record, convicted of stealing three golf clubs

The charge is burglary – entering<sup>2</sup> a building with intent to steal. What is your verdict?

Would it influence your vote to know that Taylor, if convicted, will receive a life sentence in prison? Certainly many defense counsel think so, as do the prosecutors who vigorously object to any effort to get such information before the jury. Nevertheless, the current state of the law considers evidence regarding punishment irrelevant to the jury's factfinding role and thus inadmissible at trial.<sup>3</sup> Indeed, a largely unexamined doctrine prohibiting informing the jury of potential punishment has become firmly entrenched in American law. A defendant attempting to place punishment information before the jury should expect to meet with judicial pronouncements of the information's categorical inadmissibility, rather than a reasoned application of evidence rules.<sup>4</sup>

In an age of proliferating mandatory sentencing laws<sup>5</sup> and severe punishments for relatively minor, but nevertheless criminal, conduct, lay jurors

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from a pro shop); *Lockyer v. Andrade*, 538 U.S. 63, 66, 77 (2003) (rejecting challenge to consecutive twenty-five year to life sentences imposed on recidivist defendant who shoplifted videotapes from two Kmart stores); *see also* PAUL BUTLER, *LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE* 179-80 (2009) (summarizing cases involving severe sentences for relatively innocuous conduct); Lance Cassak & Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J.L. & PUB. POL'Y 411, 433-34 (2007) (highlighting *Taylor* and a litany of other cases where relatively minor offenses resulted in severe sentences).

<sup>2</sup> According to the testimony, Taylor stuck a wooden tool into the doorjamb, which was legally sufficient to establish "entry." *Taylor*, 83 Cal. Rptr. 2d at 920; *see also* *People v. Garcia*, 16 Cal. Rptr. 3d 833, 840 (Cal. Ct. App. 2004) (explaining that "[a]ny entry, partial or complete will suffice" to establish burglary, and thus "even the insertion of [a] tool into the door jamb itself constitute[s] entry").

<sup>3</sup> *See infra* Part II for an analysis of current law and the unsuccessful attempts to inform juries of potential punishment.

<sup>4</sup> *See, e.g.*, *United States v. Polouizzi*, 564 F.3d 142, 160 (2d Cir. 2009) (refusing to consider, on precedential grounds, defendant's argument that he had a Sixth Amendment right to a jury informed of sentencing consequences); *United States v. Parrish*, 925 F.2d 1293, 1299 (10th Cir. 1991) (dismissing in one paragraph defendant's argument that he had a right to a jury informed of the mandatory minimum sentence); *United States v. Broxton*, 926 F.2d 1180, 1183 (D.C. Cir. 1991).

<sup>5</sup> *See* *United States v. Polizzi*, 549 F. Supp. 2d 308, 398 (E.D.N.Y. 2008) (remarking that "[t]oday, federal statutory mandatory minimums are common for drug crimes, firearm possession, and sex offenses" and citing statutory examples), *vacated sub nom. Polouizzi*, 564 F.3d 142; Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 34 (2003) ("Over the past few decades, the federal government and many states have embraced mandatory minimum sentences and binding sentencing guidelines[, resulting in] a barrage of criticism . . ."); Nathan Greenblatt, *How Mandatory Are Mandatory Minimums? How Judges Can Avoid Imposing Mandatory Minimum Sentences*, 36 AM. J. CRIM. L. 1, 21 (2008) (referencing "171

would likely be outraged by the courts' studied effort to keep them ignorant of the consequences of guilty verdicts.<sup>6</sup> In fact, in the case summarized above, after convicting Taylor and learning his fate, several jurors offered to testify at his sentencing hearing in futile opposition to imposition of the life sentence mandated by California's Three Strikes Law.<sup>7</sup>

As this example illustrates, jurors have increasingly become mere tools in the assembly-line processing of crime and punishment.<sup>8</sup> Jurors, in fact, play no

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federal laws imposing mandatory minimum sentences"); Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 61-62 (1993) ("Two developments in the last twenty years have transformed felony sentencing in the United States. First, most jurisdictions have adopted determinate sentencing schemes that narrow the range of sanctions available to trial courts and reduce or eliminate [parole board] discretion . . . . [Second,] legislatures have enacted mandatory sentencing laws that require significantly enhanced punishment in a large number of felony prosecutions . . . ." (footnote omitted)).

<sup>6</sup> See *Polizzi*, 549 F. Supp. 2d at 320 ("Told of the [mandatory] minimum [sentence] after the verdict was received, a number of jurors expressed distress, indicating they would not have voted to convict had they known of the required prison term."); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 123 (emphasizing that jurors' "outrage" at their unknowing participation in seemingly unjust results poses a danger of delegitimizing the jury system); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 n.15 (2003) (noting that jurors who convicted a thirteen-year-old of murder were "horrified" to learn that their verdict necessitated a mandatory sentence of life in prison without parole (quoting Dana Canedy, *As Florida Boy Serves Life Term, Even Prosecutor Wonders Why*, N.Y. TIMES, Jan. 5, 2003, at A1)); Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 149-50 (2009) ("Jurors sometimes complain that they are forced to render verdicts that are inconsistent with their moral intuitions, or that they never would have voted to convict had they been aware of the punishment that the defendant faced."). King and Noble recount a scenario where a Virginia jury with sentencing responsibilities refused to impose the severe mandatory minimum sentence required by law on an offender they had convicted of giving a seventeen-year-old a "puff of marijuana;" the judge declared a mistrial and selected a new jury for sentencing. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 912-13 (2004).

<sup>7</sup> *Taylor*, 83 Cal. Rptr. 2d at 925 n.5 (Johnson, J., dissenting). In an unusual postscript, Stanford Law School's "Three Strikes Project" recently revived the case, and a California judge ordered Taylor freed after thirteen years in prison. See Daniel B. Wood, *Case of Soup-Kitchen Thief Fuels Critics of Three-Strikes Laws*, CHRISTIAN SCI. MONITOR, Aug. 19, 2010, <http://www.csmonitor.com/USA/Justice/2010/0819/Case-of-soup-kitchen-thief-fuels-critics-of-three-strikes-laws>. The judge noted that Taylor's "was one of many third-conviction cases that brought 'disproportionate' sentences and 'resulted in, if not unintended, then at least unanticipated, consequences.'" *Id.* The Los Angeles District Attorney (who was not in office at the time of the conviction) did not oppose the court's ruling and, in fact, criticized Taylor's sentence in his 2000 election campaign. Rebecca Cathcart, *Judge Orders Man Freed in a Three-Strikes Case*, N.Y. TIMES, Aug. 16, 2010, at A18.

<sup>8</sup> See Barkow, *supra* note 5, at 34 (stating that "the jury's role as a check on the

direct role in the over ninety percent of criminal convictions obtained through plea bargains.<sup>9</sup> And, even in the small percentage of cases that proceed to trial, jurors operate on a “need to know” basis.<sup>10</sup> With respect to the consequences of a guilty verdict, the criminal justice system has concluded that jurors simply do not need to know.<sup>11</sup>

Reigniting a debate that has erupted throughout American legal history, a small minority of judges and a handful of commentators have recently challenged this paradigm, contending that the celebrated right to a jury trial requires something more than a jury’s resolution of disputed facts (i.e., Did Gregory Taylor intend to steal?). Instead, these voices urge, jurors must be given information such as the consequences of a guilty verdict, so that they can fulfill their historical role as community conscience (i.e., Should Gregory Taylor be imprisoned for life?).<sup>12</sup> Perhaps the most notable of these challenges

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government’s power has become far more limited” as the “criminal process in the United States has become largely an administrative one”); Valerie P. Hans, *Judges, Juries, and Scientific Evidence*, 16 J.L. & POL’Y 19, 20 (2007) (“[M]ost jurors . . . adopt a predominantly passive role as fact-finders within the adversary system.”); Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2118 (1998) (focusing on a plea bargaining regime to characterize the American justice system as neither inquisitive nor adversarial, but rather as an “administrative system of justice”); Myers, *supra* note 6, at 155-56 (“[T]he modern jury, bound as it is by jury instructions that limit its scope, has significantly less power than it once did.” (footnote omitted)); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 567 n.194 (2004) (“[T]he role of the juror is highly regulated and restricted . . . . Jurors are regularly deprived of large and crucial segments of evidence: they are forbidden to ask the witnesses questions and to explore the scene of the crime, they are often deprived of the testimony of the criminal defendant[, and] they are not allowed to take into account anticipated sentences . . . .”); cf. Iontcheva, *supra* note 6, at 339 (“[A]s the role of the jury has receded, . . . the criminal justice system has become ever more opaque to the average citizen.”).

<sup>9</sup> See GEORGE FISHER, PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 223 (2003) (chronicling the rise of plea bargaining to a preeminent position in American criminal justice). Jurors also play no direct role in the countless cases disposed of through more informal arrangements, either through dismissal or through the prosecutor’s agreement to forego prosecution on various conditions (e.g., the defendant engages in community service, drug treatment, provides information, or avoids future arrests).

<sup>10</sup> See, e.g., *United States v. Goodface*, 835 F.2d 1233, 1237 (8th Cir. 1987) (“[T]he jury’s duty is to determine the guilt or innocence of the accused solely on the basis of the evidence adduced at trial.”).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *United States v. Polizzi*, 549 F. Supp. 2d 308, 440, 446 (E.D.N.Y. 2008) (holding that defendant had Sixth Amendment right to jury informed of mandatory minimum sentence), *vacated sub nom.* *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009); *United States v. Datcher*, 830 F. Supp. 411, 416-17 (M.D. Tenn. 1993) (same), *abrogated by* *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996); see also *United States v. Pabon-Cruz*, 391 F.3d 86, 90 (2d Cir. 2004) (reporting and reversing district court ruling, to same effect);

to the status quo is well-respected District Court Judge Jack Weinstein's voluminous 2008 ruling that a criminal defendant had a constitutional right to inform the jury of the mandatory minimum sentence he faced for downloading child pornography.<sup>13</sup> As significant as the ruling itself was the Second Circuit's response. The appeals court reversed without responding to Judge Weinstein's comprehensive analysis, instead simply referencing the generic prohibition of information regarding potential punishment (i.e., punishment evidence)<sup>14</sup> in American trials.<sup>15</sup>

Within the legal academy, even commentators sympathetic to the notion that jurors should be advised of applicable punishments appear to accept the inadmissibility of such information under current law.<sup>16</sup> These commentators

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Cahill, *supra* note 6, at 146 (“[T]he jury’s role . . . should include being a normative evaluator whose ‘authorization’ of the maximum punishment is knowing, not accidental.”); Cassak & Heumann, *supra* note 1, at 417-20 (arguing that the Due Process Clauses of the Fifth and Fourteenth Amendments, which mandate a fundamentally fair trial, require that criminal defendants be able to inform the jurors of mandatory minimum sentences); Milton Heumann & Lance Cassak, *Not-So-Blissful Ignorance: Informing Jurors About Punishment in Mandatory Sentencing Cases*, 20 AM. CRIM. L. REV. 343, 344-45 (1983) (raising constitutional arguments that would require informing the jury of mandatory sentences); Myers, *supra* note 6, at 141 (advocating the enactment of statutes that would require juries to be “explicitly instructed that they had to find moral blameworthiness in order to convict the defendant”); Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1253 (1995) (“[T]he jury nullification power may be considered a constitutionally protected power meant to give teeth to the defendant’s Sixth Amendment right to a jury trial.”); Jeffrey Zahler, Note, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present “Moral” Evidence?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 485, 488 (2008) (arguing that the defense must be permitted to present evidence of prison conditions at trial); Jenny E. Carroll, *Of Rebels, Rogues and Roustabouts: The Jury’s Second Coming* 5-6 (Seton Hall Law Sch., Pub. Law & Legal Theory Research Paper Series, Paper No. 1486188, Aug. 22, 2010), available at <http://ssrn.com/abstract=1486188> (recognizing an opening recently provided by the Supreme Court “for the historical vision of jurors as judges of both law and fact” and therefore “as (potential) nullifiers”).

<sup>13</sup> *Polizzi*, 549 F. Supp. 2d at 404-48 (devoting forty-four pages of the opinion to analysis of whether the jury should have been informed of mandatory punishment).

<sup>14</sup> The phrases “punishment evidence” and “punishment information” are used interchangeably throughout this article to cover the various possible forms in which information regarding the punishment facing a defendant upon conviction could be communicated to the jury (e.g., testimony, stipulation, statements of counsel, or jury instructions).

<sup>15</sup> *Polouizzi*, 564 F.3d at 160-63, *vacating Polizzi*, 549 F. Supp. 2d 308.

<sup>16</sup> See, e.g., Barkow, *supra* note 5, at 79 (explaining that juries are generally “unaware of what the actual sentence will be” upon conviction); Cahill, *supra* note 6, at 92 (characterizing the current system as one where “the jury makes a set of factual findings and votes for a conviction . . . without knowing the . . . punishment range attaching to [the offense]”); Cassak & Heumann, *supra* note 1, at 496 (acknowledging that their proposal to

generally champion statutory reforms that would allow juries to learn of, and veto, certain punishments that await a defendant upon conviction.<sup>17</sup> A related reform effort seeks to mandate instructions that would inform jurors of their “right” to vote for acquittal even when the prosecution has proven the defendant’s legal guilt beyond a reasonable doubt.<sup>18</sup> Not surprisingly, these

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inform jurors of certain punishments “would certainly break new ground”); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2443 (1999) (advocating for jurors informed of potential punishments even though “[t]his argument . . . runs counter to current doctrine”); Greenblatt, *supra* note 5, at 15 (“Courts deny defendants even a chance to mention mandatory minimums to the jury.”); Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role As a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 97 (2006) (“[J]udges deny juries access to information necessary to perform their sentence-mitigation function . . . .”); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 285 (2006) (arguing that judges should give juries an idea of the potential sentence the defendant would face to further juries’ use of their nullification power if the sentence is too harsh); Sauer, *supra* note 12, at 1242 (“The general rule in federal and most state judicial systems is that neither the judge nor advocates should inform the jury of the sentencing consequences of a guilty verdict.”).

<sup>17</sup> See Cahill, *supra* note 6, at 94 n.12, 136 (advocating that juries be informed of potential punishments, but recognizing that the proposed reform is not “of constitutional dimension”); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 956 (2003); Iontcheva, *supra* note 6, at 365-66; Kemmitt, *supra* note 16, at 97 (arguing for restoration of juries’ historical role through procedure that would “inform[] juries of the sentencing consequences of their decisions prior to jury deliberations”); Langer, *supra* note 16, at 285-86; Erik Luna & Paul G. Cassell, *Mandatory Minimalism*, 32 CARDOZO L. REV. 1, 78-80 (2010) (proposing a legislatively-authorized sentencing procedure where a judge, contemplating imposition of a mandatory minimum sentence, could seek input from the jury and, if the jury disapproved of the mandatory minimum, impose a lesser sentence); Myers, *supra* note 6, at 141 (advocating enactment of statutes that would require juries to be “explicitly instructed that they had to find moral blameworthiness in order to convict the defendant”).

<sup>18</sup> See David C. Brody, *Sparf and Dougherty Revisited: Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 91, 93 (1995) (advocating instructing juries of their power to nullify, but recognizing that “[t]he Constitution does not require that the jury be informed of its unreviewable power to acquit in a criminal trial”); Irwin A. Horowitz, *The Effect of Jury Nullification Instruction on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 26-30, 34-36 (1985) (summarizing arguments regarding nullification instructions and discussing results of mock juror study). Paul Butler advocates an informal approach, arguing that “it would be useful . . . to educate the public about nullification’s important role in our constitutional history,” and encourages jurors to engage in a pattern of “strategic nullification” as part of a larger strategy to effect social change. BUTLER, *supra* note 1, at 71, 74-75; see also Greenblatt, *supra* note 5, at 25 (“[A] combination of informal attorney argument, judicial comments, and curative instructions appears to be an avenue for informing a jury of a mandatory minimum sentence and avoiding the sentence through acquittal.”); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 255-56 (1996) (citing cases where

proposed reforms – designed to allow jurors to exercise their unreviewable nullification<sup>19</sup> power to block imposition of severe, often-mandatory sentences – have been ignored by state and federal legislatures. After all, legislatures are generally the institutions responsible for the sentencing provisions that reformers seek to disarm through nullification.

A parallel academic movement highlights a recent line of Supreme Court cases, spearheaded by *Apprendi v. New Jersey*,<sup>20</sup> that some commentators claim foreshadows a new constitutional right to a jury informed of severe punishment provisions.<sup>21</sup> Again, however, the judiciary itself appears uninterested in any such extension of *Apprendi*.

This Article approaches the smoldering controversy from a new angle. It acknowledges the dim prospects for reform in either the legislative or judicial arenas,<sup>22</sup> and thus accepts that existing statutory and constitutional law on the admission of punishment evidence is static. Rather than directly advocating statutory or constitutional reforms, the Article explores the potential for defendants to introduce punishment evidence under existing law and, in so doing, avoid severe sentences in cases where the jury deems the punishment undeserved.

The Article emphasizes the often-overlooked fact that relevance is the key to the admissibility of punishment evidence. As a consequence, the admissibility of such evidence depends on a far more case-specific analysis than courts and commentators have previously presumed. In fact, there is a broadly-applicable “anti-motive” theory of relevance that, if adopted by defendants, could lead to the widespread introduction at trial of the consequences of conviction.

The anti-motive theory, more fully described in Part IV, *infra*, is an alternative to the nullification argument thus far invoked by defendants seeking to introduce punishment evidence at trial.<sup>23</sup> Rather than claim that the jury

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“nullification advocates have contacted potential jurors to tell them of their power to acquit against the evidence, usually to the distress of the trial judges”).

<sup>19</sup> “Jury nullification” refers to “a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute.” Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150 (1997); see also Leipold, *supra* note 18, at 253-54 (“Nullification occurs when the defendant’s guilt is clear beyond a reasonable doubt, but the jury, based on its own sense of justice or fairness, decides to acquit.”).

<sup>20</sup> 530 U.S. 466 (2000). *Apprendi* held that juries must find all facts, other than the fact of a prior conviction, that increase the defendant’s punishment beyond the statutory minimum. *Id.* at 490.

<sup>21</sup> Cahill, *supra* note 6, at 145; Cassak & Heumann, *supra* note 1, at 459-60; Carroll, *supra* note 12, at 5-6, 43; see also United States v. Polizzi, 549 F. Supp. 2d 308, 426 (E.D.N.Y. 2008) (contending that the *Apprendi* line of “decisions bear on the question of whether juries should be informed of the sentences that would result from guilty verdicts”), *vacated sub nom.* United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009).

<sup>22</sup> See *infra* Part III.

<sup>23</sup> See, e.g., Thomas v. State, 349 A.2d 384, 388-89 (Md. Ct. Spec. App. 1975) (stating

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must be given an opportunity to reject the legislatively-authorized punishment by voting to acquit, the defense can argue more conventionally that evidence of punishment is relevant to the probability that the defendant committed the charged crime. The defendant's ex ante awareness of a severe punishment for a charged crime – corroborated, or in some cases established, by a simple description of the applicable sentencing law – decreases somewhat the probability that he committed that offense. As a consequence, under the permissive relevance standard that governs in American courts, evidence of a harsh applicable punishment will often be relevant to the defendant's guilt and, thus, must be admitted absent some countervailing rule of evidence (e.g., Federal Rule of Evidence 403).<sup>24</sup>

The anti-motive theory posited here draws an analogy to the uncontroversial admission of motive evidence in criminal cases. Just as the prosecution can introduce evidence that supports an inference that the defendant stood to benefit from a charged crime (i.e., motive), the defense should be able to introduce evidence that supports the contrary proposition – that the defendant had a great deal to lose if he committed the crime (i.e., anti-motive). Indeed, this theory of the relevance of punishment evidence simply echoes the general deterrence rationale that proponents often cite to justify harsh sentencing provisions.<sup>25</sup>

The contention that a particularly severe punishment for the charged crime can be introduced at trial without any statutory or constitutional reform challenges the contrary assumption in existing case law and commentary. It also has far-reaching implications. If defendants are able to inform juries of applicable punishment provisions in a broad array of cases, this tactic could trigger widespread jury nullification, publicly signaling that certain sentencing laws (e.g., mandatory minimum sentences) are out-of-touch with community norms.<sup>26</sup> Sentence-based jury nullification would lend a populist appeal to the

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that defendant seeking to inform the jury of the five-year mandatory sentence for a firearm offense “candidly acknowledge[d] that his purpose is ‘jury nullification’ of a statute the jury doesn’t like”); *State ex rel. Schiff v. Madrid*, 679 P.2d 821, 824 (N.M. 1984) (rejecting defendant’s argument that the jury must be permitted to “refus[e] to convict despite the evidence if they feel the penalty is inappropriate”).

<sup>24</sup> See *infra* Part IV.D for a discussion of the applicability of Rule 403 to punishment evidence.

<sup>25</sup> See, e.g., *Ewing v. California*, 538 U.S. 11, 26 (2003) (“[California’s] interest in deterring crime also lends some support to the three strikes law.”); *People v. Reed*, 40 Cal. Rptr. 2d 47, 48 (Cal. Ct. App. 1995) (identifying “the deterrence of recidivism” as the “basic purpose” of three strikes legislation); Douglas A. Berman, *The Enduring (and Again Timely) Wisdom of the Original MPC Sentencing Provisions*, 61 FLA. L. REV. 709, 718 (2009) (“[I]n nearly all jurisdictions throughout the United States, legislatures and sentencing commissions came to embrace and enact mandatory imprisonment terms for certain offenses and more severe and rigid sentencing rules based on enhanced concerns about consistently imposing ‘just punishment’ and deterring the most harmful crimes.”).

<sup>26</sup> Others have forcefully criticized the harsh, mandatory sentencing regimes now in

cause of mitigating harsh sentencing regimes – a cause currently championed (with little success) by academics and defense counsel. Further, if it becomes apparent that harsh sentencing provisions are, paradoxically, preventing juries from convicting some of the “worst” offenders, it will become less clear that such sentencing provisions constitute effective means of crime control. Proponents of moderate, discretionary sentencing laws will be able to characterize their reforms as tougher on criminals.<sup>27</sup>

The full scope of the implications of a viable theory of admissibility for punishment evidence is impossible to forecast in advance. Nevertheless, such a theory possesses a compelling advantage over competing proposals to mitigate unduly harsh sentencing provisions: it can be applied immediately, even without the stalled statutory and constitutional reforms advocated in previous commentary.

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place in many American jurisdictions. See, e.g., Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 400 (2005) (discussing criticisms of a federal sentencing regime that strives for “uniformity to the substantial exclusion of reasonable individualization and at the cost of relative proportionality”); Clark, *supra* note 16, at 2445 (criticizing three-strikes statute on the grounds that it operates “through the medium of blinkered juries” that allows for “assigning responsibility without anyone ever having to take responsibility for that assignment”); Luna & Cassell, *supra* note 17, at 7 (proposing “to modify the federal mandatory minimum scheme so as to ameliorate its most draconian and unfair expressions”); Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 100 (2009) (arguing against mandatory penalties because “[t]hey often result in injustice” and are unsupported by empirical evidence that they “have significant deterrent effects”). This Article does not specifically contest the wisdom of modern sentencing laws. Instead, it takes as a fairly uncontroversial starting point that these laws lead to unjust results in a certain subset of cases – roughly approximated as those cases where otherwise unbiased, qualified jurors would so recoil from allowing imposition of the applicable sentence that they would acquit a defendant despite proof of guilt beyond a reasonable doubt. See Cahill, *supra* note 6, at 122-23 (“[T]he offenses and situations conducive to jury nullification would be those where the legislature most likely got it wrong in determining the offense grade – wrong in terms of tracking the shared moral judgment of the community.”); Tonry, *supra*, at 100 (arguing that under harsh mandatory sentencing regimes, some offenders “receive[] a mandated penalty that everyone immediately involved considers too severe”); cf. Myers, *supra* note 6, at 144 (asserting that ““at any given time, significant portions of the criminal code are out of touch with majority sentiment”” (quoting Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1330 (2008))).

<sup>27</sup> Cf. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 310-11 (The Univ. of Chi. Press 1971) (1966) (explaining Indiana’s relaxation of mandatory penalty for drunk driving as being motivated by juries’ refusal to convict in drunk driving cases, and reporting that in 1819 English bankers petitioned Parliament to remove the death penalty for the crime of forgery because, in light of the penalty, “it had become almost impossible to obtain a conviction for that crime”).

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The Article proceeds in four parts. Part I explores the key assumption underlying the debate regarding punishment evidence and jury nullification: that juries will exercise the power to nullify in order to block severe sentencing laws. Part II analyzes the case law that has thus far thwarted efforts by defendants to introduce punishment evidence at trial. Part III highlights the dim prospects of statutory and constitutional reforms championed by those who seek to alter this status quo. Part IV posits an anti-motive theory of relevance that, without any change to existing law, could allow defendants to inform juries of severe sentencing provisions that would apply upon conviction.

#### I. WHY PUNISHMENT EVIDENCE MIGHT INFLUENCE JURY VERDICTS

A key assumption in the commentary advocating jury nullification of harsh sentencing laws is that jurors would be willing to acquit, despite proof of guilt, in order to block the imposition of an unusually severe punishment. This section explores that assumption.

It must be acknowledged at the outset that there is something counterintuitive about the suggestion that informing juries of applicable sentencing provisions would change their verdicts. In a democratic society, jurors' views of appropriate criminal sentences should track those of the legislators who enact sentencing statutes. After all, voters and jurors are drawn from the same pool of citizens. Legislators presumably aim to reflect the wishes of their constituents and thus the citizen-juror should encounter little in the sentencing laws that deviates from what the citizen-voter would desire.<sup>28</sup> Indeed, some of the harshest sentencing provisions, such as California's Three Strikes Law,<sup>29</sup> were directly enacted by voters.<sup>30</sup> Thus, the typical citizen may have voted for the very provision that commentators presume she would later seek to nullify as a juror.

The most compelling explanation for why the democratic process intuition summarized above does not accurately predict jury behavior emphasizes the distinction between the enactment of a severe sentencing statute in the abstract and the imposition of a severe sentence in a particular case. Rachel Barkow explains:

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<sup>28</sup> See *McCormick v. United States*, 500 U.S. 257, 272 (1991) ("Serving constituents and supporting legislation that will benefit the district and individuals and groups therein is the everyday business of a legislator."); Kemmitt, *supra* note 16, at 136 ("Criminal laws are, at least in theory, likely to be reflective of the general will . . .").

<sup>29</sup> CAL. PENAL CODE § 667(b)-(i) (West 2010); *id.* § 1170.12 (West 2004).

<sup>30</sup> California's Three Strikes Law is actually two essentially identical sentencing provisions enacted separately (but close in time) by the legislature and through a voter initiative. *People v. Superior Court (Romero)*, 917 P.2d 628, 630 (Cal. 1996). Similar voter-enacted laws exist in Washington and Georgia. See Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 701 (1995).

As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case. Jury trials force the people – in the form of community representatives – to look at crime not as a general matter, the way they do as voters, but instead to focus on the particular individual being charged.<sup>31</sup>

Gregory Taylor's case, summarized at the outset of this Article, illustrates this proposition. As a general matter, imposition of lengthy prison terms on unrepentant (church) burglars and other recidivist criminals makes good sense to voters. Individualized application of this sentiment becomes problematic, however, when it is invoked to impose a life sentence on a homeless man who tried to break into a church kitchen to obtain some food.

The available empirical evidence supports Barkow's suggestion that jurors, even if generally supportive of harsh sentencing laws, will be reluctant to convict if made aware of the applicability of an unusually disproportionate punishment. Harry Kalven and Hans Zeisel's groundbreaking study of the American jury devotes a chapter titled *Punishment Threatened is Too Severe*<sup>32</sup> to explain a number of observed instances where juries acquitted despite strong prosecution evidence of guilt. In the cases summarized, the presiding judges explained the acquittals by pointing to the jury's (often incorrect) perception of a looming punishment that it deemed disproportionate to the crime.<sup>33</sup> Kalven and Zeisel compare this phenomenon to the analogous practice of early nineteenth-century English jurors who refused to convict guilty defendants because they deemed the offenders undeserving of the automatic death sentence that would follow.<sup>34</sup> The authors summarize their findings as

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<sup>31</sup> Barkow, *supra* note 5, at 62 (footnote omitted); *see also* United States v. Polizzi, 549 F. Supp. 2d 308, 441-42 (E.D.N.Y. 2008), *vacated sub nom.* United States v. Polouizzi, 564 F.3d 142 (2d Cir. 2009); Cahill, *supra* note 6, at 110; James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL'Y REV. 173, 175 (2010) (reporting results of survey of federal jurors: the median juror recommended a sentence that was only 36% of the bottom of the Federal Sentencing Guidelines range); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 587 (2001). In addition, as Barkow explains, "[l]egislatures cannot predict *ex ante* all the situations that will be covered by a general law; therefore, the law inevitably will be overbroad and cover some situations that legislators (and those voting for them) would not want covered." Barkow, *supra* note 5, at 61; *see also* Stuntz, *supra*, at 549 (describing an "imbalance of legislative incentives" that causes criminal legislation to be "*more tilted*" in the government's favor "than the public would demand"). Legislators may, however, expect prosecutors – not juries – to narrow the law in application. Stuntz, *supra*, at 548.

<sup>32</sup> KALVEN & ZEISEL, *supra* note 27, at 306-12.

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

<sup>34</sup> *Id.* at 310-11; *see also* Woodson v. North Carolina, 428 U.S. 280, 289-90 (1976) (plurality opinion) (describing how such behavior resulted in changes in sentencing law that "limit[ed] the classes of capital offenses"); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 52-55 (1983).

follows: “Even with the more modest [i.e., non-capital] sentences of today, the jury at times finds the penalty so disproportionate to its view of the offense that it is moved to acquit the defendant rather than subject him to that penalty.”<sup>35</sup> Other studies reach similar conclusions.<sup>36</sup>

While there is, then, both empirical and theoretical support for the assumption that informing juries of sentencing provisions will lead to acquittals in individual cases, it is important to note that this issue will only arise in a subset of criminal trials. Defendants will be largely uninterested in introducing punishment evidence in cases where the likely punishment is either difficult to forecast,<sup>37</sup> or relatively clear but roughly equivalent or less harsh than the average juror would expect. In such circumstances the defense will achieve little advantage from punishment evidence and may suffer disadvantages.<sup>38</sup>

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<sup>35</sup> KALVEN & ZEISEL, *supra* note 27, at 312.

<sup>36</sup> See Polizzi, 549 F. Supp. 2d at 441-42; Barkow, *supra* note 5, at 80-81; Heumann & Cassak, *supra* note 12, at 345-52; Iontcheva, *supra* note 6, at 332 (“There is evidence that the adoption of mandatory sentencing laws in several states was succeeded by an increase in jury nullification.”); cf. David N. Dorfman & Chris K. Iijima, *Fictions, Fault, and Forgiveness: Jury Nullification in a New Context*, 28 U. MICH. J.L. REFORM 861, 918 (1995) (asserting that the jury instruction informing juries not to be concerned with punishment is perhaps the “most dissonant with [jury] nullification” because “[a]lmost all nullification acquittals can be reduced to one common judgment – that the defendant, although technically guilty, should not be punished”); Garold Stasser et al., *The Social Psychology of Jury Deliberations: Structure, Process & Product*, in THE PSYCHOLOGY OF THE COURTROOM 221, 232 (Norbert L. Kerr & Robert M. Bray eds., 1982) (reviewing empirical studies of jury behavior and observing that “both mock and actual juries sometimes discuss the consequences of conviction for the defendant, even though this is not legally part of their responsibility” (citations omitted)).

<sup>37</sup> For example, a defendant convicted of selling heroin in a school zone in the District of Columbia is subject to a sentence ranging anywhere from probation to sixty years in prison. D.C. CODE § 48-904.01(a)(2)(A) (2001) (authorizing penalties of up to thirty years in prison for distributing drugs); *Id.* § 48-904.07a(b) (doubling sentence for certain drug crimes committed in a school zone). While the jury may find the sentencing range of interest, jurors will be unable to predict where in that range any sentence would fall. In order to provide sufficient information to a jury regarding the likely sentence in such a case, the defense would have to put on evidence about the particular judge’s sentencing patterns and likely sentencing considerations, such as the defendant’s prior criminal record. The prosecution might seek to rebut this evidence. In these circumstances, even if the defense wanted to introduce the evidence, it should expect a trial court to exclude it under Federal Rule of Evidence 403 as engendering waste of time and jury confusion. See FED. R. EVID. 403. Nevertheless, evidence that the offense punishment is doubled if committed in a school zone might be relevant to suggest that the defendant would not have committed such a crime near a school. See *infra* Part IV.

<sup>38</sup> See cases cited *infra* note 61. In addition, the defense will likely be disinclined to discuss the consequences of the conviction at trial because doing so might suggest to the jury that the defendant expects to be convicted.

Defendants will generally seek to introduce punishment evidence only in the (expanding) subset of cases where the sentence upon conviction is reasonably certain and surprisingly harsh. Examples include cases where defendants face: (a) mandatory minimum sentences designated for certain offenses, such as drug trafficking and gun crimes; (b) statutory ineligibility for a certain type of lenient treatment, such as probation; and (c) mandatory recidivist sentences under “three strikes” laws and analogous sentencing schemes.<sup>39</sup> A defendant may also seek to inform the jury of certain collateral consequences of conviction, such as deportation, the loss of child custody, or forfeiture of a professional license or job. All of this information has the potential to sway jurors to acquit despite a strong prosecution case and creates little prospect of disadvantaging criminal defendants.

Significantly, if the jury acquits because it believes the consequences of conviction to be excessive, its verdict will be just as final as a verdict based on the weakness of the government’s evidence. Under the Federal Constitution, an acquittal, even if “based upon an egregiously erroneous foundation,” cannot be disturbed.<sup>40</sup> The admissibility (or inadmissibility) of punishment evidence, then, becomes a critically important question.

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<sup>39</sup> See Clark, *supra* note 16, at 2444-45 (identifying the “circumstances under which defendants might most want juries to have sentencing information” as those where “the punishment a defendant will receive if convicted is substantially more harsh than the jury might reasonably expect” such as cases that “arise under ‘three strikes’ statutes”). Judge Weinstein sketched roughly these same contours in *Polizzi*. 549 F. Supp. 2d at 323 (clarifying that the right to inform the jury of a particular sentence “is limited to that small group of cases where the jury would not be expected to know of the applicable harsh mandatory minimum” and thus “would not, for example, appear to be applicable to robbery, terrorism or personal assaults with weapons where juries expect long prison terms”).

<sup>40</sup> *Fong Foo v. United States*, 369 U.S. 141, 143 (1962); see also *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (“‘The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal,’ for the ‘public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though the acquittal was based upon an egregiously erroneous foundation.’” (quoting *Arizona v. Washington*, 434 U.S. 497, 503 (1978)) (internal quotation marks omitted)); Anne Bowen Poulin, *The Jury: The Criminal Justice System’s Different Voice*, 62 U. CIN. L. REV. 1377, 1399-1400 (1994).

It is important to recognize that jury nullification is an imperfect mechanism for dispensing justice. In fact, nullification in the face of severe prison sentences can create a windfall for undeserving defendants. For example, two offenders arrested for an identical burglary may face vastly divergent punishments based on their criminal records. It is a clumsy system that, upon allowing a jury to find out that an unrepentant recidivist is facing life in prison, releases the recidivist (through jury nullification), but punishes the first-time offender. Thus, in many ways, statutory reforms of sentencing provisions are a more desirable mechanism for tempering injustice occasioned by those laws. Unfortunately, statutory reforms do not appear viable in the current political climate. See *infra* Part III.B.

## II. THE PROHIBITION OF PUNISHMENT EVIDENCE IN AMERICAN COURTS

Given the potential for the prospect of a severe punishment to induce ambivalent jurors to acquit, it is no surprise that defendants regularly attempt to inform jurors of applicable stiff sentencing laws. These efforts have been almost uniformly rebuffed. The prevailing rule in American courts forbids witnesses, attorneys, or judges from informing jurors of the consequences of conviction – whether through testimony, arguments of counsel, or jury instructions.<sup>41</sup> The rule has been consistently applied to reject defense requests to inform the jury that a defendant is facing a life sentence under a recidivist offender law, such as California’s Three Strikes Law,<sup>42</sup> a lengthy federal or state mandatory minimum sentence,<sup>43</sup> or the generic prospect of lengthy imprisonment.<sup>44</sup>

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<sup>41</sup> Cassak and Heumann highlight “the courts’ practically universal and unwavering commitment” to this rule. Cassak & Heumann, *supra* note 1, at 420-21; *see also* United States v. Parrish, 925 F.2d 1293, 1299 (10th Cir. 1991) (“Unless a statute specifically requires jury participation in determining punishment, the jury shall not be informed of the possible penalties.”); United States v. Broxton, 926 F.2d 1180, 1183 (D.C. Cir. 1991); United States v. Goodface, 835 F.2d 1233, 1237 (8th Cir. 1987); Lyles v. United States, 254 F.2d 725, 728 (D.C. Cir. 1957), *overruled in part by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc), *superseded by statute*, Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057 (codified as amended at 18 U.S.C. §§ 17, 4241-4247 (2006)), *as recognized in* Shannon v. United States, 512 U.S. 573 (1994); State v. Koch, 673 P.2d 297, 303-04 (Ariz. 1983) (“[A] trial court’s jury instructions generally should not touch on the subject of punishment except to advise the jury not to consider it.”); People v. Kelly, 822 P.2d 385, 408 (Cal. 1992) (en banc); State v. Guthrie, 461 S.E.2d 163, 184 (W. Va. 1995); JACOB A. STEIN, CLOSING ARGUMENTS § 1:87 (2d ed. 2005) (citing cases); Myers, *supra* note 6, at 159.

<sup>42</sup> *See* People v. Nichols, 62 Cal. Rptr. 2d 433, 435 (Cal. Ct. App. 1997) (rejecting challenge to trial judge’s refusal to inform the jury that defendant was facing a three strikes sentence even though the jury had specifically requested that information and stating that “informing the jury appellant was subject to three strikes would in effect be ‘inviting’ the jury to exercise its power of jury nullification”); *see also* People v. Cline, 71 Cal. Rptr. 2d 41, 45-46 (Cal. Ct. App. 1998).

<sup>43</sup> *Shannon*, 512 U.S. at 586-87 (“[A]s a general matter, jurors are not informed of mandatory minimum or maximum sentences, nor are they instructed regarding probation, parole, or the sentencing range accompanying a lesser included offense.”); United States v. Johnson, 62 F.3d 849, 850-51 (6th Cir. 1995); *Parrish*, 925 F.2d at 1299; *Broxton*, 926 F.2d at 1183; *Goodface*, 835 F.2d at 1237; *Chapman v. United States*, 443 F.2d 917, 918, 920 (10th Cir. 1971); *People v. Royse*, 437 N.E.2d 679, 686 (Ill. App. Ct. 1982); *Thomas v. State*, 349 A.2d 384, 388-89 (Md. Ct. Spec. App. 1975); *State v. Courtney*, 425 S.W.2d 121, 122-23 (Mo. 1968); *People v. Cipollone*, 482 N.Y.S.2d 552, 553 (N.Y. App. Div. 1984).

<sup>44</sup> *State v. Waggoner*, 697 P.2d 345, 347 (Ariz. Ct. App. 1984) (rejecting defendant’s argument to allow him to inform the jury of punishment enhancements because “[t]he question to be decided by the jury is whether the allegations are true” and “[t]he fact that they enhance the punishment is not material”); *State v. Main*, 52 A. 257, 260 (Conn. 1902) (affirming trial court’s ruling prohibiting defense counsel from “read[ing] to the jury that

A. *The Supreme Court's Pronouncements on Punishment Information*

Despite its widespread acceptance and apparent simplicity, the basis for and precise contours of the preclusion of punishment information at trial remain unclear.<sup>45</sup> In modern times, the authority most commonly cited for this prohibition is the United States Supreme Court's opinion in *Shannon v. United States*.<sup>46</sup>

The precise issue in *Shannon* was whether a criminal defendant, who raised an insanity defense, was entitled to a jury instruction explaining the arguably counter-intuitive consequences of an insanity acquittal.<sup>47</sup> In resolving that the defendant was not entitled to such an instruction, the Supreme Court invoked the general principle that "when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'"<sup>48</sup> Courts interpreting *Shannon* have taken this statement, and the surrounding analysis,<sup>49</sup> to stand for the broad proposition that information

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part of the statute which merely prescribes the punishment for the offense charged"); *Inman v. State*, 393 N.E.2d 767, 769-70 (Ind. 1979) (rejecting defense challenge to trial court ruling "preventing the appellant or prosecutor from making any statements, references, arguments, asking any questions either on voir dire or of witnesses or in final argument pertaining to penalties or to seek or elicit any evidence with regard to penalty"); *State v. Johnson*, 586 S.W.2d 808, 809 (Mo. Ct. App. 1979) (affirming trial court's admonishment of defense counsel's argument to the jury that punishing defendant would "take a man away from his job . . . and slap him in the penitentiary for five years"); *State v. Tetrault*, 95 A. 669, 670 (N.H. 1915) (rejecting argument that defense counsel should have been permitted "to state to the jury the penalty prescribed for the offense" and remarking that "[t]he exclusion of this matter from [the jury's] consideration was in accord with the uniform practice in this state").

<sup>45</sup> See Cahill, *supra* note 6, at 109 (arguing that the rule requiring the jury to find facts without knowledge of the consequences "seems rooted more in history than in any principled basis" and is "based mainly in a traditional notion that imposing punishment is the judge's and not the jury's bailiwick").

<sup>46</sup> *Shannon*, 512 U.S. at 579 ("Information regarding the consequences of a verdict is . . . irrelevant to the jury's task."); see, e.g., *Johnson*, 62 F.3d at 850 (citing *Shannon* in upholding district court's refusal to inform the jury of the fifteen-year mandatory minimum sentence facing defendant charged with unlawful possession of ammunition); see also *Jones v. United States*, 527 U.S. 373, 384 (1999) (citing *Shannon* in rejecting contention that a trial court must instruct the jury, in a capital case, regarding the consequences if the jury cannot unanimously agree on a sentence); James Joseph Duane, "Screw Your Courage to the Sticking-Place": *The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 HASTINGS L.J. 463, 473 (1998) ("*Shannon* has exercised a powerful influence in the lower courts. It is widely cited as the primary basis for rejecting any defense request to advise a jury about mandatory minimum sentences faced by the accused upon conviction, even if the charge carries a stiff penalty that might come as a great surprise to the jury.>").

<sup>47</sup> *Shannon*, 512 U.S. at 579.

<sup>48</sup> *Id.* at 579 (footnote omitted) (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)).

<sup>49</sup> *Id.* at 587.

regarding punishment is inadmissible during the guilt phase of a criminal trial.<sup>50</sup>

The *Shannon* Court posited a twofold justification for the broad rule it endorsed. First, because the jury's role is solely to decide whether the facts presented at trial establish that the defendant violated a criminal statute, the potential punishment faced by the defendant "is . . . irrelevant to the jury's task."<sup>51</sup> Second, and relatedly, the Court explained, evidence of punishment distracts jurors from their fact-finding responsibilities, and thus "creates a strong possibility of confusion."<sup>52</sup>

*Shannon*'s unqualified support for the "well established" rule<sup>53</sup> that prohibits informing jurors of the consequences of conviction appears firmly grounded in familiar concepts of relevance and jury confusion, encapsulated in the Federal Rules of Evidence. Rule 402 precludes the admission of irrelevant evidence<sup>54</sup> and Rule 403 provides for the exclusion of relevant evidence if that evidence's "probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury."<sup>55</sup> The opinion in *Shannon* does not cite these rules, however, relying instead on an earlier Supreme Court case, *Rogers v. United States*.<sup>56</sup> It is necessary, then, to briefly examine *Rogers* to determine

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<sup>50</sup> See Duane, *supra* note 46, at 473-74; cases discussed *infra* Part II.B and *supra* note 46. While *Shannon* considered the propriety of a jury instruction regarding punishment, its emphasis on relevance suggests that the instruction in this context was indistinguishable from the trial court's taking judicial notice of, and thereby submitting as evidence to the jury, the content of the applicable sentencing statute. See *Berea Coll. v. Kentucky*, 211 U.S. 45, 56 (1908) (recognizing that state and federal courts take judicial notice of pertinent statutes).

<sup>51</sup> *Shannon*, 512 U.S. at 579. The separation between facts, which are said to be the jury's province, and law, which is the province of the court, derives from earlier authority. See *United States v. Gaudin*, 515 U.S. 506, 513 (1995) (explaining that "[t]he question [in *Sparf, infra*] was whether the jury [had] the power to determine, not only historical facts, not only mixed questions of fact and law, but pure questions of law in a criminal case" and "[w]e decided that it did not"); *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920); *Sparf v. United States*, 156 U.S. 51, 106 (1895) (holding that trial court did not err in instructing the jury that they were "the exclusive judges of the facts" and must render a verdict in accordance with the law as set forth by the court).

<sup>52</sup> *Shannon*, 512 U.S. at 579.

<sup>53</sup> *Id.*

<sup>54</sup> FED. R. EVID. 402 ("Evidence which is not relevant is not admissible.").

<sup>55</sup> FED. R. EVID. 403.

<sup>56</sup> *Shannon*, 512 U.S. at 579 (citing *Rogers v. United States*, 422 U.S. 35, 40 (1975)). The *Shannon* majority also cited *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962). *Shannon*, 512 U.S. at 579. *Pope*, like *Shannon*, rejected a challenge to a trial court's refusal to instruct the jury that a defendant found not guilty by reason of insanity would nevertheless be compelled to receive treatment at a mental hospital until "cured." *Pope*, 298 F.2d at 508. Providing the jury with any information regarding punishment, the *Pope* court ruled, would "draw the attention of the jury away from their chief function as sole judges of

whether there is some other principle, apart from the general evidentiary principles referenced above, that prohibits punishment evidence.

In *Rogers*, the Supreme Court reversed a conviction that followed a trial court's ex parte assurance, in response to a jury note, that it would accept a verdict of "[g]uilty as charged with extreme mercy of the Court."<sup>57</sup> The Supreme Court held that the trial court erred by responding to the note without notifying counsel.<sup>58</sup> The error was prejudicial, the Court stated, because the presence of counsel might have led to a more appropriate response that "included the admonition," later quoted in *Shannon*, that "the jury . . . should reach its verdict without regard to what sentence might be imposed."<sup>59</sup>

*Rogers* does not include any analysis on this last critical point, instead citing three cases decided in the intermediate appellate courts.<sup>60</sup> These cases reversed convictions in circumstances similar to *Rogers*, relying on "the familiar rule that a verdict of guilty cannot stand if it has been induced by any intimation from the trial judge that a *light sentence* might be imposed, thus encouraging a juror to abandon his vote of not guilty."<sup>61</sup> This analysis of *Shannon* and *Rogers* reveals that something beyond the general evidence rules animates the courts' aversion to presenting punishment information to the jury, but that this essentially constitutional principle is intended to protect the defense, not the prosecution.<sup>62</sup>

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the facts, open the door to compromise verdicts and to confuse the issue[s]." *Id. Pope* thus focused on Rule 403's jury confusion aspect of admissibility. The *Pope* court also, like *Rogers*, relied on case law that protects a defendant from a jury's acquiescing in a guilty verdict based upon the suggestion of lenient treatment. *Id.* (citing *Dicks v. United States*, 253 F.2d 713 (5th Cir. 1958), for the proposition "that this court could not commend a statement by the trial court that the sentence would be mild").

<sup>57</sup> *Rogers*, 422 U.S. at 36. *Rogers* was charged with making threats against President Nixon. *Id.* at 42. There was little likelihood that the threats, voiced to the customers and staff at a Holiday Inn coffee shop in Louisiana, would be carried out. *See id.* at 41-42.

<sup>58</sup> *Id.* at 39.

<sup>59</sup> *Id.* at 40.

<sup>60</sup> *Id.* (citing *United States v. Patrick*, 494 F.2d 1150 (D.C. Cir. 1974); *United States v. Glick*, 463 F.2d 491, 494 (2d Cir. 1972); *United States v. Louie Gim Hall*, 245 F.2d 338 (2d Cir. 1957)).

<sup>61</sup> *Glick*, 463 F.2d at 494 (emphasis added); *see also Patrick*, 494 F.2d at 1153-54 (finding error in trial judge's suggestion to the jury that it could recommend psychiatric treatment along with a verdict of guilty); *Louie Gim Hall*, 245 F.2d at 341 (emphasizing that reversal was required because, the court "cannot say that, under these circumstances, no juror holding out for acquittal was led to abandon his position by the judge's assurance that a recommendation for leniency would be acted upon"); *Demetree v. United States*, 207 F.2d 892, 895-96 (5th Cir. 1953) (finding it "unnecessary to cite authorities" to establish error from trial judge's statement to deadlocked jurors that defendant could receive probation or a fine and that he "would be lenient").

<sup>62</sup> *See Shannon v. United States*, 512 U.S. 573, 591 (1994) (Stevens, J., dissenting).

The rule applied in *Rogers* and the cases on which it relied prohibits mention of a *lenient* punishment because, if the jury hears of such a punishment, “one or more jurors entertaining doubts as to [the defendant’s] guilt [may] agree[] to vote for conviction because they had it in their power to soothe their consciences by causing little or no punishment to be imposed.”<sup>63</sup> Such a vote jeopardizes the defendant’s constitutional right to a unanimous determination of guilt beyond a reasonable doubt.<sup>64</sup> If, by contrast, a jury is informed at the defendant’s request of a particularly *severe* punishment, the constitutional concern that a defendant will be convicted upon something less than proof beyond a reasonable doubt evaporates. While the prosecution may claim some injury from the admission of information regarding punishment, this injury has no constitutional dimension and, absent statutory authority (e.g., a Federal Rule of Evidence), cannot be redressed by the courts.<sup>65</sup>

The Supreme Court’s pronouncements in *Shannon* and *Rogers* can thus be construed to establish two discrete principles governing the introduction of punishment evidence: (i) a constitutional principle that a jury should not be informed of a potentially lenient punishment; and (ii) an overlapping evidentiary principle that information sought to be provided to the jury,

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<sup>63</sup> *Louie Gim Hall*, 245 F.2d at 341; *see also* *United States v. McCracken*, 488 F.2d 406, 424 (5th Cir. 1974); *Glick*, 463 F.2d at 494; *Lovely v. United States*, 169 F.2d 386, 391 (4th Cir. 1948).

<sup>64</sup> A defendant has a due process right to a determination of guilt “beyond a reasonable doubt.” *In re Winship*, 397 U.S. 358, 364 (1970). A constitutional and statutory right to a unanimous verdict exists in federal, but not necessarily in state, criminal trials. *See* Jeffrey Bellin, *An Inestimable Safeguard Gives Way to Practicality: Eliminating the Juror Who “Refuses to Deliberate” Under Federal Rule of Criminal Procedure 23(b)(3)*, 36 U. MEMPHIS L. REV. 631, 635 (2006); *see also* U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .”).

<sup>65</sup> *United States v. Datcher*, 830 F. Supp. 411, 417 n.16 (M.D. Tenn. 1993) (“There is no requirement of symmetry in criminal cases. That is, because the prosecution may not bring up possible light punishment is not a reason for barring the defendant from bringing up possible heavy punishment.”), *abrogated by* *United States v. Chesney*, 86 F.3d 564, 574 (6th Cir. 1996); *see also* *United States v. Gaudin*, 515 U.S. 506, 511 (1995); *In re Winship*, 397 U.S. at 364. Courts have recognized that it does not violate any constitutional right to provide the jury with sentencing information. *See, e.g.*, *State v. King*, 973 S.W.2d 586, 591 (Tenn. 1998) (rejecting challenge that trial court’s provision of information regarding penalty in accordance with now-repealed Tennessee statute violated defendant’s constitutional rights). The federal courts are severely restricted in their ability to exclude relevant evidence absent some statutory, rule-based, or constitutional authority to do so. *See* FED. R. EVID. 402 (“All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.”); Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 882 (1988).

including information regarding the consequences of a verdict, must be tested against the normal rules of evidence. While *Rogers* most clearly invokes the first principle, the 7-2 decision in *Shannon* should be understood as a straightforward application of the second. Where, as in *Shannon*, the defense offers punishment evidence solely to influence the jury on an extra-legal, emotional level (e.g., nullification), the evidence is irrelevant<sup>66</sup> and may lead to impermissible jury confusion.<sup>67</sup> Ordinary principles of evidence (not some overarching, judge-fashioned preclusion of punishment information) require its exclusion from the evidence presented at trial.

B. *Short-Lived District Court Rulings That a Defendant Has a Constitutional Right to a Jury Informed of the Applicable Punishment*

Departing from the general rule described in the preceding section, three federal district court judges have concluded that, in certain circumstances, the Constitution mandates a jury informed of the applicable sentence upon conviction. These rulings, and the uniform reaction of the appellate courts to them, demonstrate how resistant the judiciary has become to punishment evidence.

In the 1993 case of *United States v. Datcher*,<sup>68</sup> United States District Court Judge Thomas A. Wiseman, Jr. ruled that a defendant had a constitutional right to inform the jury that he faced a minimum ten-year sentence if convicted of attempting to distribute a controlled substance while carrying a firearm.<sup>69</sup> Judge Wiseman based this ruling on the principle that “community oversight of a criminal prosecution is the primary purpose of a jury trial” and, thus, “to deny a jury information necessary to such oversight is to deny a defendant the full protection to be afforded by [a] jury trial.”<sup>70</sup> Judge Wiseman’s ruling in *Datcher* preceded *Shannon* by one year. Two years later, the Sixth Circuit, citing *Shannon*, rejected Judge Wiseman’s analysis, explaining that “the

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<sup>66</sup> See FED. R. EVID. 402; cf. *United States v. Thomas*, 116 F.3d 606, 616 (2d Cir. 1997) (holding that a district court can remove from the jury a juror who intends to nullify because “trial courts have the duty to forestall or prevent [nullification]”); *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983) (“A jury has no more ‘right’ to find a ‘guilty’ defendant ‘not guilty’ than it has to find a ‘not guilty’ defendant ‘guilty.’”); Poulin, *supra* note 40, at 1402 (“[T]he rules of evidence are employed to control the jury. Rules of relevance, for example, exclude evidence unless it pertains to legally recognized theories. When strictly enforced, these rules become a mechanism for controlling the jury by controlling the flow of information to the jury and eliminating evidence that might lead the jury to nullify.” (footnote omitted)).

<sup>67</sup> See FED. R. EVID. 403.

<sup>68</sup> 830 F. Supp. 411 (M.D. Tenn. 1993), *abrogated by* *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996).

<sup>69</sup> *Id.* at 412.

<sup>70</sup> *Id.* at 415-16.

*Datcher* decision is contrary to Supreme Court pronouncements on this issue.”<sup>71</sup>

Despite this repudiation, two other well-respected district court judges in the Second Circuit followed Judge Wiseman’s path. In *United States v. Pabon-Cruz*,<sup>72</sup> Judge Gerard Lynch ruled that he would inform the jury, prior to its deliberations, of the ten-year mandatory minimum sentence the defendant faced if convicted of advertising child pornography.<sup>73</sup> The prosecution immediately petitioned for review to prevent the ruling from taking effect and the Second Circuit, citing *Shannon*, granted the petition and reversed.<sup>74</sup>

More recently, in the most comprehensive judicial treatment of the subject to date, District Court Judge Jack Weinstein ruled (after forty-four pages of analysis) that a defendant had “a Sixth Amendment right to a jury informed of the five-year minimum” prison sentence that would follow upon conviction.<sup>75</sup> Plumbing the historical record, Judge Weinstein emphasized that “juries of 1791 would have been aware of any harsh sentence imposed mandatorily upon a finding of guilt,” and “would have been expected to deliver a verdict of not guilty or of guilty of a lesser crime had [the jury] believed the punishment excessive for the crime . . . charged.”<sup>76</sup> The Second Circuit reversed without responding to Judge Weinstein’s thorough historical analysis.<sup>77</sup> Instead, the Second Circuit looked back only four short years to its decision in *Pabon-Cruz*, which the appellate court said constituted “controlling circuit law” and

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<sup>71</sup> *Chesney*, 86 F.3d at 574 (rejecting claim that trial court violated defendant’s right to inform the jury of punishment he would receive upon conviction).

<sup>72</sup> 391 F.3d 86 (2d Cir. 2004). Please note that citations for the discussion of this case are to the Second Circuit’s review of Pabon-Cruz’s conviction in *United States v. Pabon-Cruz*, 255 F. Supp. 200 (S.D.N.Y. 2003). This appellate opinion describes the trial court’s rulings and the Second Circuit’s order granting the Government’s petition for a writ of mandamus, both of which are unpublished.

<sup>73</sup> *Pabon-Cruz*, 391 F.3d at 89, 91.

<sup>74</sup> *Id.* at 91. In an opinion reviewing the subsequent conviction, the Second Circuit rejected a challenge to the trial court’s failure to inform the jury of the mandatory sentence. *Id.* at 95. The Court, however, avoided taking on the issue directly. Rather than rule that the trial court had no discretion to allow the jury to hear about punishment, the Second Circuit ruled only that Pabon-Cruz had no constitutional right to such an instruction and thus could not claim error in the trial court’s instructions. *Id.* at 95 & n.11; *United States v. Polizzi*, 549 F. Supp. 2d 308, 438 (E.D.N.Y. 2008) (emphasizing procedural nuance in distinguishing the case), *vacated sub nom.* *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009).

<sup>75</sup> *Polizzi*, 549 F. Supp. 2d at 438. The district court’s extensive opinion in the case includes a colloquy with the jurors, four of whom stated that they would not have voted for conviction had they known of the mandatory five-year minimum sentence that applied. *Id.* at 339-41.

<sup>76</sup> *Id.* at 405.

<sup>77</sup> *Polouizzi*, 564 F.3d at 160-61, *vacating Polizzi*, 549 F. Supp. 2d 308.

held that a defendant had “no Sixth Amendment right to a jury instruction on the applicable mandatory minimum sentence.”<sup>78</sup>

### III. THE PROSPECTS FOR REFORM

The preceding summary paints a bleak picture for those who seek to blunt the effects of harsh sentencing regimes by introducing punishment evidence at trial. It is useful then, at this juncture, to briefly explore the prospect that the status quo will be altered through changes to the statutory or constitutional framework regulating punishment evidence in American trials. To the extent reform along these lines seems likely, there would be little need for a theory of admissibility of punishment evidence under existing law.

#### A. *A New Constitutional Right to Introduce Punishment Evidence*

As the Second and Sixth Circuit recognized in reversing the district court rulings discussed in Part II.B, *supra*, Shannon’s broad pronouncement of the inadmissibility of punishment information implicitly assumes that a defendant has no constitutional right to present punishment evidence to a jury.<sup>79</sup> Nevertheless, a handful of commentators maintain, particularly in light of more recent Sixth Amendment rulings such as *Apprendi v. New Jersey*,<sup>80</sup> that there is a constitutional right to a jury informed of the consequences of conviction.<sup>81</sup>

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<sup>78</sup> *Id.* at 161. Judge Weinstein’s decision came in the context of a defense motion for a new trial. *See id.* at 151-52. As in *Pabon-Cruz*, the Second Circuit relied on the unique procedural posture of the case to avoid confronting the question directly, stating that “it is not necessary to decide whether it would have been within the district court’s discretion to inform the jury of the applicable mandatory minimum sentence.” *Id.* at 162.

<sup>79</sup> *See* United States v. Pabon-Cruz, 391 F.3d 86, 94 (2d Cir. 2004). The rule is, of course, limited to the vast majority of cases where the “jury has no sentencing function.” Shannon v. United States, 512 U.S. 573, 579 (1994).

<sup>80</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *see also* *Cunningham v. California*, 549 U.S. 270 (2007); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002).

<sup>81</sup> *See Polizzi*, 549 F. Supp. 2d at 426 (contending that the *Apprendi* line of “decisions bear on the question of whether juries should be informed of the sentences that would result from guilty verdicts”); Cahill, *supra* note 6, at 146; Cassak & Heumann, *supra* note 1, at 459-60; Carroll, *supra* note 12, at 5-6, 43; *see also* Laura I. Appleman, *The Lost Meaning of the Jury Trial Right*, 84 IND. L.J. 397, 404 (2009) (arguing that the “Court’s sentencing jurisprudence” (i.e., *Apprendi* et al.), in concert with the author’s historical arguments, “further strengthens the call for a strong jury role” in criminal trials); Hoffman, *supra* note 17, at 983 (“[T]here are principles in [the *Apprendi* line of] cases that seem ineluctably to lead to the conclusion that jury sentencing is constitutionally compelled.”); Iontcheva, *supra* note 6, at 333, 338 (“[T]he *Apprendi*-line of cases fail to address the question of why juries should be allowed to determine facts directly bearing on sentencing, but be kept in the dark about the actual consequences of their findings.”); Myers, *supra* note 6, at 155 (“[In the *Apprendi* line of cases] the Supreme Court has been restoring the jury to a central role in American jurisprudence, at least insofar as it is the sole arbiter of all facts necessary to

While forcefully protecting other facets of the jury trial right, the *Apprendi* line of cases, in fact, provide little support for a constitutional right to a jury informed of punishment. First, as a practical matter, the similar makeup of the majorities in *Apprendi* and *Shannon* suggest little tension between the cases. Of the five Justices who formed the *Apprendi* majority, four joined the majority opinion in *Shannon*, including Justice Thomas, *Shannon*'s author.<sup>82</sup> If *Apprendi* and its progeny signal a retreat from the rule set forth in *Shannon*, this signal appears to have been lost on the decision's authors.<sup>83</sup> Second, *Apprendi*'s holding does not conflict with *Shannon*'s broad pronouncement of the general inadmissibility of punishment information. *Apprendi* holds that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury."<sup>84</sup> As this now-famous formulation implies, *Apprendi* champions not the jury itself, but the jury's fact-finding authority. The *Apprendi* case law can most easily be understood as rebuffing legislative encroachment on the jury's exclusive prerogative to find legally dispositive facts. This protection of the jury's fact-finding authority fits neatly into *Shannon*'s pronouncement, discussed in Part II.A, *supra*, that such facts are *all* that a jury must consider. To borrow from another recent Supreme Court opinion, a reading of *Shannon* and *Apprendi* together suggests that the jury's ability to find dispositive legal facts marks out not merely the core of the Sixth Amendment jury trial right (*Apprendi*), but its perimeter as well (*Shannon*).<sup>85</sup>

If *Apprendi* and its progeny lay any groundwork for a future constitutional ruling mandating a sentence-ratifying role for juries, the cases do so only with respect to analytical methodology. To fill out the undefined contours of the jury trial right,<sup>86</sup> *Apprendi* and other recent Sixth Amendment cases<sup>87</sup> look to

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support the verdict in the case.").

<sup>82</sup> *Apprendi*, 530 U.S. at 468. Justice Stevens authored the majority opinion, in which Justices Scalia, Souter, Thomas, and Ginsburg joined. *Id.* Justice Thomas authored the majority opinion in *Shannon*, in which Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter, and Ginsburg joined. *Shannon*, 512 U.S. at 574.

<sup>83</sup> None of the opinions in *Apprendi* reference *Shannon*. *Apprendi*, 530 U.S. 466 (2000).

<sup>84</sup> *Id.* at 490; *see also* *Oregon v. Ice*, 129 S. Ct. 711, 714 (2009); *Cunningham*, 549 U.S. at 274-75.

<sup>85</sup> *See* *Davis v. Washington*, 547 U.S. 813, 824 (2006) (relying on the core-perimeter dichotomy to define Sixth Amendment confrontation right); Kemmitt, *supra* note 16, at 96 ("[T]he *Apprendi* line of cases actually functions to reinforce the jury's role as fact-finder and prevent its possession of more expansive powers.").

<sup>86</sup> "The text of the Constitution provides little guidance as to what a trial by jury entails – save to point out that the jury is responsible for the trial of all '[c]rimes' and 'criminal prosecutions.'" Barkow, *supra* note 5, at 46 (footnotes omitted) (quoting U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI); *see also* *Leipold*, *supra* note 18, at 285.

<sup>87</sup> *E.g.*, *Crawford v. Washington*, 541 U.S. 36, 50-56, 68 (2004).

the common understanding of the right at the time of the nation's founding.<sup>88</sup> While this emphasis on history is not novel,<sup>89</sup> it provides a glimmer of hope to those who seek to expand the jury's role in the modern criminal justice system. This is because, as Judge Weinstein cogently explained in *United States v. Polizzi*, the historical record reveals that, at the time of America's founding, criminal juries would have been aware of harsh sentencing rules and acted to avoid them where they believed justice so required.<sup>90</sup> In fact, in a much earlier battle over the jury's historical prerogatives, Justice Gray, dissenting in *Sparf v. United States*,<sup>91</sup> forcefully argued that the historical evidence mandated that a trial court could not command a jury to follow the courts' instructions on the law.<sup>92</sup> (The subtext in *Sparf* was sentence-based jury nullification: the jury knew Sparf would be sentenced to death if convicted of murder and, unsuccessfully, sought legal authority from the judge to avoid the sentence by convicting of manslaughter).<sup>93</sup>

Justice Gray and Judge Weinstein were, ultimately, unable to persuade their respective colleagues and there is little indication that the current Justices are any more likely than their predecessors (or the Second Circuit) to accept the historical argument for a broader constitutional role for juries. Perhaps the most telling sign of this fact is the most recent application of *Apprendi* in *Oregon v. Ice*.<sup>94</sup> *Ice*, which holds that the Sixth Amendment permits a judge to

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<sup>88</sup> See *Apprendi*, 530 U.S. at 497 (characterizing the New Jersey statute it struck down as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system"); Appleman, *supra* note 81, at 400 ("In the *Apprendi-Blakely* line of cases, the Court relied heavily on the historical role of the criminal jury to support its contention that only a jury may find the facts that increase an offender's punishment above the maximum.").

<sup>89</sup> See *Sparf v. United States*, 156 U.S. 51, 169-70 (1895) (Gray, J., dissenting) (setting forth an exhaustive historical analysis of jury trial right in response to majority's equally comprehensive analysis because "[t]his question, like all questions of constitutional construction, is largely an historical question").

<sup>90</sup> *United States v. Polizzi*, 549 F. Supp. 2d 308, 405 (E.D.N.Y. 2008), *vacated sub nom.* *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009); see also Barkow, *supra* note 5, at 66 ("For some years after the Revolution and America's founding, many judges refused to tell jurors that they were obliged to accept the judge's view of the law. Furthermore, lawyers argued questions of law before the jury in some cases." (footnote omitted)); Brown, *supra* note 19, at 1150; Myers, *supra* note 6, at 155-56.

<sup>91</sup> 156 U.S. 51 (1895).

<sup>92</sup> *Id.* at 169-70 (Gray, J., dissenting).

<sup>93</sup> The *Sparf* trial court instructed the jury that Sparf, who was charged with murder, would be sentenced to death if convicted. *Id.* at 61 n.1. Prior to reaching a verdict, the jurors engaged in various colloquies with the trial court that appear to seek legal authority to convict of the lesser offense of manslaughter. *Id.* The trial court repeatedly informed the jurors that the law, as applied to the facts of the case, could not support such a conviction. *Id.*

<sup>94</sup> 129 S. Ct. 711 (2009).

find facts necessary to impose consecutive sentences,<sup>95</sup> suggests a waning enthusiasm among the Justices to push *Apprendi* beyond its current boundaries.<sup>96</sup> Indeed, the case appears to signal a retreat even from the central premise of *Apprendi*, that legally dispositive facts must be found by a jury, not a judge.<sup>97</sup>

B. *Permitting Punishment Evidence by Statute*

Statutory reform would be the ideal mechanism for employing jurors' notions of community norms to smooth out the rough edges of modern sentencing regimes. Not only could statutory reform be crafted outside of the cramped confines of constitutional interpretation, but it could be modeled after a viable regime currently operating in an American jurisdiction.

North Carolina courts permit defense attorneys to apprise the jury of the applicable criminal punishment in accordance with a statute that commands that "the whole case . . . of law as of fact may be argued to the jury."<sup>98</sup> The

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<sup>95</sup> *Id.* at 714-15.

<sup>96</sup> See *Harris v. United States*, 536 U.S. 545, 558 (2002) (plurality opinion) ("Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments."); Barkow, *supra* note 5, at 38 ("Thus far, however, a majority of the Court has been unwilling to use [the *Apprendi* line of] cases to reinvigorate the jury's – and thus the judiciary's – structural constitutional role."); see also *Spaziano v. Florida*, 468 U.S. 447, 465 (1984) (holding, in a decision preceding *Apprendi*, that the Constitution does not preclude placing the discretion to impose the death penalty with the judge rather than a jury).

<sup>97</sup> See *Ice*, 129 S. Ct. at 720 (Scalia, J., dissenting) ("Oregon's sentencing scheme allows judges rather than juries to find the facts necessary to commit defendants to longer prison sentences, and thus directly contradicts what we held eight years ago and have reaffirmed several times since.").

<sup>98</sup> *State v. Pitter*, No. COA05-1547, 2006 WL 3359658, at \*3 (N.C. Ct. App. Nov. 21, 2006) (unpublished table decision) (quoting N.C. GEN. STAT. § 7A-97 (2005)); see also *State v. McMorris*, 225 S.E.2d 553, 554 (N.C. 1976) ("It is . . . permissible for a criminal defendant in argument to inform the jury of the statutory punishment provided for the crime for which he is being tried."). Other states have similar provisions in their state constitutions, see BUTLER, *supra* note 1, at 68, 194 n.4 (stating that Indiana, Maryland, Georgia, and Oregon have constitutional provisions allowing juries to judge law), but do not interpret them as North Carolina does, see *McCoy v. State*, 645 S.E.2d 728, 731 (Ga. Ct. App. 2007) (explaining that a juror who stated that he would vote to acquit if he believed the "defendant was going to receive an excessive sentence," and who was then "informed that he would not be told the punishment for the crimes alleged at trial" and responded, "[i]n a matter this serious I probably would be interested to find out what the penalties were," was properly dismissed for cause); *Inman v. State*, 393 N.E.2d 767, 769-70 (Ind. 1979) (prohibiting informing jury of punishment); *Thomas v. State*, 349 A.2d 384, 388-89 (Md. Ct. Spec. App. 1975) (forbidding defense from arguing about sentence); cf. *State v. Hoffman*, 677 P.2d 72, 73 (Or. Ct. App. 1984) (rejecting suggestion that state constitutional provision permitted counsel to argue for nullification).

courts explain that this practice “serves the salutary purpose of impressing upon the jury the gravity of its duty” and permits the “defendant to urge upon the jury the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to decide it only after due and careful consideration.”<sup>99</sup> Until its repeal in 1998,<sup>100</sup> Tennessee had a similar statutory provision that required that the jury, upon request of the defendant, be informed in a fairly comprehensive manner of the likely punishment upon conviction.<sup>101</sup> If statutes such as these were enacted more broadly, there would be no need to seek alternate means of placing such information before the jury. As the recent demise of Tennessee’s statute indicates, however, there is little momentum for reforms of this sort.<sup>102</sup>

The critical obstacle may simply be a political one. Criticism of harsh sentencing laws is not new.<sup>103</sup> Nevertheless, legislators, who predictably resist calls for change that can be characterized as “soft” on crime, have proven disinclined to blunt sentencing regimes that, in some cases, were recently enacted to great political acclaim.<sup>104</sup> Legislators, it seems, see no problem in

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<sup>99</sup> *McMorris*, 225 S.E.2d at 554. The North Carolina courts caution that the state’s rule “does not mean that a defendant should be permitted to argue that because of the severity of the statutory punishment the jury ought to acquit; to question the wisdom or appropriateness of the punishment; or to state the punishment provisions incorrectly.” *Id.* at 555. Counsel is also not permitted “to speculate upon the outcome of possible appeals, paroles, executive commutations or pardons.” *Id.*

<sup>100</sup> TENN. CODE ANN. § 40-35-201 (2006) (prohibiting informing the jury of punishment under the current statute).

<sup>101</sup> *See State v. King*, 973 S.W.2d 586, 587 & n.1 (Tenn. 1998) (describing statutory provision requiring instruction on sentencing when requested and its deletion by amendment in 1998).

<sup>102</sup> There does not appear to be any other American jurisdiction that permits, by law, the defense counsel to present punishment information to a non-sentencing jury. There is a decision in the military courts that leaves the door open for such a practice, in the trial court’s discretion, but “only where . . . it is shown as necessary to assure that members carry out their duties properly,” a circumstance that “should be rare.” *United States v. Smith*, 24 M.J. 859, 863 & n.2 (A.C.M.R. 1987). The federal courts have recognized a minor exception, apparently based on estoppel principles, where one party improperly injects the issue of punishment into trial and, in doing so, misstates the actual punishment. *Shannon v. United States*, 512 U.S. 573, 587 (1994) (recognizing that “[i]f . . . a witness or prosecutor” misstates the applicable punishment in the presence of the jury, “it may be necessary for the district court to intervene with an instruction to counter such a misstatement”); *see also United States v. Diekhoff*, 535 F.3d 611, 621 (7th Cir. 2008) (describing this process as “[r]ighting the course for a misled jury”). The line of case law rejected (for federal courts) in *Shannon* holds that a jury “should be instructed about consequences of a ‘not guilty by reason of insanity’ verdict because such consequences are not commonly known.” *State v. Blair*, 732 A.2d 448, 451 (N.H. 1999).

<sup>103</sup> *Cf. Tony*, *supra* note 26, at 67 (“Objections to mandatory penalties are well documented and of long standing.”).

<sup>104</sup> *See* MARK A. R. KLEIMAN, WHEN BRUTE FORCE FAILS: HOW TO HAVE LESS CRIME

need of solving.<sup>105</sup> In light of this political reality, North Carolina will likely continue to be an exception in American jurisdictions, rather than the rule.<sup>106</sup>

#### IV. THE SURPRISING RELEVANCE OF PUNISHMENT

The preceding sections fill out the existing legal landscape regarding the prospects for influencing jury verdicts through punishment evidence. To the

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AND LESS PUNISHMENT 117 (2009) (“[An] epic political defeat [has been] suffered over the past generation by the advocates of ‘soft’ rather than ‘tough’ approaches to crime control . . . .”); Barkow, *supra* note 5, at 103-05 (“[I]t should go without saying that the political process fails to provide a check given politicians’ perceptions that voters demand a tough stance on crime. . . . The political process writ large, then, seems unlikely to stop inflated statutory maxima and the growing importance of sentencing guidelines and mandatory minimums.” (footnotes omitted)).

Those who seek to influence policymakers in this area might take a lesson from the Supreme Court’s jurisprudence in a different context – jury selection – and focus on the rights of jurors rather than criminal defendants. *See Powers v. Ohio*, 499 U.S. 400, 409, 415 (1991) (explaining that a race-based peremptory challenge violates the right of “[a]n individual juror . . . not to be excluded . . . on account of race” and concluding that “a defendant in a criminal case can raise the third-party equal protection claims of jurors excluded by the prosecution because of their race”); Peter J. Henning, *Prosecutorial Misconduct and Constitutional Remedies*, 77 WASH. U. L.Q. 713, 784 (1999) (“*Powers* broadened the scope of the equal protection right by shifting the focus from harm to the defendant to harm to potential jurors removed from the jury for an impermissible reason.”); *cf.* AM. BAR ASS’N, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 59 (1999), available at <http://www.abanet.org/media/perception/perceptions.pdf> (reporting survey results: 69% of respondents agree or strongly agree that “[j]uries are the most important part of our judicial system”; 78% of respondents agree or strongly agree that “[t]he jury system is the most fair way to determine the guilt or innocence of a person accused of a crime”); Appleman, *supra* note 81, at 398-99 (arguing that the jury trial was historically understood as a collective right of the people and has been erroneously construed in modern jurisprudence as the right of the accused).

<sup>105</sup> *See* Tonry, *supra* note 26, at 101 (explaining that “for many legislators, their primary purpose has been achieved when their vote is cast” and “[t]hey have been seen to be tough on crime” and consequently, “[i]nstrumental arguments about effectiveness or normative arguments about injustice to offenders fall on deaf ears”).

<sup>106</sup> Legislatures do occasionally temper harsh sentencing regimes, although these changes tend to fall short of the sweeping changes sought by critics and are often counteracted by reforms in the opposite direction. *See* Luna & Cassell, *supra* note 17, at 17-18 (emphasizing persistence of federal mandatory minimum sentencing laws despite “growing opposition”); Tonry, *supra* note 26, at 69-70 (commenting that recent changes to sentencing provisions, including narrowing of the crack/powder cocaine sentencing disparity and amendments to New York’s Rockefeller drug laws, “only nibble at the edges” as “[n]o major laws have been repealed, no major laws have been enacted retroactively to shorten the sentences of the hundreds of thousands of prisoners serving time under mandatory minimum laws, and most new laws narrowing their scope have been restrictively drafted to cover only minor offenses and offenders”).

extent change is desirable, it is unlikely to come from either legislatures or courts. The only remaining option, even if a somewhat unsatisfactory one, is to revisit the possibility of placing punishment evidence before the jury under existing law.

Optimism for this endeavor can be found in the fact that, once exhumed,<sup>107</sup> the principles relied on by the courts to exclude punishment evidence should not rule out its admissibility altogether. Although largely unexamined, the controlling inquiry with respect to punishment evidence appears to be framed by the ordinary rules of evidence, and particularly relevance. If punishment evidence is relevant, it will be admissible unless some other rule of evidence calls for exclusion.<sup>108</sup> This general framework – applicable to all trial evidence – is hardly surprising. What may come as a shock, however, is how easily some punishment evidence appears to meet this evidentiary benchmark.

A. *A Broad Avenue of Admissibility: Anti-Motive Evidence*

Courts and commentators have thus far assumed that application of ordinary principles of evidence preclude admission of punishment evidence.<sup>109</sup> This section argues the contrary, highlighting a non-nullification, anti-motive theory of relevance that could render particularly severe punishments admissible at trial.

At its core, the anti-motive theory relies on an analogy to the courts' uncontroversial treatment of evidence of motive tendered by the prosecution. Evidence of a defendant's motive to commit a crime is clearly relevant at trial.<sup>110</sup> Such evidence (e.g., testimony in a murder case that the accused is the beneficiary of the decedent's life insurance or a rival gang member) is relevant to support an inference that the defendant, acting on this motive, committed the charged crime.<sup>111</sup> In introducing the evidence, the prosecutor conjures up the defendant's hypothetical, *ex ante* mental calculus ("if I kill the victim, I will obtain the life insurance proceeds"), and expects that the jury will find it more likely that the defendant ultimately decided to commit the crime than if the motive did not exist.<sup>112</sup>

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<sup>107</sup> See *supra* Part II.A.

<sup>108</sup> FED. R. EVID. 402.

<sup>109</sup> See *supra* notes 16-18.

<sup>110</sup> See *Schmidt v. United States*, 133 F. 257, 263 (9th Cir. 1904) ("While the prosecution is never required to prove a motive for the crime, it is always permitted to do so.").

<sup>111</sup> See, e.g., *Spencer v. State*, 203 S.E.2d 856, 858 (Ga. 1974) (holding that evidence of decedent's life insurance policy naming defendant was relevant in murder prosecution); see also *Windham v. Merkle*, 163 F.3d 1092, 1103-04 (9th Cir. 1998) (discussing relevance of rival gang memberships in murder prosecution); EDWARD IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 3:17, at 3-114 to -117 (2008).

<sup>112</sup> See FED. R. EVID. 401 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); George F. James,

Motive represents one aspect of an offender's mental calculus – the perceived benefits of the crime. Another aspect of this calculus is the potential costs of a crime. Just as a person who is contemplating committing an offense will perceive the benefits likely to accrue from the criminal act (i.e., motive), he will also perceive the likely costs (i.e., anti-motive). Indeed, the *ex ante* calculus referenced above presupposes some weighing of the perceived costs against the perceived benefits. In the language of law and economics, “[a] person commits a crime because the expected benefits exceed the expected costs,” and one of the “costs” is, of course, “the expected costs of criminal punishment.”<sup>113</sup> Thus, if we accept that the defendant's motive (i.e., the benefits of the crime) is relevant prosecution evidence, any perceived costs of the crime, such as potential punishment, must be relevant defense evidence.

Take the case of a defendant with two convictions for aggravated assault, and thus, two “strikes” under California's Three Strikes Law, who is on trial for felony theft. An offender without any prior “strikes” would, upon conviction for felony theft, be sentenced to either probation or up to one year in prison.<sup>114</sup> A third strike offender, however, will be sentenced to life imprisonment.<sup>115</sup> All other things being equal,<sup>116</sup> the prospect of the severe

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*Relevancy, Probability and the Law*, 29 CALIF. L. REV. 689, 699 (1941) (stating that evidence of a murder suspect's motive becomes relevant when it “place[s] [the suspect] in a class of persons in which the incidence of murder is greater than among the general public”).

<sup>113</sup> RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 7.2, at 219 (7th ed. 2007). This argument does not depend on an acceptance of “the obviously false assumption that criminal behavior is *always* the result of expected utility maximization.” KLEIMAN, *supra* note 104, at 81 (emphasis added). The only assumption necessary for the relevance analysis posited here is that “crimes, like other actions, are determined in part by their anticipated consequences.” *Id.* (“Other things being equal, we should expect the probability that someone will commit a crime is lower where the likely consequences are worse, compared to the alternative noncriminal pattern of actions. Thus, the threat of harsher, swifter, or more certain punishment will, in some instances, tip the balance away from crime.”). It should also be noted that the possibility of detection plays a large role in any deterrence calculation, *id.* at 50, but so long as the possibility is not zero, punishment remains relevant.

<sup>114</sup> CAL. PENAL CODE § 489 (West 2010).

<sup>115</sup> *Id.* § 667(e)(2)(A). In theory, the offender could be sentenced less harshly if the prosecutor fails to charge the prior strikes or the trial court exercises its authority to dismiss one of the defendant's prior strikes. See *People v. Superior Court (Romero)*, 917 P.2d 628, 648 (Cal. 1996). In addition, the offender may assume he will not be caught or convicted. All of these possibilities decrease, somewhat, the strength of the deterrent effect, but ultimately go to the weight of the evidence, not its admissibility. Similarly, the fact that a life insurance company might balk at paying out on a decedent's life insurance policy or go bankrupt, does not make the existence of the policy irrelevant as motive evidence.

<sup>116</sup> One might object that, at least in the recidivism context, the defendant's recidivism-based eligibility for a higher penalty increases through a propensity analysis (rather than decreases through an anti-motive analysis) the likelihood that he committed the charged crime. Propensity reasoning, however, is generally prohibited in American jurisdictions.

punishment faced by a second strike offender has a rational tendency to decrease the likelihood that he committed such a theft. The Three Strikes Law is, in other words, relevant to a determination of the defendant's guilt.<sup>117</sup>

The *Polizzi* case, discussed in Part II.B, *supra*, provides another example. Peter Polizzi, a successful restaurant owner, husband and father, was charged with downloading child-pornographic images that FBI agents found on a computer in the family's garage.<sup>118</sup> The existence of a five-year mandatory prison term for downloading such images (and Polizzi's knowledge of that sentence) would certainly be relevant to a claim that either it was not Polizzi who downloaded the images (as opposed to Polizzi's sixteen-year-old son or one of the son's friends), or that Polizzi downloaded the pictures accidentally, or as a result of a computer virus, or because he believed the images to depict adults rather than children.<sup>119</sup>

Abstracted only slightly, the anti-motive theory of relevance finds support in the case law. American courts have readily accepted analogous arguments that the prospect of a significant criminal sanction for certain conduct is relevant to suggest that a person has not engaged in that conduct. In fact, this theory of relevance appears in virtually every case in which the prosecution relies on a "cooperating witness" with a pending criminal charge. In cross-examining a prosecution witness who testifies to obtain leniency in another case, the defense routinely implies that the witness is lying to curry favor with the prosecution. The prosecution, then, attempts to rebut any suggestion of perjury by eliciting that a cooperation agreement signed by the witness states that false testimony will result in a perjury prosecution and the denial of the benefits of the witness's cooperation or plea agreement.<sup>120</sup> In a long-approved line of

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See FED. R. EVID. 404; *Michelson v. United States*, 335 U.S. 469, 475-76 (1948).

<sup>117</sup> See Vaughn C. Ball, *The Myth of Conditional Relevancy*, 14 GA. L. REV. 435, 446 (1980) ("To decide whether the evidence is relevant . . . the judge must in effect estimate how probable each of the different versions of [a disputed] event is without the offered evidence and how probable with the evidence. . . . If these probabilities are different, the evidence is relevant.").

<sup>118</sup> *United States v. Polizzi*, 549 F. Supp. 2d 308, 323, 327-29 (E.D.N.Y. 2008), *vacated sub nom. United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009).

<sup>119</sup> In fact, Polizzi admitted at the time of the arrest that he downloaded the images knowing they constituted child pornography. *Polizzi*, 549 F. Supp. 2d at 328-30. His claim at trial was temporary insanity – that he did so in response to a pop-up internet solicitation that triggered an irrational reaction based on his obsessive-compulsive disorder and severe sexual abuse he suffered as a child. *Id.* Despite the hurdles presented by this unorthodox defense, Polizzi could still plausibly claim that the stiff mandatory prison sentence for downloading child pornography supported his claim that, if sane, he would not have downloaded the images.

<sup>120</sup> See *United States v. Cosentino*, 844 F.2d 30, 33 & n.1 (2d Cir. 1988) (explaining that while "the prosecutor may inquire into impeaching aspects of cooperation agreements on direct, bolstering aspects such as promises to testify truthfully or penalties for failure to do so may only be developed to rehabilitate the witness after a defense attack on credibility"

argument, the prosecution, thus, explicitly contends that the known prospect of a criminal sanction supports an inference that the cooperating witness is less likely to have committed an alleged crime (perjury).

Similarly, the prosecutor can argue on a motive theory that, to avoid severe punishment for an initial crime, a defendant killed a witness to that crime. For example, in *United States v. Menzer*,<sup>121</sup> the prosecution introduced evidence that the defendant was on probation for sexually abusing a child to demonstrate his alleged motive for setting fire to his home – so that his wife and children (two of whom died in the fire) would not report subsequent sex crimes he committed and thus trigger revocation of probation.<sup>122</sup> Again, in *United States v. Siegel*,<sup>123</sup> a defendant, under indictment for fraud, was prosecuted for killing a witness to the defendant's fraudulent schemes.<sup>124</sup> The Fourth Circuit upheld the admission of evidence detailing the depth of the fraud on the theory that it was relevant to show the defendant “would likely face a lengthy prison term and substantial restitution obligations if she were caught.”<sup>125</sup> Similarly, in *Hernandez v. Cepeda*,<sup>126</sup> the prosecution introduced a suspect's pending criminal charges, “for the purpose of demonstrating [his] motive to resist arrest.”<sup>127</sup> In each of these cases, and many others,<sup>128</sup> the court-approved theory of relevance neatly parallels the anti-motive theory, presuming that a defendant's behavior was influenced by the prospect of a severe criminal punishment.

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and noting that other circuits allow cooperation agreements to be used to bolster cooperating witnesses without imposing these formal requirements); *United States v. Townsend*, 796 F.2d 158, 163 (6th Cir. 1986) (recognizing common practice of “elicitation during direct examination of a plea agreement containing a promise to testify truthfully” and remarking that “[w]hile the existence of a plea agreement may support the witness' credibility by showing his or her interest in testifying truthfully, the plea agreement may also impeach the witness' credibility by showing his or her interest in testifying as the government wishes”); *United States v. Oxman*, 740 F.2d 1298, 1302-03 (3d Cir. 1984) (rejecting challenge to government's introduction of cooperation agreement at trial and recognizing that “reference to the condition requiring truthful testimony would be proper rehabilitation”), *vacated sub nom.* *United States v. Pflaumer*, 473 U.S. 922 (1985) (ordering reconsideration of jury instruction and government's failure to disclose certain impeaching evidence).

<sup>121</sup> 29 F.3d 1223 (7th Cir. 1994).

<sup>122</sup> *Id.* at 1233-34.

<sup>123</sup> 536 F.3d 306 (4th Cir. 2008).

<sup>124</sup> *Id.* at 308.

<sup>125</sup> *Id.* at 317-18.

<sup>126</sup> 860 F.2d 260 (7th Cir. 1988).

<sup>127</sup> *Id.* at 265.

<sup>128</sup> See IMWINKELRIED, *supra* note 111, at 3-119.

B. *The Requirement of Subjective Awareness and the Puzzle of Conditional Relevance*

The chain of reasoning required to support the anti-motive relevance argument sketched in the preceding section proceeds as follows: (a) the punishment for the charged crime is severe; (b) the defendant was aware of the punishment; and (c) because people are less likely to commit crimes when the known consequences of doing so include severe punishment, the defendant is less likely to have committed the charged crime. As this formula reveals, the anti-motive theory of relevance depends on an intermediate fact that connects the severe punishment for the crime to the defendant's pre-crime calculus – the defendant's *ex ante* awareness of the punishment.

It is tempting, then, to analyze the relevance of punishment evidence not under the Federal Rules of Evidence's fairly unstructured and permissive relevance test (Rule 401), but rather as one of "conditional relevance" under Rule 104(b). In the parlance of Rule 104(b), the relevance of a severe punishment under the anti-motive theory is "subject to the introduction of evidence sufficient to support a finding" that the defendant knew of the punishment at the time of the crime.<sup>129</sup> While this evidentiary hurdle is fairly minimal, it could provide significant tactical difficulty for some defendants.<sup>130</sup>

Conditional relevance objections are not, however, routinely raised in the trenches of trial practice. Most practitioners voice objections in this context in terms of straight relevance under Rule 401.<sup>131</sup> In fact, conditional relevance is one area where academics and practitioners are in accord. Mirroring the relative infrequent appearance of the doctrine in trial practice, most academics argue that there is no discrete concept of "conditional" relevance.<sup>132</sup> The

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<sup>129</sup> FED. R. EVID. 104(b).

<sup>130</sup> See *infra* Part IV.C (discussing tactical concerns regarding admission of subjective evidence of punishment). For a discussion of ethical implications, see *infra* note 158.

<sup>131</sup> See GEORGE FISHER, EVIDENCE 37 (2d ed. 2008) (commenting that the theoretical failings of conditional relevance doctrine "seem[] to prompt little concern or confusion" in practice because "lawyers simply do not make many conditional relevance objections"); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 1.13, at 49 (4th ed. 2009) ("Outside the area of authentication, few cases actually consider conditional relevancy issues."). *But cf.* *Cox v. State*, 696 N.E.2d 853, 861 (Ind. 1998) (stating that a question of admissibility litigated at trial and on appeal centered around Rule 104(b), and chiding the advocates for not citing the rule).

<sup>132</sup> See, e.g., MUELLER & KIRKPATRICK, *supra* note 131, at 47 ("[T]he notion of conditional relevancy is deeply problematic."); Ball, *supra* note 117, at 437-38 (explaining that the concept of conditional relevance is inconsistent with the Federal Rules' definition of relevance as a matter of probability); Ronald J. Allen, *The Myth of Conditional Relevancy*, 25 LOY. L.A. L. REV. 871, 871-72 (1992) (echoing and supplementing Ball's criticisms); Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1244, 1248 (criticizing the doctrine of conditional relevance on several grounds, including that it is indistinct from general relevance); Dale A. Nance, *Conditional Relevance Reinterpreted*, 70 B.U. L. REV. 447, 506 (1990) (recognizing

consensus view is that all questions of relevance, whether labeled “conditional” or not, should be analyzed under the general relevance test of Rule 401.<sup>133</sup> Under Rule 401, “[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>134</sup>

If courts analyze anti-motive evidence under Rule 401’s permissive definition of relevance, defendants will often be able to establish that the existence of a severe punishment is relevant even without foundational evidence that the defendant, in fact, knew of the punishment. The defense will first proffer the sentencing statute as relevant to the defendant’s pre-crime, cost-benefit calculus. At that point, judges should apply the same “rough and ready” form of experiential, logical induction that applies to all questions of relevance – determining whether the proffered evidence, in fact, increases the probability of some material fact.<sup>135</sup> This question, whether deemed conditional relevance or just relevance, requires the same determination: “whether or not the fact finder, as part of common knowledge and experience, might possess a generalization of human behavior that connects the evidentiary proffer to a material proposition.”<sup>136</sup>

Some punishments have so saturated popular culture that juries will readily assume that a defendant would have been aware of them. For example, a juror could easily conclude that anyone previously convicted of two “strikes” knows that a third “strike” means “you’re out,” (i.e., a life prison term). In other cases, for example a mandatory minimum sentence for drug trafficking, the inferential leap from a proscribed punishment to the defendant’s awareness of that punishment will be less clear, but still, arguably, sufficient for the evidence to go to the jury. Interestingly, the prosecution case may aid the defendant’s effort to establish an awareness of a potential punishment to the extent it suggests that the defendant is someone who would have a particular interest in the punishment for certain offenses (e.g., a drug dealer, gun

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validity of criticisms of conditional relevance and suggesting an alternative “best evidence principle” to replace the doctrine).

<sup>133</sup> See FISHER, *supra* note 131, at 34-36 (“Most experts agree . . . that there is no separate problem of conditional relevance.”); Allen, *supra* note 132, at 884; Ball, *supra* note 117, at 467-69 (arguing that Rule 104(b)’s conditional relevance requirement is an unwarranted “obstacle course for judge and jury alike” that is “confusing,” “founded on an incorrect analysis,” and should be “dismantled at the earliest opportunity”).

<sup>134</sup> FED. R. EVID. 401.

<sup>135</sup> Ball, *supra* note 117, at 461-62.

<sup>136</sup> Allen, *supra* note 132, at 878-79; see also *United States v. Beechum*, 582 F.2d 898, 913 (5th Cir. 1978) (en banc) (stating that a trial court can exclude evidence due to the absence of proof of a conditional fact, “only where the jury could not reasonably find the preliminary fact to exist” (quoting 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE § 5054, at 269 (1977))).

possessor, or purveyor of internet pornography). As the Supreme Court has explained, the trial court “must consider all evidence presented to the jury” in making the conditional relevance determination.<sup>137</sup>

Again, an analogy to traditional motive evidence is instructive. A prosecutor in a murder trial seeking to introduce testimony that the defendant is the beneficiary of the decedent’s life insurance policy or a rival gang member will generally not be required to introduce separate evidence that the defendant knew about these incentives. It is sufficient, for relevance purposes, that the incentive existed.<sup>138</sup> It is for the jury to determine whether to draw the inference that the incentive was known to the defendant and, if the jury concludes that it was not, to discount the motive evidence accordingly.<sup>139</sup>

There are, admittedly, limits on how far the defendant can take this argument in the context of punishment evidence. If a defendant relies on an inference of knowledge applicable to all persons, he will be unable to argue that punishment evidence is relevant where it is: (i) undisputed that a crime was committed, and (ii) all persons would be equally deterred by a generally applicable punishment (e.g., life imprisonment for attempted murder). In such circumstances, without at least evidence of subjective awareness, the punishment evidence cannot distinguish the defendant from others who may have committed the crime and is, consequently, irrelevant.<sup>140</sup>

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<sup>137</sup> *Huddleston v. United States*, 485 U.S. 681, 690-91 (1988).

<sup>138</sup> *See, e.g., Spencer v. State*, 203 S.E.2d 856, 858 (Ga. 1974) (permitting evidence of two insurance policies even though defendant admitted knowledge of the smaller policy alone and only circumstantial evidence of his knowledge of the larger policy existed).

<sup>139</sup> For a case in which an appellate court required prosecution evidence of the defendant’s knowledge of a particularly convoluted motive, see *Cox v. State*, 696 N.E.2d 853, 860-62 (Ind. 1998) (ruling on admissibility of evidence supporting prosecution theory that the defendant shot into the home of the victim because, four days earlier, the defendant’s friend was denied bond based, in part, on the addition of charges, to a pending charge, of molesting the victim’s daughter). Supporting the larger point made in the text, however, the Indiana Supreme Court emphasized the minimal relevance standard in affirming the district court’s admission of the motive evidence. *Id.* at 861 (“[T]he preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist.” (quoting *Beechum*, 582 F.2d at 913)).

<sup>140</sup> *See* FED. R. EVID. 401; Ball, *supra* note 117, at 446 (explaining that evidence is only relevant if it changes the probability of a material fact); James, *supra* note 112, at 699 (asserting that evidence of a murder suspect’s motive becomes relevant when it “place[s] [the suspect] in a class of persons in which the incidence of murder is greater than among the general public”).

There is a counter-argument to this concession. Defense counsel could argue that their clients’ circumstances lend themselves to an inference that a particular punishment would cause greater than average deterrence. *Cf.* Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1569 (2009) (positing that because “the currency of punishment is largely experiential and the boundaries of punishment are comparative,”

In many cases, however, these conditions will be absent. The defendant may dispute the prosecution's contention that a crime was committed, or contend that an otherwise criminal act was perpetrated without the requisite mens rea (i.e., unintentionally or in self-defense). In these circumstances, the existence of a severe punishment for the commission of a crime becomes relevant because it decreases the probability that the defendant (or anyone) intentionally committed the offense. The defendant may also be unusually susceptible to a severe punishment (e.g., through a recidivism enhancement or parole status),<sup>141</sup> placing him within a narrow class of people who would be most strongly deterred from committing the crime. This circumstance, even without further evidence of subjective knowledge, makes it less likely that the defendant, as opposed to someone not facing the same severe punishment, is the perpetrator.<sup>142</sup>

In sum, a defendant invoking an anti-motive theory should often be able to introduce evidence of a severe punishment that will follow upon conviction, even if he fails to produce additional evidence of ex ante awareness of that punishment. Such punishment evidence is relevant, in and of itself, so long as the defendant can plausibly argue that – all other things being equal – it decreases the probability that he committed the charged offense.<sup>143</sup>

### C. *Tactical Issues Regarding Evidence of Subjective Awareness*

Although the defendant may, as the preceding section suggests, be able to introduce punishment evidence under an anti-motive theory even without producing evidence of subjective awareness, the relevance argument will always be strengthened by such evidence. The production of evidence of

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policymakers must “consider offenders’ baseline experiential conditions as well as their experiential conditions in prison” in setting appropriate punishments).

<sup>141</sup> See *infra* note 159, for discussion of the tactical issues raised by the presentation of punishment information that may imply (or open the door to rebuttal evidence regarding) the existence of the defendant’s criminal record.

<sup>142</sup> See Nance, *supra* note 132, at 450 (evaluating hypothetical where evidence of a spoken statement is offered to establish notice to X and there is no evidence that X heard the statement: “even if, from all the evidence presented, there is only a small probability that X heard the spoken statement, it is still some evidence of notice that, together with the other evidence, may warrant a finding of notice”).

<sup>143</sup> See *Beechum*, 582 F.2d at 913 (“Evidence is relevant once it appears ‘to alter the probabilities of a consequential fact.’” (quoting JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN’S EVIDENCE* ¶ 401[06], at 401-18 (1976))); Allen, *supra* note 132, at 884 (summarizing the sole criteria for relevance, conditional or otherwise as: “[i]f there is any probability that a reasonable person could be rationally influenced by evidence, the evidence is relevant and should be admitted”). For a parallel argument in a distinct context, see Gregg D. Polsky & Dan Markel, *Taxing Punitive Damages*, 96 VA. L. REV. 1295 (2010) (arguing that, despite courts’ apparent reluctance to admit such information, evidence regarding tax consequences of punitive damage awards should be admitted in civil jury trials).

subjective awareness, however, will often raise substantial tactical issues for the defense.

The most direct manner of introducing evidence of the defendant's pre-crime, subjective awareness is through the defendant's own trial testimony. The defendant can simply testify that at the time the crime is alleged to have occurred, he was aware – even if only vaguely so – of the severe punishment awaiting him were he to commit such an offense. This testimony solves the “conditional relevance” problem and clearly permits introduction of the punishment evidence over a relevance objection. (The actual sentencing statute would also be admissible, at that point, as corroboration of the defendant's testimony.)<sup>144</sup> In cases where the defendant intends to testify, then, there is no legal or tactical bar to the admission of anti-motive, punishment evidence.<sup>145</sup>

In approximately half of all criminal cases, however, defendants do not testify.<sup>146</sup> Strong tactical reasons support a decision to remain silent at trial. When the defendant takes the witness stand, the prosecution can vigorously cross-examine him and introduce, for impeachment, the defendant's criminal record.<sup>147</sup> In cases where these (and other) disadvantages outweigh the benefits of testifying, it may be tactically disadvantageous for a defendant to

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<sup>144</sup> Cf. *United States v. James*, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (concluding that evidence of victim's violent acts was relevant to corroborate testimony of defendant that victim boasted of the acts).

<sup>145</sup> Cf. *People v. O'Shell*, 92 Cal. Rptr. 3d 57, 65 (Cal. Ct. App. 2009) (recognizing that, in a proceeding to determine whether a sex offender was likely to reoffend upon release, offender's “testimony as to the consequences of reoffense under the Three Strikes law was not properly excluded as irrelevant”). There is still a potential factual bar. If the defendant was not, in fact, aware of the punishment, then he cannot testify to the contrary without committing perjury. Grey areas may abound, however; the defendant will be well aware of the applicable punishment at the time of trial and may have difficulty recalling the state of his awareness prior to the crime.

<sup>146</sup> See John H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted*, 5 J. EMPIRICAL LEGAL STUD. 477, 489 & n.47 (2008) (observing that “available evidence indicates that approximately one half of all criminal defendants testify at their trials” and citing supporting studies); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 329-30 (1991) (describing study of trials in Philadelphia in the 1980s revealing that 49% of felony defendants and 57% of misdemeanor defendants chose not to testify); Gordon Van Kessel, *Quieting the Guilty and Acquitting the Innocent: A Close Look at a New Twist on the Right to Silence*, 35 IND. L. REV. 925, 950-51 (2002) (summarizing studies dating back to 1920s and concluding that “with increasing frequency defendants are not taking the stand at trial as they once did” and “the extent of refusals to testify varies from one-third to well over one-half [of defendants] in some jurisdictions”).

<sup>147</sup> See FED. R. EVID. 609; *United States v. Wade*, 388 U.S. 218, 231 (1967); Jeffrey Bellin, *Improving the Reliability of Criminal Trials Through Legal Rules that Encourage Defendants to Testify*, 76 U. CIN. L. REV. 851, 863-80 (2008) (summarizing legal advantages of declining to testify).

testify simply to voice a subjective, *ex ante* awareness of the applicable punishment.

Nevertheless, the standard that the defense must meet to satisfy even the Rule 104(b) “conditional relevance” hurdle is not exacting. In determining whether a party has introduced sufficient evidence under Rule 104(b), “the trial court neither weighs credibility nor makes a finding that the [party] has proved the conditional fact” (i.e., the defendant’s knowledge).<sup>148</sup> Instead, “[t]he court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence.”<sup>149</sup>

There are a number of sources, apart from the defendant’s own testimony, from which defense counsel could cobble together sufficient evidence to allow the jury to “reasonably find” that the defendant possessed some awareness of the punishment at issue.<sup>150</sup> Often the record of a prior proceeding will include an admonition regarding future consequences of criminal conduct.<sup>151</sup> Similarly, a probation officer or prior defense attorney could be called to the witness stand to testify as to warnings given to the defendant regarding the consequences of re-offense. Family members or friends could testify that a defendant spoke about those potential consequences.<sup>152</sup> Evidence of media campaigns launched to educate the public about particularly severe punishments may be pertinent.<sup>153</sup> The defense may also be able to provide evidence that an acquaintance of the defendant or a famous person suffered imposition of the punishment at issue. For example, sports fans who followed the recent case of NFL star Plaxico Burress are now aware that possession of a loaded firearm in New York is punishable by a mandatory three-and-a-half-year prison term.<sup>154</sup> Where the punishment statute was enacted by popular

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<sup>148</sup> *Huddleston v. United States*, 485 U.S. 681, 690 (1988).

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 691.

<sup>151</sup> For example, when an offender is convicted of a first or second strike in California, particularly if the conviction results from a guilty plea, the judge or prosecutor often states on the record that the offense is a “strike” for future sentencing purposes. *See, e.g., People v. Solorio*, No. H028553, 2005 WL 3387618, at \*1 (Cal. Ct. App. Dec. 9, 2005) (unpublished decision).

<sup>152</sup> The evidence would not be hearsay if admitted not to establish the truth of the defendant’s statements, but rather his awareness of the fact. *See* FED. R. EVID. 801(c). The sentencing provision itself could then be introduced to corroborate the witness’s testimony. *Cf. United States v. James*, 169 F.3d 1210, 1214-15 (9th Cir. 1999) (concluding that evidence of victim’s violent acts was relevant to corroborate testimony of defendant that victim boasted of the acts).

<sup>153</sup> *See, e.g., Heumann & Cassak, supra* note 12, at 346-47 (recounting Michigan’s campaign to publicize mandatory sentences for gun crimes complete with a catchy slogan: “One With Gun Gets You Two”).

<sup>154</sup> In New York, it is a Class C felony to possess a loaded firearm outside the home. N.Y. PENAL LAW § 265.03 (McKinney 2008). A defendant convicted of this offense must

vote (e.g., California's Three Strikes Law), the defense could produce evidence that the defendant voted in an election authorizing the punishment.<sup>155</sup>

Finally, the defense could invoke the legal maxim that "[a]ll citizens are presumptively charged with knowledge of the law."<sup>156</sup> Although it is a legal fiction, courts regularly apply the maxim in criminal cases<sup>157</sup> and it is difficult to justify restricting its application to only those situations where it disadvantages the accused. Thus, in cases where the facts (or the judge) demand an evidentiary showing of subjective awareness, the defendant has a variety of sources, including circumstantial evidence and a long-standing legal presumption, from which to make that showing.<sup>158</sup> At bottom, however, the

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be sentenced to at least three and a half years in prison. *Id.* § 70.02(3)(b) (McKinney Supp. 2010). New York's law came into the national spotlight when Burress was charged under that law. *See* Michael S. Schmidt, *Main Threat to Burress Is a Sentencing Law*, N.Y. TIMES, Dec. 3, 2008, at B12.

<sup>155</sup> In addition or in lieu of the evidence described above, the defense may be able to lay sufficient foundation for subjective awareness through expert witness testimony that certain punishment schemes (e.g., the three strikes law) are sufficiently well known among recidivist offenders, or that certain enhancements are well known by certain persons (e.g., people who are acquainted with, or are themselves members of, criminal street gangs may have broad awareness of gang sentencing enhancements).

<sup>156</sup> *Atkins v. Parker*, 472 U.S. 115, 130 (1985).

<sup>157</sup> *See, e.g., Cheek v. United States*, 498 U.S. 192, 199 (1991) ("Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. This common-law rule has been applied by the Court in numerous cases construing criminal statutes.").

<sup>158</sup> Ethical issues abound as well, but none that are not already familiar to criminal defense counsel. Just as an attorney can defend a guilty client, counsel can, under current ethical guidelines, offer truthful evidence to support a false inference of innocence. *See* David Luban, *The Inevitability of Conscience: A Response to My Critics*, 93 CORNELL L. REV. 1437, 1459 (2008) (remarking that it would be "a radical change in prevailing ethics rules" to "forbid[] defenders from arguing theories that they know are false"); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 126-27 (1987) (recognizing that ethical guidelines permit criminal defense attorneys to engage in "direct presentation of testimony, not itself false, but used to discredit the truthful evidence . . . , or to accredit a false theory; and . . . argument to the jury based on [that evidence]"); *cf. United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., dissenting in part and concurring in part) ("Our interest in not convicting the innocent permits [defense] counsel . . . to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth."). Thus, even if defense counsel believes her client had no idea, prior to the offense, of the punishment for the crime, current ethical rules do not prohibit her from introducing otherwise truthful evidence to the contrary. Indeed, even those who would alter these rules, appear amenable to an exception in this context. William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1725 (1993) (accepting "aggressive defense" tactics if the tactic "subverts punishment that, although formally prescribed, is unjustly harsh and discriminatory in terms of the more general norms of the legal culture"). Similarly, there is

inquiry remains a simple one: if the punishment evidence, in concert with the other evidence before the jury, increases, even marginally, the probability that the defendant would have resisted committing the offense, it is relevant and must be admitted unless excluded by some other rule of evidence.<sup>159</sup>

D. *Will Relevant Punishment Evidence Be Excluded Under Rule 403*

Establishing the relevance of punishment evidence will not ensure its admissibility. The Federal Rules of Evidence provide that “[a]ll relevant evidence is admissible, *except as otherwise provided*.”<sup>160</sup> A potentially countervailing rule in this context, implicitly invoked in *Shannon*, is Rule 403.<sup>161</sup> Under Rule 403, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of . . . confusion of the issues, or misleading the jury.”<sup>162</sup>

At first blush, there is little obvious merit to a Rule 403 objection to punishment evidence. If the defense limits its jury arguments to the anti-

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no recognized ethical bar that would prohibit defense counsel’s introducing punishment evidence under a narrow anti-motive theory while also hoping that the evidence will resonate, on a broader level, with the jury’s extra-legal sense of fairness and justice. *Cf. id.* at 1706 (“When the surrounding role players have all the information available to the defense lawyer and there are no other procedural deficiencies, it is plausible for the lawyer to defer concern with nonclient interests to the other role players.”).

<sup>159</sup> FED. R. EVID. 402. When a severe punishment applies due to the defendant’s status as a repeat offender, probationer, or parolee, tactical issues will also arise as to the substance of the punishment evidence presented. The defendant will likely attempt to introduce evidence of a severe statutory punishment without revealing the reason (e.g., parole status, two prior strikes) that the punishment applies. This may, however, be impractical because, *inter alia*, the defendant’s awareness of the punishment may hinge, in part, on his being a repeat offender or parolee. Prosecutors will also likely argue, with rhetorical force, that they must be permitted to rebut defense evidence of severe punishments for a seemingly trivial offense by eliciting evidence of the recidivism that triggered the punishment.

For the most part, I leave these tactical considerations to future litigants, but it is worth noting that there is a logical flaw in “rebuttal” along the lines suggested. Under an anti-motive theory, the defense is offering the evidence to show the defendant’s pre-crime mental calculus as to whether the crime is “worth” committing. The prosecution’s proposed rebuttal – an explanation as to why the defendant is in this particular predicament – does not speak to this calculus. If, however, the defendant misrepresents the punishment he faces, the prosecutor would likely be permitted to introduce evidence of the actual punishment under *Shannon*. *See Shannon v. United States*, 512 U.S. 573, 587 (1994) (suggesting that punishment evidence may be admissible, apparently under an estoppel theory, to correct “a misstatement” improperly introduced into evidence as to the actual consequences of conviction).

<sup>160</sup> FED. R. EVID. 402 (emphasis added).

<sup>161</sup> *Shannon*, 512 U.S. at 579 (“Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.”).

<sup>162</sup> FED. R. EVID. 403.

motive theory discussed above, there is little potential for confusion. The argument is straightforward: it is somewhat less likely that the defendant committed the charged crime because he would have been deterred by the severe statutory punishment for the offense.

There is reason to pause, however. As discussed in Part I, *supra*, defendants will often have an ulterior motive for attempting to introduce punishment evidence: jury nullification. Indeed, this motive is what makes the potential relevance of such evidence so significant. Defendants invoking an anti-motive theory to introduce punishment evidence will, at least in part, be trying to nudge the jury into nullifying (i.e., voting to acquit because the defendant does not deserve the extreme sanction mandated by law). A trial judge could consider this prospect of jury nullification as grounds for excluding, under Rule 403, even relevant evidence regarding potential punishment. The prospect of nullification could be viewed either as a type of “confusion” of the issues (legal guilt vs. the morality of the sentence) or as “unfair prejudice” to the prosecution, a related basis for exclusion cognizable under Rule 403.<sup>163</sup>

Further, there will be many circumstances where the probative value of punishment evidence introduced on an anti-motive theory will be weak.<sup>164</sup> The notion that a defendant would have considered even a known punishment will be less compelling when the charged crime is an emotional response to stimuli as opposed to a planned theft or fraudulent scheme. In circumstances where the defense has done little to establish the defendant’s subjective awareness of the punishment, its probative value will also be diminished.<sup>165</sup>

Still, for exclusion to be warranted under Rule 403, the dangers of unfair prejudice and jury confusion must *substantially* outweigh the probative value.<sup>166</sup> In addition, defendants can argue that concerns about undue prejudice or confusion can be mitigated through limiting instructions, rather than outright exclusion.<sup>167</sup> There are a number of areas in evidence law where

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<sup>163</sup> See *id.* (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice [or] confusion of the issues . . . .”); *United States v. James*, 169 F.3d 1210, 1215-17 (9th Cir. 1999) (Kleinfeld, J., dissenting) (defending district court judge’s decision to exclude evidence that risked unfair prejudice to the prosecution).

<sup>164</sup> See FED. R. EVID. 403 (requiring a balancing between relevant evidence’s probative value and factors that may necessitate the evidence’s exclusion).

<sup>165</sup> See Nance, *supra* note 132, at 473-74, 506 (arguing that where evidence is relevant, but nonetheless “*inexcusably incomplete*,” a court could exercise discretionary power to exclude the evidence on the grounds of misleading the jury or waste of time).

<sup>166</sup> FED. R. EVID. 403.

<sup>167</sup> See FED. R. EVID. 105 (providing for use of limiting instructions where evidence is admissible for one purpose, but not admissible for some other purpose). A proper limiting instruction would not confine the jury’s use of the punishment evidence solely to the defendant’s pre-crime calculus. As under North Carolina law, there is no reason that the evidence could not also be used to induce the jury “to give the matter its close attention and to decide [to convict] only after due and careful consideration.” *State v. McMorris*, 225

similar concerns are remedied not by exclusion of relevant evidence, but by limiting instructions. For example, a defendant's prior convictions are often admitted solely to impeach the credibility of his testimony. Courts and commentators generally agree that jurors are just as likely to use this evidence as improper propensity evidence: i.e., to conclude that the defendant is a bad person and thus probably guilty of the charged offense.<sup>168</sup> Nevertheless, the law considers this difficulty resolved by instructing jurors to utilize the evidence solely as impeachment and not as substantive propensity evidence.<sup>169</sup> There is no reason why the prosecution should not have to rely on the protections of analogous limiting instructions when the defense offers otherwise relevant punishment evidence.<sup>170</sup>

Further, exclusion of punishment evidence on the ground that its probative value is substantially outweighed by a danger of unfairly prejudicial jury nullification fails to recognize that nullification is only the most extreme of a number of more proper influences (i.e., fair prejudice) the evidence might have on the jury's deliberations. Particularly if the judge gives a limiting instruction, the defense can contend that the punishment evidence is unlikely to result in outright nullification. Rather the defense can simply recast the prosecution concern as one that each juror (particularly a juror holding out for acquittal) will take her task more seriously: (i) to convince herself that a verdict of guilty is supported by the evidence; and (ii) to decline to accept apparent deficiencies in the prosecution evidence based on an erroneous perception of the trivial nature of the case. This sentiment is, in fact, a logical extension of the case law cited in *Rogers* that prohibits evidence of a lenient punishment because such evidence may cause a jury to convict too hastily.<sup>171</sup> It is also the justification, painstakingly distinguished from nullification, that the North Carolina courts advance for their state's rule permitting counsel to inform juries of the consequences of conviction.<sup>172</sup>

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S.E.2d 553, 554 (N.C. 1976).

<sup>168</sup> See Jeffrey Bellin, *Circumventing Congress: How the Federal Courts Opened the Door to Impeaching Criminal Defendants with Prior Convictions*, 42 U.C. DAVIS L. REV. 289, 299-303 (2008).

<sup>169</sup> See *id.* at 300-03 (describing process by which prior conviction impeachment evidence is admitted subject to limiting instruction); cf. FED. R. EVID. 703 advisory committee's note on 2000 amendment (recognizing that when the jury hears hearsay evidence considered by an expert, "the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes"); *United States v. Monteleone*, 77 F.3d 1086, 1091 (8th Cir. 1996) (discussing cautionary instruction required when a character witness is cross-examined about specific acts under Rule 405).

<sup>170</sup> See *supra* note 167, for discussion of contours of proper limiting instruction.

<sup>171</sup> See *supra* notes 57-64 and accompanying text.

<sup>172</sup> *McMorris*, 225 S.E.2d at 554-55 (explaining that under North Carolina law, "[i]t is proper for [a] defendant to urge upon the jury the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention and to

## CONCLUSION

Criminal defendants have long recognized jury nullification as a potential ally in the fight against the, at times, unjust application of harsh sentencing laws. This potential has been largely frustrated, however, by defendants' inability to introduce information about applicable sentencing provisions at trial. The state of the law is such that a jury that might acquit in the face of a harsh sentencing provision, will almost always render its verdict without learning of the provision's application.

The dilemma is not merely that jurors will fail to recognize the stark implications of their deliberations; they may also toil under an understandable misapprehension of the significance of the case. As in *People v. Taylor*,<sup>173</sup> highlighted at the outset of this Article, and *United States v. Polizzi*,<sup>174</sup> discussed in Part II.B, *supra*, jurors may assume, in light of the nature of the charged offense, that the defendant will receive a moderate punishment upon conviction, and subconsciously factor that assumption into the depth of their deliberations. Jurors may then come to learn, after voting to convict, that the verdict triggered a harsh term of imprisonment that is, in the jurors' view, far

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decide it only after due and careful consideration" and contrasting this justification with an improper argument "that because of the severity of the statutory punishment the jury ought to acquit"). North Carolina's justification resonates with Justice Souter's majority opinion in *Old Chief v. United States*. 519 U.S. 172 (1997). That opinion explains that the prosecution must generally be permitted to introduce evidence, even on an undisputed point, that impresses the jury with the solemnity of its task; the opinion also notes, in this context, the difficulty faced by a defense juror "to hold out conscientiously for acquittal." *Id.* at 187-88. One way to strengthen the resolve of such a juror would be to introduce evidence of an unusually severe punishment that will follow upon conviction. See Duane, *supra* note 46, at 473-75 (arguing that "*Shannon* simply cannot be reconciled with *Old Chief*" and that "[t]his inconsistency borders on madness"); Zahler, *supra* note 12, at 497 ("Allowing defendants to present evidence on the conditions of prisons where they could be sent if convicted is similar in nature to the evidence deemed acceptable by the *Old Chief* Court."). It is important to recognize, however, that *Old Chief* only supports admission of punishment evidence after that evidence has cleared the relevance hurdle. See Todd E. Pettys, *Evidentiary Relevance, Morally Reasonable Verdicts, and Jury Nullification*, 86 IOWA L. REV. 467, 485 (2001) ("Although ambiguous, *Old Chief* implies that evidence must first fall within the traditional notion of relevance, and only then does it become eligible for heightened probative value due to its moral weight or its capacity to satisfy jurors' expectations.").

<sup>173</sup> 83 Cal. Rptr. 2d 919 (Cal. Ct. App. 1999). After convicting Taylor, jurors learned of the possible sentence and several of them offered to testify at Taylor's sentencing hearing in opposition to life imprisonment. *Id.* at 925 n.5 (Johnson, J., dissenting).

<sup>174</sup> 549 F. Supp. 2d 308 (E.D.N.Y. 2008), *vacated sub nom.* *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009). Several jurors said that they would not have convicted the defendant if they had known of the mandatory sentence before returning the verdict. *Id.* at 320, 339-41.

out of proportion to both the crime committed and the strength of the prosecution's case.<sup>175</sup>

This Article presents a partial solution to this dilemma, advancing an anti-motive theory of relevance that could permit defendants to introduce punishment evidence in a broad spectrum of cases. Once the information regarding punishment is introduced at trial, jurors, even if instructed otherwise, may rely on this evidence to exercise their traditional nullification power. Or, the evidence may simply prompt each juror to hold the prosecution to its already high burden of proof, even in cases that might otherwise appear trivial.<sup>176</sup> In either of these scenarios, jurors who have largely become bystanders in America's criminal justice system will be better able to resume their traditional role as "the great corrective of law in its actual administration."<sup>177</sup>

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<sup>175</sup> Cf. Kemmitt, *supra* note 16, at 143 (arguing that jurors will interpret the phrase "reasonable doubt" more strictly "when they are made aware of the twenty-year penalty that will result from their decision to convict"). There is empirical support for the intuition that jurors alter their perception of "reasonable doubt" based on factors such as the perceived severity of the offense. See Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 116-17 (2002).

<sup>176</sup> See *McMorris*, 225 S.E.2d at 554 (explaining that under North Carolina law, "[i]t is proper for [a] defendant to urge upon the jury the possible consequence of imprisonment following conviction to encourage the jury to give the matter its close attention").

<sup>177</sup> Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910). In a similar vein, Judge Learned Hand explained that trial by jury "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions." *United States ex rel. McCann v. Adams*, 126 F.2d 774, 776 (2d Cir. 1942).