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

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INTRODUCTION

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

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

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

* Judge, United States District Court, Northern District of Ohio. I am grateful to colleagues Judges Patricia Gaughan, Donald Nugent, Dan Polster, Solomon Oliver, and especially Matthew Kennelly and Robert Pratt for their help in conducting these surveys. I extend thanks to Judges and Professors Gerry Lynch and Nancy Gertner for their helpful suggestions and to Professor Doug Berman for encouragement, thoughts, and for putting up with me talking continually about the study during rounds of golf. I was greatly assisted by Christopher Lowenkamp, Ph.D., who guided me in running the statistical analysis. Finally, I say thanks to current and former law clerks who helped me assemble the study materials and then helped edit my efforts. Erin Flanagan gave special efforts to set up the database. Regina Fitzpatrick, Elizabeth Sheyn, Stephen Brown, and Karen Smith all provided major assistance in editing the Article.

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

2 The jurors resided in zip codes with an average median family income of $45,084, somewhat less than the United States median of $50,046. American FactFinder, http://
If anything distinguished them, they were older than average citizens of the community, with seven jurors over 50 years old and three over 60.

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

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

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

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

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


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

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

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

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

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


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

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

I. SENTENCING THEORY AND HISTORY

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

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

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

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

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

\(^11\) Id. at 71 (“General deterrence seeks to discourage would-be offenders from committing further crimes by instilling a fear of receiving the penalty given to this offender.”).

\(^12\) See id. at 70 (“This crime-control method assumes not only that such offenders can be reliably identified but also that they are not made worse by imprisonment, and that—while in custody—they are not replaced by other offenders.”).
education, training, and treatment. Deterrence, incapacitation, and rehabilitation look forward and ask: What amount and kind of punishment does society need to make itself safe? We characterize these purposes as utilitarian: they use criminal punishment as a tool to improve society’s future.

The debate regarding the purposes of sentencing has generally been between retribution and the three utilitarian functions. In contrast to the forward-looking purposes of deterrence, incapacitation, and rehabilitation, retribution focuses on the offender’s actual conduct and the harm occasioned. With retribution, society considers the offender’s degree of blameworthiness and amount of harm done and imposes punishment accordingly. Thus, the defendant’s past culpable acts and the effects of those acts upon victims and society determine the sentence.

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

Immanuel Kant and Jeremy Bentham offer the classic competing justifications for the retributive and consequentialist purposes of sentencing. Kant argued that retribution provides the most just purpose for sentencing.

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

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

According to Kant, no societal benefit could justify a sentence untethered to a defendant’s conduct; a punishment used as a utilitarian tool to improve future societal conditions would be unjust.
General prevention ought to be the chief end of punishment, as it is its real justification. If we could consider an offence which has been committed as an isolated fact, the like of which would never recur, punishment would be useless. It would be only adding one evil to another.\(^{18}\)

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

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

\section*{B. The History of American Sentencing Policy as Reflecting the Debate Among Sentencing Purposes}

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

\subsection*{1. Sentencing Policy Before the Sentencing Reform Act of 1984}

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

\begin{footnotesize}
\begin{enumerate}
\item[18] Jeremy Bentham, \textit{The Rationale of Punishment} 20 (Adamant Media Corp. 2005) (1830); see also Fish, \textit{supra} note 16, at 63–64.
\item[23] See Frase, \textit{supra} note 8, at 71.
\end{enumerate}
\end{footnotesize}
announced by the sentencing judges.24 Wholly apart from questions about whether a rehabilitative model focused on the correct issue, observers increasingly questioned whether the model could adequately predict future dangerousness or protect the public.25

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

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

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

24 See Bowman, supra note 21, at 302.
25 See James Q. Wilson, Thinking About Crime 164 (1983) (“As the scientific basis for the possibility of rehabilitation was shown wanting, the philosophical rationale for making that the chief goal of sentencing began collapsing.”); see also Frase, supra note 8, at 71; Tonry, supra note 15, at 55.
27 Compare Model Penal Code § 1.02 (2007) with Model Penal Code § 1.02 (Proposed Official Draft 1962); see also Robinson et al., supra note 8, at 4.
29 See Bowman, supra note 8, at 746.
31 28 U.S.C. § 994(k) provides: “The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.” See also United States v. Sklar, 920 F.2d 107, 115 (1st Cir. 1990) (“It is crystal clear that Congress largely rejected rehabilitation as a direct goal of criminal sentencing under the guidelines.”).
lines cabined judicial discretion in the service of consistency. Although the Supreme Court has restored levels of discretion with its decisions in United States v. Booker, Kimbrough v. United States, and Spears v. United States, the Guidelines appropriately reduce disparity among both sentencing judges and individual cases.

3. The Prioritization of Retribution by the Federal Sentencing Guidelines

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

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

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

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32 See United States v. Booker, 543 U.S. 220, 253 (2005) (“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”).
33 Booker, 543 U.S. 220.
36 In considering the direction to avoid unwarranted disparities under 28 U.S.C. § 3353(a)(6), sentencing courts principally consider national disparities, not intra-case disparities. See United States v. Presley, 547 F.3d 625, 631 (6th Cir. 2008); United States v. Saez, 444 F.3d 15, 18 (1st Cir. 2006).
38 See United States v. Brewer, 899 F.2d 503, 507 (6th Cir. 1990); United States v. McNamara, 920 F.2d 244, 247 (4th Cir. 1990); United States v. Mejia-Orosco, 867 F.2d 216, 218 (5th Cir. 1989); Bowman, supra note 21, at 316.
level calculation, the criminal history category calculation accommodates
the goals of individual deterrence and incapacitation. These two calcula-
tions, offense level and criminal history, combine to set the Guidelines
range. Yet when combined, the offense characteristics predominate over
criminal history in suggesting the sentence. Each additional offense level
generally raises the sentencing range equivalent to an additional criminal
history category.40 While moving up in offense levels is relatively easy,
moving up in criminal history categories typically requires an additional
“prior sentence of imprisonment exceeding one year and one month.”41 The
recommended sentencing range only doubles for a defendant who has had
four prior sentences of imprisonment that each exceeded 13 months.42 In
contrast, the recommended sentence for mail fraud, for example, doubles
when the fraud loss was more than $70,000, instead of $10,000.43 The
Guidelines make sentence determinations principally dependent upon the na-
ture and circumstances of the offense, the seriousness of the offense, and the
need to provide just punishment—all retributive considerations.44 The
Guidelines’ prioritization of offense conduct rather than offender characteris-
tics is thus inherently retributive.

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

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

40 For example, with an offense level of 15 and a criminal history category VI, the Guide-
lines recommend a sentence of 41 to 51 months. If the offense level is 16 but the criminal
history category is V, the Guidelines recommend the same 41 to 51 month range. The one-
level offense level increase is punished as much as an additional prior felony conviction in-
volving a sentence greater than 13 months. U.S. SENTENCING COMM’N, supra note 37, § 4A1.1
and ch. 5 pt. A.
41 Id. § 4A1.1.
42 Id.
43 Id. § 2B1.1(b)(1).
44 See 18 U.S.C. § 3553(a); see also Hofer & Allenbaugh, supra note 15, at 51 (“[T]he
content and structure of the [Guidelines] rules is most consistent with a philosophy that gives
the lowest priority to rehabilitation, secondary importance to incapacitation of higher risk off-
fenders, and the highest priority to proportionate punishment.”).
46 The Guidelines also reduce disparities by restricting sentencing judges to considering
factors involving offense characteristics. See ABA STANDARDS FOR CRIMINAL JUSTICE, supra
note 26, at xix.
47 See U.S. SENTENCING COMM’N, supra note 37, §§ 5H1.1–5H1.6; see also 28 U.S.C.
§ 994(k).
ness. The Guidelines control federal sentencing, and retributive purposes dominate the Guidelines.

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

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

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

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

49 Robinson et al., supra note 8, at 6.


51 Id. at 67 tbl.4.7.

52 Because rehabilitation-focused punishments inherently depend upon when rehabilitation results, they potentially result in longer imprisonment when parole authorities do not judge a relatively low level offender to have corrected his or her behavior. See Andrew von Hirsch &
For example, societal retribution alone cannot justify a mandatory life sentence without the possibility of parole when an individual is caught possessing and intending to sell 50 grams of crack cocaine. Nevertheless, our society has recommended such a punishment when the offending individual has two previous felony drug offenses. In these so-called three strikes cases, the principal consideration in the retributive calculation—the harm occasioned by such a crime—is low, as the “victims” of such drug crimes are typically other drug abusers. Such a severe punishment can only be justified by reference to whatever utilitarian benefit results if such sentences deter others and if that deterred conduct is egregious enough to warrant the cost.

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

Moreover, incapacitation by its very nature will reduce recidivism during the term of imprisonment, but deterrence and rehabilitation fail to achieve the reduction in crime that undergirds their legitimacy. Deterrence rests on the shaky philosophical foundation that imposing otherwise unwarranted punishment will serve as an example to others. Stated otherwise, deterrence subjects one person to the purposes of others. Moreover, deterrence faces practical problems. Large majorities of even serious crimes go unreported, unsolved, or unpunished. Given the small chance that they will be caught, offenders reasonably discount the deterrence message. In addi-
tion, with many similar offenses prosecuted in state court, any increases in federal sentences will have minimal effect upon deterrence. Rehabilitation can achieve some success, but it is nearly impossible to predict when and if rehabilitation has occurred with respect to any particular offender. And while incapacitation does reduce crime in the short run, it is difficult to justify the human and financial costs associated with wholesale warehousing of potential recidivists amid staggering state and federal deficits, especially when its ability to foretell future recidivism is weak.

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

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

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

57 See id. at 464.
58 See id. at 465–66 (arguing that tools used to predict recidivism are too inaccurate to be used in selecting between an individual’s liberty or incarceration).
59 But see Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (finding that such a sentence “was not an unreasonable application of our clearly established law”).
60 But see United States v. Wimbley, 553 F.3d 455, 462 (6th Cir. 2009) (holding that mandatory life sentence without the possibility of parole for possessing with the intent to sell 143.2 grams of crack cocaine after two earlier felony convictions was not cruel and unusual punishment).
61 See Ristroph, supra note 48, at 1300.
62 Robinson & Darley, supra note 8, at 478.
ishment will be distributed and that it will deter other potential offenders. This edification function can be particularly important if actual arrest and punishment rates are low.\(^{63}\) When punishment is seen as justly imposed, it better restates the conduct necessary for good moral standing within the community.\(^{64}\) Thus, a retributive sentencing system might best accomplish other sentencing goals, too.

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

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

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\(^{63}\) See Frase, supra note 8, at 72 (“Such norms guide and restrain behavior even when the chances of detection and punishment are slight.”).

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


\(^{67}\) See 28 U.S.C. § 994(b).

\(^{68}\) See U.S. SENTENCING COMM’N, supra note 15, at 16–17; see generally Breyer, supra note 30.
lished the connection between community sentiment and criminal punishment.

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

II. SAMPLING COMMUNITY SENTIMENT REGARDING APPROPRIATE SENTENCING

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

A. Overview of the Jury Survey and Methods

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

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

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

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

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

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

B. Overall Statistical Findings

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

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

---

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

73 See United States v. Lewis, No. 1:07-CR-68-4 (N.D. Ohio July 16, 2007) (Guidelines median is 113% of median juror recommendation); United States v. Ousley-Lee, No. 4:08-CR-38 (S.D. Iowa Apr. 30, 2007) (Guidelines median is 325% of median juror recommendation).
the minimum Guidelines recommended sentences and 22% of the median Guidelines recommended sentences. Stated another way, the Guidelines range median was 445% of the median jurors’ recommendation, and the low end of the Guidelines range was 273% of the median jurors’ recommendation. These differences are statistically significant.

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

**Table 1: Juror Recommendations Compared to Actual and Guidelines Sentences**

<table>
<thead>
<tr>
<th></th>
<th>Actual Sentence</th>
<th>Guidelines Minimum</th>
<th>Guidelines Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of juror recommendations less than:</td>
<td>200</td>
<td>229</td>
<td>235</td>
</tr>
<tr>
<td>Number of juror recommendations greater than:</td>
<td>46</td>
<td>32</td>
<td>21</td>
</tr>
<tr>
<td>Number of juror recommendations equal to:</td>
<td>15</td>
<td>0</td>
<td>5</td>
</tr>
</tbody>
</table>

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

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

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74 See infra tbl.2.
75 These results are statistically significant at the p < .05 level based on a Wilcoxon Signed Rank Test. The p-value for comparing the juror recommendations against the Guidelines minima was < .0000. The p-value for comparing the juror recommendations against the Guidelines maxima was also < .0000.
76 The study included 22 criminal trials, each with a 12-person jury. However, 3 of the sampled jurors did not respond, so the total sample size included 261 juror responses.
As shown by this chart, across 22 cases, the average juror-recommended sentence was 65 months, while the average Guidelines minimum was 138 months and the average Guidelines maximum was 174 months. The difference between the average juror-recommended sentence and the sentence imposed was also large. On average, the Guidelines-recommended minimum sentence was more than twice the juror-recommended sentence. Finally, the average Guidelines maximum is roughly three times the jurors’ average recommended sentence.\textsuperscript{77}

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

\textbf{C. Sample Cases}

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

\textsuperscript{77} Each of these differences is statistically significant under the t-tests at the \( p < .05 \) level.

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

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

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

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

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79 United States v. Pusey, 189 F. App’x 475, 478 (6th Cir. 2006).
80 Pusey had 18 final criminal history points.
82 With a total offense level of 26 and a criminal history category of VI, the Guidelines recommended imprisonment for 120 to 150 months, consecutive to the 60 months imposed under 18 U.S.C. § 924(c)(1)(A).
83 The mean recommendation was 35 months. See infra app. tbl.3.
84 The average median family income of the zip code areas that the jurors were drawn from was $55,398. See American FactFinder, http://factfinder.census.gov (in the “Fast Access” box, separately insert zip codes 44040, 44052, 44055, 44094, 44102, 44104, 44108, 44128, 44133, 44134, 44137, and 44212) (on file with the Harvard Law School Library). The
population and they recommended a sentence markedly different than the Guidelines.

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

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

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


Rice scored a criminal history category V.

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

See infra app. tbl.3.

U.S. SENTENCING COMM’N, supra note 78, at 8 tbl.3.

Under Ohio Rev. Code Ann. § 2923.13 (West 2009), the possession of a firearm by a felon is a third degree felony, punishable by a prison term of 1, 2, 3, 4, or 5 years. See Ohio Rev. Code Ann. § 2929.14(A)(3) (West 2009). By contrast, under federal law, a felon in possession of a firearm can be sentenced to up to 10 years of incarceration under 18 U.S.C. § 922(g)(1). On average, Ohio incarcerates inmates convicted of having weapons under disability for 1.14 years. See generally Ohio Dep’t of Rehab. and Corr., Time Served Report (2007), available at http://www.drc.ohio.gov/web/Reports/Time/Time%20Served%202007.pdf. In sharp contrast, the average sentence imposed by federal judges for having been a felon...
In United States v. Ballard, a jury convicted Ballard of having been a felon in possession of a firearm violating 18 U.S.C. § 922(g)(1).\(^{91}\) Having previously been convicted of various offenses, including robbery and conspiring to violate federal drug laws, Ballard’s Guidelines range sentence was 100 to 120 months.\(^{92}\) I sentenced Ballard to 105 months of incarceration.\(^{93}\)

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

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

\(^{91}\) United States v. Ballard, 280 F. App’x. 468, 469 (6th Cir. 2008).
\(^{92}\) The maximum term of imprisonment was 10 years under 18 U.S.C. § 922(g)(1).
\(^{93}\) See infra app. tbl.3.
\(^{94}\) The mean juror recommended sentence was 64 months, with a standard deviation of 49. In Ballard’s case, the individual juror recommendations were: 12, 12, 12, 16, 18, 60, 60, 96, 120, 120, 120, and 120 months.
\(^{95}\) See infra app. tbl.3.
III. RECOMMENDATIONS FOR REFORM

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

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

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

97 See Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (Hill & Wang 1973) (“[My] first basic point is this: the almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law.”). But see Adriana Lanni, Note, JURY SENTENCING IN NONCAPITAL CASES: AN IDEA WHOSE TIME HAS COME (AGAIN)?, 108 YALE L.J. 1775, 1790 (1999) (contending that available procedures, especially heightened judicial review of jury-imposed sentences, mitigate disparity, and finding: “[t]he studies do not support the popular assumption that juries mete out harsher, more disparate, and more racially biased punishments than judges”).
98 Lanni, supra note 97, at 1787 (“Jury sentencing does not promise to reduce sentencing disparity; in fact, it would necessarily result in more disparate (though not more racially prejudiced) penalties than those imposed by the current regime.”).
100 Iontcheva, supra note 22, at 343.
101 Atkins v. Virginia, 536 U.S. 304, 322–25 (2002) (Rehnquist, J., dissenting); see also Ring, 536 U.S. at 616 (Breyer, J., concurring) (“[T]he jury remains uniquely capable of determining whether, given the community’s views, capital punishment is appropriate in the partic- ular case at hand.”). Chief Justice Rehnquist gives the legislature important responsibility for determining appropriate sentencing. However, Kimbrough v. United States, 128 S.Ct. 558,
As a symbol of popular and local sovereignty, citizen juries confer legitimacy upon the most invasive thing a state can do: strip a person of life, liberty, or property. By interposing itself between crime and punishment, the citizen jury—when it works as it was intended to—makes the state’s actions something ordinary people feel they own.  

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

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

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

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

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


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

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

CONCLUSION

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

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

105 MODEL PENAL CODE § 1.02(2) (2007).
## APPENDIX

### Table 3: Jury Survey Results

<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td><strong>Guidelines Range</strong></td>
<td>Minimum</td>
<td>Maximum</td>
<td><strong>Guidelines Median</strong></td>
<td><strong>Median</strong></td>
</tr>
<tr>
<td>Possession with Intent to Distribute Crack Cocaine</td>
<td>120</td>
<td>150</td>
<td>195</td>
<td>36</td>
</tr>
<tr>
<td>Using/Carrying Firearm During Drug Trafficking</td>
<td>60</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Felon in Possession of a Firearm</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Guidelines Range</strong></td>
<td>Minimum</td>
<td>Maximum</td>
<td><strong>Guidelines Median</strong></td>
<td><strong>Median</strong></td>
</tr>
<tr>
<td>Possession with Intent to Distribute Cocaine</td>
<td>240</td>
<td>Life</td>
<td>240</td>
<td>54</td>
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<table>
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<th></th>
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</tr>
</thead>
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<tr>
<td><strong>Guidelines Range</strong></td>
<td>Minimum</td>
<td>Maximum</td>
<td><strong>Guidelines Median</strong></td>
<td><strong>Median</strong></td>
</tr>
<tr>
<td>Receipt of Child Pornography</td>
<td>87</td>
<td>108</td>
<td>97.5</td>
<td>15</td>
</tr>
<tr>
<td>Possession of Child Pornography</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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

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

° Where “life” is guidelines sentence or juror response, average life expectancy data used to calculate statistics.
<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
<th>Guidelines Range</th>
<th>Guidelines Jury Results</th>
<th>Guidelines Min / Guideline Median</th>
<th>Guidelines Median / Jury Median</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>United States v. David Garner, 1:05-CR-392</strong></td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>18 USC 2119(1) and 2</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Carjacking</td>
<td>Minimum 63</td>
<td>Maximum 78</td>
<td>Median 154.5, Mean 60/63</td>
<td>105%/258%</td>
</tr>
<tr>
<td>18 USC 924(c)(1)(A)(ii) and 2</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brandishing a Firearm During a Crime of</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Violence</td>
<td>Minimum 84</td>
<td>Maximum 105</td>
<td>Median 258, Mean 258</td>
<td></td>
</tr>
<tr>
<td><strong>United States v. Eric Ballard, 4:06-CR-106</strong></td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>18 USC 922(g)(1)</td>
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<td></td>
</tr>
<tr>
<td>Felon in Possession of a Firearm</td>
<td>Minimum 100</td>
<td>Maximum 120</td>
<td>Median 110, Mean 60/64</td>
<td>167%/183%</td>
</tr>
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<td><strong>United States v. Gionne V. Smith, 5:06-CR-310</strong></td>
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<td></td>
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<tr>
<td>18 USC 922(g)(1)</td>
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<tr>
<td>Felon in Possession of a Firearm</td>
<td>Minimum 46</td>
<td>Maximum 57</td>
<td>Median 51.5, Mean 18/21</td>
<td>256%/286%</td>
</tr>
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<td><strong>United States v. Rajah Baylor, 1:06-CR-368</strong></td>
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<td>18 U.S.C. 1951(a)</td>
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<tr>
<td>Interference with Commerce by Robbery</td>
<td>Minimum 51</td>
<td>Maximum 63</td>
<td>Median 141, Mean 84/87</td>
<td>161%/168%</td>
</tr>
<tr>
<td>18 U.S.C. 924(c)(1)(A)(ii)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Use of a Firearm in Relation to a Crime of Violence*</td>
<td>Minimum 84</td>
<td>Maximum 105</td>
<td>Median 208, Mean 208</td>
<td></td>
</tr>
<tr>
<td><strong>United States v. William F. Harbour, 1:06-CR-374</strong></td>
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<tr>
<td>18 U.S.C. 2252(a)(2)</td>
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<tr>
<td>Attempted Receipt of Child Pornography</td>
<td>Minimum 70</td>
<td>Maximum 87</td>
<td>Median 78.5, Mean 54/59</td>
<td>130%/145%</td>
</tr>
<tr>
<td>18 U.S.C. 2252(a)(5)(B)</td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Possession of Child Pornography</td>
<td>Minimum 70</td>
<td>Maximum 87</td>
<td>Median 78.5, Mean 54/59</td>
<td>130%/145%</td>
</tr>
</tbody>
</table>

† Jury poll includes fewer than twelve responses.
<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
<th>Guidelines Range</th>
<th>Guidelines Min / Median / Mean</th>
<th>Guidelines Min / Median / Mean</th>
<th>Jury Results</th>
<th>Guidelines Min / Median / Mean</th>
<th>Guidelines Min / Median / Mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>21 U.S.C. 841(b)(1)(A)</td>
<td>Possession with Intent to Distribute Crack Cocaine</td>
<td>135 168 151.5</td>
<td>36 51 375%</td>
<td>421%</td>
<td>United States v. Anthony Greer, 1:07-CR-17</td>
<td></td>
</tr>
<tr>
<td>21 U.S.C. 846</td>
<td>Conspiracy to Distribute PCP</td>
<td>188 235 211.5</td>
<td>24 28 783%</td>
<td>881%</td>
<td>United States v. Gerald Taylor, 1:07-CR-68</td>
<td></td>
</tr>
<tr>
<td>21 U.S.C. 841(b)(1)(A)</td>
<td>Possession with Intent to Distribute PCP</td>
<td>188 235 211.5</td>
<td>19 26 989%</td>
<td>1113%</td>
<td>United States v. Maurion Lewis, 1:07-CR-68</td>
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</tr>
<tr>
<td>21 USC 841(b)(1)(A)</td>
<td>Possession with Intent to Distribute Cocaine</td>
<td>168 210 189</td>
<td>60 60 281%</td>
<td>316%</td>
<td>United States v. Randy Delano, 1:07-CR-566</td>
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</tr>
<tr>
<td>18 USC 922(g)(1)</td>
<td>Felon in Possession of a Firearm</td>
<td>41 51 46</td>
<td>3 10 1367%</td>
<td>153%</td>
<td>United States v. Robert Anthony Ousley-Lee, 4:08-CR-38</td>
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</tr>
<tr>
<td>Convicted Crime(s)</td>
<td>guidelines Range</td>
<td>Juror Results</td>
<td>Guidelines Min / Max</td>
<td>Guidelines Median / Median</td>
<td></td>
<td></td>
</tr>
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</tr>
<tr>
<td>18 USC 2113(a) and (d) Bank Robbery</td>
<td>360 Life* 444 240 262 150% 185%</td>
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<tr>
<td>18 USC 924(c)(1)(A)(ii) Use of a Firearm in Relation to a Crime of Violence*</td>
<td>84</td>
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<thead>
<tr>
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<th>Guidelines Min / Max</th>
<th>Guidelines Median / Median</th>
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<tbody>
<tr>
<td>18 USC 2113(a),(d), 355(k) Bank Robbery</td>
<td>Life* Life* N/A 300 328 N/A N/A</td>
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<tr>
<td>18 USC 924(c)(1)(A)(ii) Use of a Firearm in Relation to a Crime of Violence*</td>
<td>Life*</td>
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<tr>
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<th>Guidelines Median / Median</th>
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</thead>
<tbody>
<tr>
<td>18 USC 922(g)(1) Felon in Possession of a Firearm</td>
<td>21 27 24 15 21 140% 160%</td>
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<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
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<th>Guidelines Min / Max</th>
<th>Guidelines Median / Median</th>
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<tr>
<td>18 USC 922(g)(1) Felon in Possession of a Firearm</td>
<td>188 235 212 36 76 52% 588%</td>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>18 USC 922(g)(1) Felon in Possession of a Firearm</td>
<td>70 87 79 18 21 38% 436%</td>
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### United States v. Harold Jones, 1:08-CR-168

<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
<th>Guidelines Range</th>
<th>Jury Results</th>
<th>Guidelines Median</th>
<th>Guidelines Mean</th>
<th>Guidelines Min</th>
<th>Guidelines Median</th>
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</thead>
<tbody>
<tr>
<td>18 USC 1341 Mail Fraud</td>
<td>37 46 41.5</td>
<td>0 7</td>
<td>N/A</td>
<td>N/A</td>
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### United States v. Nakisha Winfrey Winters, 4:08-CR-85

<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
<th>Guidelines Range</th>
<th>Jury Results</th>
<th>Guidelines Median</th>
<th>Guidelines Mean</th>
<th>Guidelines Min</th>
<th>Guidelines Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 USC 1623 Perjury</td>
<td>21 27 24</td>
<td>0 2</td>
<td>N/A</td>
<td>N/A</td>
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<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
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<th>Guidelines Median</th>
<th>Guidelines Mean</th>
<th>Guidelines Min</th>
<th>Guidelines Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 USC 152(3) False Statement</td>
<td>21 27 24</td>
<td>30 32</td>
<td>70%</td>
<td>80%</td>
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### United States v. Paulette Gladwell, 5:09-CR-190

<table>
<thead>
<tr>
<th>Convicted Crime(s)</th>
<th>Guidelines Range</th>
<th>Jury Results</th>
<th>Guidelines Median</th>
<th>Guidelines Mean</th>
<th>Guidelines Min</th>
<th>Guidelines Median</th>
</tr>
</thead>
<tbody>
<tr>
<td>18 USC 656 Theft/Embezzlement/Misapplication by Bank Officer</td>
<td>18 24 21</td>
<td>33 66</td>
<td>55%</td>
<td>64%</td>
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<tr>
<td>18 USC 1001(a)(2) False Statement</td>
<td>21</td>
<td>66</td>
<td>55%</td>
<td>64%</td>
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