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### Constitutionally Tailoring Punishment

Richard A. Bierschbach

*Yeshiva University - Benjamin N. Cardozo School of Law*

Stephanos Bibas

*University of Pennsylvania Carey Law School*

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# CONSTITUTIONALLY TAILORING PUNISHMENT

Richard A. Bierschbach\*  
Stephanos Bibas\*\*

*Since the turn of the century, the Supreme Court has regulated noncapital sentencing under the Sixth Amendment in the Apprendi line of cases (requiring jury findings of fact to justify sentence enhancements) as well as under the Eighth Amendment in the Miller and Graham line of cases (forbidding mandatory life imprisonment for juvenile defendants). Although both lines of authority sound in individual rights, in fact they are fundamentally about the structures of criminal justice. These two seemingly disparate doctrines respond to structural imbalances in noncapital sentencing by promoting morally appropriate punishment judgments that are based on individualized input and that reflect the perspectives of multiple institutional actors. This new understanding illuminates how both doctrines relate to the Court's earlier regulation of capital sentencing and how checks and balances can promote just punishment in a pluralistic system. It also underscores the need for other actors to complete the Court's work outside the confines of rights-based judicial doctrines by experimenting with a broader range of reforms that are not constitutionally required but rather are constitutionally inspired.*

## TABLE OF CONTENTS

INTRODUCTION .....	398
I. STRUCTURAL PROBLEMS, INDIVIDUAL RIGHTS .....	402
A. <i>Structural Problems</i> .....	403
B. <i>Constitutional Design</i> .....	405
1. Moral Appropriateness, Individualization, Checks and Balances .....	405
2. <i>Graham, Apprendi, and Sentencing Design</i> .....	410
C. <i>The Limits of Rights-Based Solutions</i> .....	416
II. THE PROCEDURAL JUSTICE OF SENTENCING .....	420
A. <i>Structure, Process, and Punishment</i> .....	420
B. <i>Punishment and Institutional Competence</i> .....	423
C. <i>The Virtues of Multiple Viewpoints</i> .....	426

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\* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

\*\* Professor of Law and Criminology and Director, Supreme Court Clinic, University of Pennsylvania Law School. We thank Miriam Baer, David Ball, Michael Burstein, Mike Cahill, Jill Fisch, Rick Garnett, Cynthia Godsoe, Lauryn Gouldin, Adam Kolber, Robert Leider, Maggie Lemos, Kate Levine, Dan Markel, Mark McKenna, Max Minzner, Alex Reinert, Alice Ristroph, Christine Scott-Hayward, Re'em Segev, Kate Shaw, Jocelyn Simonson, Aaron Simowitz, Kevin Stack, Nelson Tebbe, and participants in the New York City Criminal Law Theory Colloquium at New York University and a faculty workshop at Notre Dame Law School for valuable comments on earlier drafts, as well as Benjamin Zegarelli for excellent research assistance. Copyright © 2013 by Richard A. Bierschbach & Stephanos Bibas.

1. Substantive Pluralism .....	427
2. Procedural Pluralism .....	430
3. The Interaction of Democratic and Judicial Perspectives .....	434
III. SENTENCING REFORM BEYOND INDIVIDUAL RIGHTS .....	436
A. <i>Reinvigorating Lay and Judicial Involvement at Sentencing</i> ..	437
B. <i>Relaxing Mandatory Sentences</i> .....	439
C. <i>Sentencing Guidelines and Presumptions</i> .....	441
D. <i>Reassessing Charges at Sentencing</i> .....	443
E. <i>Plea Bargaining</i> .....	446
F. <i>Rationing Charges</i> .....	448
G. <i>Making Back-End Sentencing a True Check</i> .....	450
CONCLUSION .....	451

#### INTRODUCTION

In the late twentieth century, the Supreme Court largely restricted constitutional sentencing law to capital cases, proclaiming that under the Eighth Amendment, “death is different.”<sup>1</sup> But, since the turn of the century, the Court has revolutionized noncapital sentencing as well. The *Apprendi v. New Jersey* line of cases interpreted the Sixth Amendment to define facts that raise maximum punishments as substantive elements of crimes that require jury findings.<sup>2</sup> More recently, *Graham v. Florida* banned life without the possibility of parole (“LWOP”) sentences for juveniles who have not killed.<sup>3</sup> And, just last year, *Miller v. Alabama* forbade legislatively mandated LWOP sentences for juveniles who have killed, although it permitted sentencers to exercise discretion in imposing such sentences in unusual cases.<sup>4</sup>

These lines of cases appear to have little in common. *Apprendi* turned on a highly formalistic interpretation of the Sixth Amendment right to “trial[ ] by an impartial jury.”<sup>5</sup> *Graham* and *Miller* were functionalist and rested uneasily on the Eighth Amendment’s apparently substantive ban on “cruel and unusual punishments.”<sup>6</sup> If life imprisonment for juveniles were itself substantively cruel, however, the Court should have banned it outright

1. See, e.g., *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008); *Gilmore v. Taylor*, 508 U.S. 333, 342 (1993); *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion). *But cf.* *Williams v. New York*, 337 U.S. 241, 245–52 (1949) (refusing to apply special procedural rules to death penalty cases under the Fourteenth Amendment’s Due Process Clause).

2. 530 U.S. 466 (2000); see also *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).

3. 130 S. Ct. 2011, 2034 (2010).

4. 132 S. Ct. 2455, 2469, 2471–72 & n.10, 2475 (2012) (consolidated opinion). *Miller* was consolidated with *Jackson v. Hobbs* for argument and the Court’s decisions and opinions for both appear together. *Miller*, 132 S. Ct. at 2455. References to *Miller* throughout this Article refer to both cases.

5. U.S. CONST. amend. VI.

6. U.S. CONST. amend. VIII.

instead of simply leaving open a chance at parole or allowing sentencers to impose LWOP on certain killers. Moreover, the decisions emphasized retribution and rehabilitation at the expense of deterrence and incapacitation, even though the Eighth Amendment supposedly does not mandate any particular penological theory. Despite these oddities, most commentators persist in discussing *Graham* and *Miller* in terms of the substantive cruelty of LWOP for juveniles, missing the procedural nuances.<sup>7</sup>

Perhaps for that reason, commentators have overlooked important parallels between the *Graham* and *Apprendi* lines. Both lines of cases marked a departure from the Court's usual deference to legislative judgment with respect to noncapital sentencing decisions. Both also limited judges' powers in some ways while enhancing them in others. And both read constitutional provisions in unexpected ways to reallocate sentencing power among various actors rather than to limit sentences or sentence enhancements directly and substantively. Both lines of cases thus fit oddly within the Sixth and Eighth Amendments' jurisprudential boxes.

We see deep connections between these seemingly unrelated doctrines. The Court is awkwardly squeezing fundamental notions about the structural features of a system of just punishment into disparate individual rights provisions. What is emerging is a larger structural and procedural framework for constitutionally tailoring punishment.

Not all the decisions underlying this development are new—the Court began regulating capital procedures nearly four decades ago, and cases like the analogous *Woodson/Lockett/Eddings* trilogy, which took a largely procedural approach to individualizing death sentences, have been with us since the 1970s.<sup>8</sup> Those cases, however, were confined by the “death is different” mantra, while now a similar approach is starting to reshape noncapital sentencing. It is informed in significant part by notions of checks and balances and the structural dimensions of due process. The unifying strand is the Court's tacit recognition that, in our constitutional democracy, one cannot separate questions of substantively just punishment from those of procedural and institutional design. Checks and balances are essential not only to the separation of powers in criminal justice but also to the promotion of morally appropriate punishments. This Article brings that idea to the surface, appraises it, and explores possibilities for taking it seriously outside the confines of rights-based judicial doctrines.

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7. See, e.g., Richard S. Frase, *Graham's Good News—and Not*, 23 FED. SENT'G REP. 54 (2010); Craig S. Lerner, *Juvenile Criminal Responsibility: Can Malice Supply the Want of Years?*, 86 TUL. L. REV. 309 (2011); Marsha Levick et al., *The Eighth Amendment Evolves: Defining Cruel and Unusual Punishment Through the Lens of Childhood and Adolescence*, 15 U. PA. J.L. & SOC. CHANGE 285 (2012); Alison Siegler & Barry Sullivan, “‘Death Is Different’ No Longer”: *Graham v. Florida* and the Future of Eighth Amendment Challenges to Noncapital Sentences, 2010 SUP. CT. REV. 327.

8. See *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion in part); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

Few scholars have focused on such a process-driven approach to understanding the Court's recent constitutional sentencing law. Rachel Barkow, for instance, has explored the importance of separated powers to the constitutional framework for sentencing. She advocates a formalist approach, favoring strict protection of the jury's role in applying sentencing laws and the redesign of prosecutors' offices to prevent undue concentrations of power in prosecutorial hands.<sup>9</sup> And, writing before *Apprendi* and *Graham*, Lou Bilionis explained that many of the Court's substantive constitutional criminal law cases embrace a "process reinforcement" view of constitutional regulation that seeks to interfere only to correct legislative breakdowns or to protect politically disfavored groups.<sup>10</sup> Bilionis endorses that approach as giving pride of place to legislative primacy over criminal law choices, including the conscious choice, in an imperfect world, to impose on defendants "the risk of morally unjustified or excessive sanctions."<sup>11</sup> In *Apprendi* and *Graham*, we see the Court taking a third path. It is groping toward sentencing procedures that ensure particularized decisionmaking that reflects the contributions of a range of actors, much as it did in its capital punishment decisions of the 1970s and 1980s.

The Court's approach rests on three interconnected principles. The first is that, ideally, sentences should reflect morally appropriate judgments. They should give significant weight to notions of retributive desert and a defendant's potential for reform. Although the Court sometimes says that it is not adopting any one theory of punishment, its framework rests on a core commitment to a democratic brand of retributivism, tempered by other punishment values. Second, morally appropriate judgments require at least some measure of individualized input. While there is plenty of room for wholesale legislation and policies *ex ante*, just sentencing also presupposes some fine-grained determinations at the retail level of individual cases. Third, in determining what is morally appropriate and what is not, no one actor should hold all the cards. Power should be diffused among multiple actors. Overlapping powers and checks should act as a series of vetogates to ensure that punishments reflect both individual desert and the conscience of the community, rather than a single institution's idiosyncratic or momentary harshness. Checks and balances thus help to legitimize sentences and to give content to the notion of moral appropriateness.

These principles are not always consciously expressed or consistently followed in the Court's sentencing decisions, but they are latent in many of them. They undergirded *Woodson/Lockett/Eddings* and the Court's capital

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9. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1041–44 (2006) [hereinafter Barkow, *Separation of Powers*]; see also Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 873–74 (2009) [hereinafter Barkow, *Institutional Design*]; Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 106–12 (2003) [hereinafter Barkow, *Recharging the Jury*].

10. Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1318–32 (1998).

11. *Id.* at 1307.

punishment jurisprudence in general, and we see them at the core of the *Graham* and *Apprendi* lines. Viewing these capital and noncapital cases together illuminates how structural and process-focused considerations can help sentencing to accommodate competing punishment principles. That perspective reunites substantive criminal law with its estranged spouse, criminal procedure. It also helps to move past some of the otherwise-puzzling doctrinal issues and limitations that inhere in an overtly rights-based approach. And it lays the groundwork for translating the Court's concerns into concrete reforms that could better serve the values embodied in the Court's decisions.

Before continuing, we should say a word about our methodology. Our project weaves together interpretive analysis, normative appraisal, and policy prescriptions. By reading these disparate lines of cases together, we expose the latent constitutional values that we believe that they share.<sup>12</sup> Those values, we further maintain, are normatively desirable. But the Court is constrained from fully realizing them by the doctrinal boxes into which its decisions must fit. Prescriptively, then, we advocate taking those values as a touchstone for developing reforms not only in the courts but also—and primarily—among other criminal justice actors and institutions. The Court must act incrementally, case by case, and through the doctrinal lens of individual rights. Nonjudicial actors, however, can follow the Court's lead, experiment with reforms, and flesh out the Court's overarching project in ways not required by the letter of its decisions.

Part I of this Article explores the decisions' doctrinal contours and the constitutional values and concerns that we see as lying at their core. The *Graham* and *Apprendi* lines of cases respond to a series of structural problems built into modern criminal justice. The decisions embody basic constitutional principles about who should impose punishment and how. But they operationalize those principles poorly, in part because they squeeze them into Sixth and Eighth Amendment doctrinal boxes about individual rights that do not easily fit the underlying structural problems.

Part II more directly examines a structural and procedural approach to sentencing. It begins by explaining the importance of that approach to the constitutional regulation of punishment. It then defends a structural approach that draws in a variety of institutions, each with its own strengths and weaknesses, to give content to punishment norms. Sentencing is a democratic rather than a philosophically pure exercise, centered on shared retributive intuitions but tempered by equality, crime control, mercy, and a host of other concerns. This complex understanding of justice requires blending the views of a range of actors, some of whom are good at specifying *ex ante* rules and some of whom are better at weighing the equities *ex*

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12. Importantly, we do not purport to offer an intentionalist or motivational account of the cases. We do not, in other words, claim that the cases consciously and consistently *mean* to advance the vision of criminal justice that we put forth. Our interpretive claim is more modest: that, whatever the intentions or motivations behind the cases and the views of the individual justices themselves, the decisions at their cores cohere around the shared set of values that we describe.

post within the framework set by the rules. Courts' constitutional rulings can prompt this sort of give-and-take, but they cannot fine-tune the structures of criminal justice on their own.

In that vein, Part III moves beyond our interpretive and normative accounts to prescribe concrete ways to better advance structural reforms in practice. It offers suggestions on how to divide sentencing power; explanations of how baseline rules and presumptions could encourage more nuanced uses of mandatory minima, sentencing guidelines, and plea bargaining; procedures for reassessing initial charging and sentencing decisions and more effectively structuring back-end safety valves; and ways to prompt prosecutors' more measured pursuit of the toughest charges and punishments. For the most part, our suggestions are constitutionally inspired, not constitutionally required; we embrace nonconstitutional policy reforms with an eye toward the constitutional values discussed in Parts I and II. The point is that policymakers and other actors can move beyond the Court's individual rights framework to effectuate reforms that better address the underlying structural concerns.

#### I. STRUCTURAL PROBLEMS, INDIVIDUAL RIGHTS

The landscape of modern criminal justice looks very different from that of two centuries ago when trials were the norm, criminal codes were vastly smaller, and local citizens provided a real check on prosecutorial and legislative power.<sup>13</sup> For the most part, however, the Court has all but ignored how that landscape has shaped criminal sentencing, limiting its constitutional sentencing law over the past four decades mostly to capital punishment. The Court put blinders on its sentencing case law, insisting that death is different instead of seeing how its concerns might apply more broadly.<sup>14</sup>

*Graham* and *Apprendi* were the Court's first real responses to the structural imbalances that characterize modern noncapital sentencing practices, and they came in the form of disparate Sixth and Eighth Amendment holdings about individual rights. Section I.A lays out the chief features of sentencing's imbalance. Section I.B offers a fresh interpretive account of the *Graham* and *Apprendi* lines to highlight the principles they have in common. The decisions rest on a commitment to morally appropriate, individualized punishment that has a retributive core but that also acknowledges a wide range of other competing punishment considerations. And they accommodate that mix of considerations through procedural checks and balances that draw multiple institutions and actors into sentencing determinations. The Court has most fully articulated those principles in capital sentencing, and they stand in tension with the modern realities described in Section I.A. As Section I.C explains, however, *Graham* and *Apprendi* operationalize those

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13. See, e.g., WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 72–73, 83–84 (2011).

14. Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1196 (2009).

principles haphazardly. By hewing closely to their narrow, rights-based doctrinal frameworks, they obscure the structural and procedural considerations at stake.

#### A. Structural Problems

The structural imbalances of modern criminal justice will be familiar to some readers. Foremost on the list is prosecutors' domination of the process. Prosecutors control sentencing largely through plea bargaining, which disposes of more than 95 percent of criminal cases.<sup>15</sup> Throughout the bargaining process, prosecutors exercise virtually unreviewable discretion in deciding which charges to file, which deals to strike, and which sentences to recommend.<sup>16</sup> This discretion gives them enormous leverage to threaten heavier charges and penalties in order to induce guilty pleas. Like everyone else, prosecutors have their own incentives and ambitions. They tend to use their leverage to move cases through the system quickly and to maximize convictions, thus promoting deterrence and incapacitation.<sup>17</sup> Sentencing and appellate judges mostly rubber-stamp these deals for a variety of reasons: they have busy dockets, they lack information, and defendants rarely complain or appeal because they prefer to avoid heavier post-trial sentences.<sup>18</sup>

Moreover, legislatures enable prosecutors, further skewing the balance of power. Prosecutors' leverage, after all, is only as great as the charges and punishments they can threaten. Today's criminal codes offer prosecutors an almost limitless range of crimes and likely penalties from which to choose when prosecuting a given bad act. Both popular politics and interest-group pressures mean that legislators benefit politically from taking tough-on-crime stances and from ensuring that prosecutors have the tools they need to do their jobs.<sup>19</sup> Legislators also necessarily define crimes prospectively and generally, with little knowledge of how courts will construe them or what mix of cases prosecutors will bring under them.<sup>20</sup> They thus have incentives

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15. Barkow, *Separation of Powers*, *supra* note 9, at 1049; see *2012 Sourcebook of Federal Sentencing Statistics* fig.C, U.S. SENT'G COMMISSION, [http://www.ussc.gov/Data\\_and\\_Statistics/Annual\\_Reports\\_and\\_Sourcebooks/2012/FigureC.pdf](http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2012/FigureC.pdf) (last visited May 13, 2013) (indicating that federal guilty plea rates for the years 2008–2012 ranged between 96 and 97 percent).

16. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2125 (1998); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 *WASH. & LEE L. REV.* 1587, 1596–600 (2010).

17. See, e.g., Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 *COLUM. L. REV.* 1655, 1707–08 (2010); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 *CALIF. L. REV.* 1471, 1498–500 (1993).

18. See, e.g., GEORGE FISHER, *PLEA BARGAINING'S TRIUMPH* 91, 123–27 (2003).

19. See Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 729–30 (2005) [hereinafter Barkow, *Administering Crime*]; Barkow, *Separation of Powers*, *supra* note 9, at 1030; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 552–57 (2001).

20. Stuntz, *supra* note 19, at 547.



to create broad and deep codes, delegating enforcement details to prosecutors.<sup>21</sup> Prosecutors, in turn, exploit this dynamic to further their own interests, lobbying legislators for even broader power and still more discretion.<sup>22</sup> In many cases, prosecutors have incentives to advocate for a tougher statutory sentence than even they believe is appropriate for a given crime just to increase their bargaining power, and legislators often have incentives to give it to them.<sup>23</sup>

This cycle has been accompanied by (and has contributed to) escalating penalties across the board. Mandatory minimum sentences are now common for many crimes, hemming in judges' discretion.<sup>24</sup> The truth-in-sentencing movement has abolished discretionary parole in many jurisdictions and has vastly curtailed it in a number of others.<sup>25</sup> Guidelines regimes have added yet another level of rigidity to sentencing. And convictions for even the most low-level crimes now often trigger a litany of collateral consequences, some of which can be worse than the punishment itself.<sup>26</sup> For the most part, these developments have benefitted prosecutors, increasing their plea-bargaining leverage.

The dominance of plea bargaining, the shift in power to prosecutors, and the increase in punitiveness have squeezed other voices, perspectives, and considerations out of the criminal justice system. Plea bargaining occurs early and out of sight, bypassing juries and excluding the views and evidence of other local community members, victims, and defendants that would normally emerge at trial.<sup>27</sup> Where juries and judges were once able to make context-sensitive determinations about an offender's blame and need for punishment, they no longer can. Judges still formally sentence defendants,

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21. See *id.* at 547–49; see also Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 27–28 (1997).

22. The story of the Feeney Amendment to the PROTECT Act, in which the Department of Justice successfully lobbied for restrictions on and prosecutorial approval of downward departures under the Federal Sentencing Guidelines, is just one of many illustrations. See Daniel Richman, *Political Control of Federal Prosecutions: Looking Back and Looking Forward*, 58 DUKE L.J. 2087, 2098–99 (2009); see also Barkow, *Administering Crime*, *supra* note 19, at 728 & n.25 (providing additional examples).

23. Barkow, *Administering Crime*, *supra* note 19, at 728; Stuntz, *supra* note 19, at 537; see also STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 47 (2012).

24. See, e.g., FISHER, *supra* note 18, at 210–19; Beale, *supra* note 21, at 27–28; Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1152 (2005); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 200–14 (1993).

25. JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST. JUSTICE POLICY CTR., *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* 4–7 (2002), available at [http://www.urban.org/UploadedPDF/310583\\_Beyond\\_prison\\_gates.pdf](http://www.urban.org/UploadedPDF/310583_Beyond_prison_gates.pdf); see also Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1750–51 (2012) (discussing the dramatic decline in discretionary parole during recent decades).

26. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) (dealing with deportation as a collateral consequence of a criminal conviction).

27. See Richard A. Bierschbach & Stephanos Bibas, *Notice-and-Comment Sentencing*, 97 MINN. L. REV. 1, 13–16 (2012).

but judges who do not preside over trials have little evidence to inform their sentencing discretion, and their hands are often tied anyway by a combination of mandatory minima, guidelines, and prosecutors' charging decisions.<sup>28</sup> The curtailment of parole has also eliminated discretion on the back end.<sup>29</sup> It has taken the parole board's views off the table and rendered evidence of eventual remorse, apology, rehabilitation, and the like largely irrelevant to an offender's sentence. Where parole still exists, it overwhelmingly focuses on risk management, and parole boards tend to consist of risk-averse political appointees with no incentives to give offenders a second chance.<sup>30</sup> Even executive clemency, for decades a real safety valve for correcting injustices and dispensing mercy, has all but disappeared.<sup>31</sup>

### B. Constitutional Design

#### 1. Moral Appropriateness, Individualization, Checks and Balances

*Graham* and *Apprendi* rest on a cluster of constitutional principles that stands in tension with this modern picture. The Court has articulated those principles in various ways over the years, expressing them most fully—if still imperfectly—in its capital sentencing decisions. The first is that sentencing is about ensuring morally appropriate judgments, not just case processing. Moral appropriateness is, at its core, retributive. The Eighth Amendment capital punishment cases from which *Graham* evolved—cases like *Roper v. Simmons*,<sup>32</sup> *Atkins v. Virginia*,<sup>33</sup> and others decades before them<sup>34</sup>—speak the

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28. See *id.* at 10–11.

29. Between 1976 and 1999, the fraction of parole releases that were discretionary fell from 65 percent to 24 percent; in other words, more than three-quarters of parole releases are now automatic by operation of law. TRAVIS & LAWRENCE, *supra* note 25, at 4–5.

30. See W. David Ball, *Normative Elements of Parole Risk*, 22 STAN. L. & POL'Y REV. 395, 397–98 (2011); Bierschbach, *supra* note 25, at 1781–82; Alexandra Marks, *For Prisoners, It's a Nearly No-Parole World*, CHRISTIAN SCI. MONITOR, July 10, 2001, at 1, available at <http://www.csmonitor.com/2001/0710/p1s4.html>; see also Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1248 (2011) (noting a “precipitous decline” in the availability of parole in the last three decades of the twentieth century).

31. See Daniel T. Kobil, *Should Mercy Have a Place in Clemency Decisions?*, in FORGIVENESS, MERCY, AND CLEMENCY 36, 37 (Austin Sarat & Nasser Hussain eds., 2007) (citing a survey of commutations from 1995 to 2003 that found that “most states averaged fewer than one hundred commutations . . . with thirty-four states . . . having dispensed twenty or fewer”); *Presidential Clemency Actions by Administration: 1945 to Present*, U.S. DEP'T JUST., [http://www.justice.gov/pardon/actions\\_administration.htm](http://www.justice.gov/pardon/actions_administration.htm) (last updated Apr. 4, 2011) (documenting steady decrease in presidential grants of clemency petitions from 36 percent under President Nixon to 1.8 percent under President George W. Bush).

32. 543 U.S. 551 (2005).

33. 536 U.S. 304 (2002).

34. See, e.g., *Tison v. Arizona*, 481 U.S. 137, 149 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Woodson v. North Carolina*, 428 U.S. 280, 304–05 (1976) (plurality opinion). See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 364–66,

general language of retributive desert. As Justice White wrote in *Enmund v. Florida*, when imposing the death penalty, an offender's "punishment must be tailored to his personal responsibility and moral guilt."<sup>35</sup> It must, in other words, "measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."<sup>36</sup> In part for that reason, the Court's substantive proportionality cases make retributive principles—comparing the culpability of offenders and the severity of their punishments with those of other offenders—a critical part of their analysis.<sup>37</sup> (By contrast, until *Graham*, the Court's Eighth Amendment cases had largely abjured tying non-capital sentencing to retributive desert.)<sup>38</sup>

At the same time, the Court's retributivism is neither pure nor static. It is popular, not philosophical. The Court looks to evidence of community consensus to help give content to punishment norms, giving great weight to state legislative judgments, on-the-ground sentencing practices, and other indicia of popular views of moral appropriateness.<sup>39</sup> In applying its own independent judgment to assess proportionality, the Court also weighs punishments against a spectrum of nonretributive ends, such as deterrence, incapacitation, and especially rehabilitation and reformation.<sup>40</sup> And when it comes to tailoring capital sentencing determinations to ensure just punishment, the Court does not limit the sentencing inquiry to retributive considerations. Instead, it requires sentencers to consider a nearly unlimited range

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372–78 (1995) (discussing the Court's goal of ensuring deserved punishment in capital sentencing and its doctrinal efforts to implement it).

35. *Enmund*, 458 U.S. at 801.

36. *Id.*

37. See, e.g., *Roper*, 543 U.S. at 568–72; *Atkins*, 536 U.S. at 317–21; see also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 721–30 (2005) (discussing the role of desert in the Supreme Court's substantive proportionality cases).

38. See, e.g., *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (plurality opinion) (holding that a sentence of twenty-five years to life for the theft of three golf clubs was "not grossly disproportionate and therefore [did] not violate the Eighth Amendment[ ]" (emphasis added)); *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (rejecting a requirement of individualized sentencing in noncapital cases and holding that a sentence of LWOP for a first-time felon convicted of possessing 672 grams of cocaine was not disproportionate under the Eighth Amendment).

39. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2023–26 (2010); *Roper*, 543 U.S. at 564–67; *Atkins*, 536 U.S. at 314–17; *Woodson*, 428 U.S. at 295–96 (plurality opinion).

40. See, e.g., *Ewing*, 538 U.S. at 30; *Atkins*, 536 U.S. at 319–20; *Gregg v. Georgia*, 428 U.S. 153, 184–86 (1976) (plurality opinion); see also Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 58–59 (2010) (discussing the "purposes of punishment test" and stating that the Court has resisted commitment to a specific theory of punishment); Carol S. Steiker, Commentary, *Panetti v. Quarterman: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290 (2007) ("In the [Eighth Amendment] morass . . . one theme has remained consistent: the Court insists that the Constitution is agnostic when it comes to penological purposes.").

of factors—forward- and backward-looking, retributivist and consequentialist—as potential mitigating circumstances.<sup>41</sup> In the Court’s eyes, moral appropriateness is a fluid concept that contemplates an eclectic range of inputs.<sup>42</sup> Retributivism still focuses on common-sense intuitions and judgments about culpability, harm, and blame, but it is tempered by a wide variety of other considerations.<sup>43</sup> Desert as a sentencing principle is as much a social and practical construct as it is a philosophical one, at least as a matter of positive constitutional law.<sup>44</sup>

Desert also requires an individualized, granular inquiry. Legislative delegations and nose counting are relevant only to a point. Legislative judgments can establish moral appropriateness at the broadest, wholesale level. And, within bounds, rules can promote equal treatment and political accountability. But rules are by their nature overinclusive; they cannot capture every nuance or factor that might take an offender outside the heartland of a given sentencing statute.<sup>45</sup> The Court has thus recognized the inherent limits of legislatures’ ability to make final and categorical sentencing judgments *ex ante*.<sup>46</sup> Mandatory death sentences have been unconstitutional since the

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41. See, e.g., *McKoy v. North Carolina*, 494 U.S. 433, 436–37 (1990); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (plurality opinion), *abrogated by Atkins*, 536 U.S. at 321; *Mills v. Maryland*, 486 U.S. 367, 370 (1988); *Sumner v. Shuman*, 483 U.S. 66, 82 (1987); *Hitchcock v. Dugger*, 481 U.S. 393, 397 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 6–7, 14 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 115–16 (1982); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion).

42. See Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 301–02 (1991) (observing that *Lockett’s* individualization requirement “contains no reference to any particular moral theory or theories” and instead embraces a principle of “moral neutrality”); Stephen P. Garvey, “*As the Gentle Rain from Heaven: Mercy in Capital Sentencing*,” 81 CORNELL L. REV. 989, 1011 (1996) (discussing the “laissez-faire character” of the capital sentencing mitigation inquiry); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 853 (1992) (reviewing BEVERLY LOWRY, *CROSSED OVER: A MURDER, A MEMOIR* (1992)) (noting that “there is no substantive limitation at all on a defendant’s ability to present” or the sentencer’s discretion to consider mitigating factors when making an individualized determination of whether to impose a death sentence).

43. See, e.g., *Graham*, 130 S. Ct. at 2026–28; *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

44. Cf. Youngjae Lee, *Desert, Deontology, and Vengeance*, 42 ARIZ. ST. L.J. 1141, 1142 (2011) (largely endorsing “[Paul] Robinson’s view that the criminal law’s desert judgments should . . . closely resemble ordinary intuitions of desert”).

45. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 177–99 (2004); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 588–93 (1992). See generally FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991).

46. *McGautha v. California*, 402 U.S. 183, 204 (1971) (“To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.”), *vacated*, 408 U.S. 941 (1972); *Williams v. New York*, 337 U.S. 241, 247 (1949); Bilionis, *supra* note 42, at 290 (“[A]ll mandatory schemes by their nature circumscribe the range of moral considerations that are taken into account in an individual case to those which happen to be reflected in the substantive criminal law’s doctrinal provisions.”).

Court decided *Woodson v. North Carolina* in 1976.<sup>47</sup> In their place, the Court insisted on individualization. The *Woodson/Lockett/Eddings* trilogy emphasized that sentencers could ensure “a just and appropriate sentence” only by “consider[ing] . . . the character and record of the individual offender and the circumstances of the particular offense.”<sup>48</sup> Statutory restrictions on allowable mitigating factors unduly restricted that task, frustrating the fine-grained, particularized inquiry that was a “constitutionally indispensable part of the process of inflicting the penalty of death.”<sup>49</sup> (As with moral appropriateness, the Court, until *Miller*, limited its Eighth Amendment individualization requirement to capital cases.)<sup>50</sup>

Finally, just sentencing contemplates a diffusion of power among multiple institutional actors within a liberal democracy. Modern capital sentencing schemes reflect this insight. Legislatures make initial, broad sentencing judgments *ex ante* by laying out the criteria for death-eligible crimes.<sup>51</sup> The Court has barred all death sentences for certain categories of defendants (such as juveniles and insane and mentally retarded defendants) and crimes (such as rape).<sup>52</sup> Prosecutors then make first-cut, individualized, *ex post* sentencing judgments by deciding whether to file capital charges. Juries further individualize, assessing every capital case not once but twice: first at the guilt phase, when they decide whether the evidence supports conviction for a death-eligible crime, and again at the sentencing phase, when they decide whether death is the appropriate punishment.<sup>53</sup> Judges also independently review death sentences at a variety of stages: at charging, when they can question the sufficiency of the evidence supporting a capital charge; immediately after trial, when they typically review jury verdicts for the death penalty to ensure that they are appropriate; and again on direct and collateral

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47. 428 U.S. 280, 301, 305 (1976) (plurality opinion).

48. *Woodson*, 428 U.S. at 304.

49. *Id.*

50. See *Ewing v. California*, 538 U.S. 11, 20–24 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 995–96 (1991).

51. See *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976) (plurality opinion) (requiring statutorily defined aggravating circumstances before capital punishment may be constitutionally imposed); Douglas Berman, *Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & CIV. RTS. L. REV. 429, 431 (2010) (“[Legislators] must specify with some precision what particular aggravating circumstances make a particular crime ‘death-worthy.’”); Steiker & Steiker, *supra* note 34, at 373–89 (discussing how capital sentencing statutes attempt to channel sentencer discretion and narrow the class of death-eligible offenders).

52. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (forbidding the death penalty for crimes committed while under the age of eighteen); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (forbidding execution of mentally retarded defendants); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986) (forbidding execution of insane defendants); *Coker v. Georgia*, 433 U.S. 584, 597–600 (1977) (plurality opinion) (forbidding the death penalty for the crime of raping an adult woman).

53. Berman, *supra* note 51, at 432; see also Alyssa Connell Lareau & Grant Henrichsen Willis, *Thirty-First Annual Review of Criminal Procedure: Capital Punishment*, 90 GEO. L.J. 1838, 1845–47 (2002).

appeal, the former of which is automatic in capital cases.<sup>54</sup> Even governors pay close attention to clemency issues in capital cases, as the executive-imposed moratoria in Illinois and Oregon show.<sup>55</sup>

Although the Court has not formally required the vast bulk of these procedures as an Eighth Amendment matter, it has viewed most of them as critical to the constitutionality of capital sentencing.<sup>56</sup> The Court's constitutional regulation of the death penalty has thus resulted in a system in which capital sentencing determinations are filtered through multiple viewpoints that act as vetogates, giving each actor a chance to influence the process and kick the defendant out of the pipeline. The Court has emphasized that this procedural system, in which different institutional actors have input at various points on punishment determinations, enhances the reliability and legitimacy of capital sentencing.<sup>57</sup> Checks and balances, in short, advance the individualized, morally appropriate determinations at which sentencing aims. Capital sentencing seeks to promote substantively just punishments largely by regulating procedures and structures.

One additional aspect of substantive justice is equality, which likewise implicates a range of institutions and actors. Concerns about equality and arbitrariness in the administration of the death penalty were critical to the

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54. See *Gregg*, 428 U.S. at 204–07 (1976) (discussing Georgia's statutory requirement for a trial court to review a jury's verdict for the death penalty against the facts of the case before affirming the penalty's imposition, as well as the Georgia Supreme Court's "sentence-review function"); see also VA. CODE ANN. § 19.2-264.5 (2008) ("When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just."); Berman, *supra* note 51, at 431.

55. See Joseph L. Hoffmann & Nancy J. King, *Improving Criminal Justice: How Can We Make the American Criminal Justice System More Just?*, 95 JUDICATURE 59, 59 (2011) ("In Illinois . . . shocking revelations about innocent men on death row led first to a moratorium on executions, and eventually to the abolition of capital punishment altogether."); Jonathan J. Cooper, *Ore. Governor Bans Death Penalty for Rest of Term*, WASH. TIMES (Nov. 23, 2011), <http://www.washingtontimes.com/news/2011/nov/23/ore-governor-bans-death-penalty-rest-term> (reporting on Oregon governor John Kitzhaber's decision to issue a reprieve to any prisoner facing execution).

56. See, e.g., *Gregg*, 428 U.S. at 198 (emphasizing the importance of a state's automatic appellate review of death sentences in determining whether the state's death penalty statute is constitutional); Steiker & Steiker, *supra* note 34, at 371–96 (reviewing the constitutional framework for regulation of capital punishment).

57. See *Clemons v. Mississippi*, 494 U.S. 738, 749 (1990) ("[T]his Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency."); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (plurality opinion) ("[S]ince the judge found, in disagreement with the jury, that the evidence did not establish any mitigating circumstance, and since the presentence report was the only item considered by the judge but not by the jury, the full review of the factual basis for the judge's rejection of the advisory verdict is plainly required."); *Gregg*, 428 U.S. at 206 ("The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty.").

Court's constitutional regulation of capital sentencing.<sup>58</sup> Those concerns have received less overt attention (so far) in the Court's constitutional turn to noncapital sentencing. But they are still part of the story. At sentencing, the justice system struggles to pursue two competing strands of equality at the same time: treating like cases alike while treating unlike cases unlike. The former implicates the wholesale, *ex ante* generalizations that are often the province of legislatures and sentencing commissions, while the latter requires retail judgments *ex post* by courts and prosecutors. The former emphasizes rule-of-law values such as predictability, stability, transparency, and accountability to voters; the latter focuses on individualized judgment calls that are hard to codify or even anticipate. In recent decades, many jurisdictions have emphasized uniformity at the expense of individualization, for example by enacting mandatory minimum sentences and binding sentencing guidelines (especially the federal guidelines). The tension between uniformity and individualization raises the fundamental question of what blend of actors should have the final say at sentencing. *Graham* and *Apprendi*, the next Section explains, do the same.

## 2. *Graham*, *Apprendi*, and Sentencing Design

The interplay of checks and balances, individualization, and morally appropriate punishments described above is latent in both the *Graham* and *Apprendi* lines.

### a. *Graham*

Like the Eighth Amendment cases that preceded them, *Graham* and *Miller* took moral appropriateness as their baseline when evaluating the constitutionality of LWOP for juvenile offenders. Justice Kennedy in *Graham* and Justice Kagan in *Miller* stressed juveniles' immaturity, impressionability, and plasticity as reasons why juveniles cannot categorically be said to deserve LWOP, even for homicides.<sup>59</sup> The conception of desert at work in their opinions is again eclectic and elastic. Many of the factors emphasized by the *Graham* and *Miller* majorities—capacity for change, potential for rehabilitation, possibility of outgrowing one's worst act—are difficult to square with a purely retributive approach to desert.<sup>60</sup> The same is true of many of the mitigating circumstances that sentencers must hear under *Woodson/Lockett/Eddings*.<sup>61</sup> Indeed, without some substantive criteria requiring release, it is

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58. See, e.g., *Gregg*, 428 U.S. at 193–95; *Furman v. Georgia*, 408 U.S. 238, 253–57 (1972) (Douglas, J., concurring); *id.* at 275, 277, 295 (Brennan, J., concurring); *id.* at 310 (Stewart, J., concurring); see also Steiker & Steiker, *supra* note 34, at 378–89.

59. *Miller v. Alabama*, 132 S. Ct. 2455, 2467–68 (2012); see also *Graham v. Florida*, 130 S. Ct. 2011, 2029 (2010).

60. See Bierschbach, *supra* note 25, at 1782–85.

61. See *supra* notes 40–44 and accompanying text.

far from clear how parole itself would fit into a retributive approach to punishment.<sup>62</sup> The Court nevertheless viewed the possibility of parole as critical, which shows that it did not care whether its vision was philosophically tidy. Its point instead was that mandating (in *Miller*) or allowing (in *Graham*) LWOP undermined moral appropriateness by making juveniles' unique circumstances irrelevant to sentencing.<sup>63</sup>

The Court's remedy was to require some opportunity to individualize and take those personal circumstances into account. For juveniles who committed homicide, *Miller* required individualization at the initial sentencing by striking down mandatory LWOP and requiring front-end sentencers to weigh the appropriateness of LWOP case by case instead (while pointedly noting that its imposition would likely be rare).<sup>64</sup> For juveniles who did not commit homicide, *Graham* required a second chance at individualization later in the form of a parole hearing.<sup>65</sup> And while *Graham* framed its rule as a substantive limit on punishment, *Miller* later explicitly linked its holding to individualization.<sup>66</sup> Invoking *Woodson/Lockett/Eddings*, Justice Kagan wrote that "mandatory penalties . . . preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it" and that "a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty."<sup>67</sup>

Of course, as a functional matter, sentencing hearings are not the only time and place at which punishment is determined. Sentencing is a pipeline in which decisions upstream greatly influence punishment determinations downstream.<sup>68</sup> In a world of plea bargaining and sentencing guidelines, prosecutors have at least as much effective sentencing power as do judges. In theory, prosecutors could individualize as well, charging only the most deserving juveniles with crimes that can trigger LWOP. So too could judges at the point of transfer (often called waiver) of a juvenile from the juvenile

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62. See Bierschbach, *supra* note 25, at 1752–66.

63. See *Miller*, 132 S. Ct. at 2466 ("By removing youth from the balance . . . [laws mandating LWOP sentences] prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionally punishes a juvenile offender."); *Graham*, 130 S. Ct. at 2027–30 ("By denying the defendant the right to reenter the community, the State makes an irrevocable judgment about that person's value and place in society. This judgment is not appropriate in light of a juvenile nonhomicide offender's capacity for change and limited moral culpability.").

64. *Miller*, 132 S. Ct. at 2469.

65. *Graham*, 130 S. Ct. at 2030 ("[T]he State must . . . give [juvenile, nonhomicide] defendants . . . some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."); see also Bierschbach, *supra* note 25, at 1776 (observing that *Graham* "diversif[ied] sentencing across time and institutions").

66. See *Graham*, 130 S. Ct. at 2028–30.

67. *Miller*, 132 S. Ct. at 2467, 2469.

68. Bierschbach & Bibas, *supra* note 27, at 37.



courts into the criminal courts.<sup>69</sup> Alabama and Arkansas argued as much in *Miller*.<sup>70</sup>

*Graham* and *Miller* recognized that things do not work that way in practice. Waiver from juvenile to criminal courts, which historically required an individualized, case-by-case judicial determination as an independent check on the prosecution of juveniles, is now often mandatory or left to prosecutors' sole discretion.<sup>71</sup> Where it is mandatory, legislatures may not have thought through the interplay of automatic waiver with mandatory and generally applicable sentencing laws that appear in far-removed sections of code.<sup>72</sup>

Even where judges retain some discretion, it has "limited utility."<sup>73</sup> Judges at the waiver stage often have little information. They do not know what they will learn about the offender or the offense over the course of later proceedings. Furthermore, the procedural rights that would help a juvenile to make a case against waiver—for example, the right to put on a mental health expert, which the juvenile in *Miller* unsuccessfully attempted to do—do not kick in until trial.<sup>74</sup> The all-or-nothing nature of waiver also presents judges with "a choice between extremes": the light punishment as a child that many juvenile systems require versus the standard, undifferentiated, harsh punishment that applies to an adult.<sup>75</sup> Judges who otherwise would take a middle course might err on the side of caution.<sup>76</sup> Prosecutors face the same calculus in states that commit waiver exclusively to their discretion. The *Miller* Court noted that prosecutorial waiver statutes "are usually silent

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69. Waiver or transfer is a necessary prerequisite for bringing criminal charges against juveniles tried as adults. See, e.g., NAT'L RESEARCH COUNCIL & INST. OF MED., JUVENILE CRIME, JUVENILE JUSTICE 206–09 (Joan McCord et al. eds., 2001).

70. See *Miller*, 132 S. Ct. at 2474.

71. See, e.g., Martha Rossiter, Comment, *Transferring Children to Adult Criminal Court: How to Best Protect Our Children and Society*, 27 J. JUV. L. 123, 126, 128–31 (2006) (reviewing and critiquing mandatory waiver laws); Melissa A. Scott, Comment, *The "Critically Important" Decision of Waiving Juvenile Court Jurisdiction: Who Should Decide?*, 50 LOY. L. REV. 711, 712, 728–29 (2004) (reviewing factors to be considered in waiver decisions); see also ARK. CODE ANN. § 9-27-318(a) (2009) (restricting the state's use of juvenile delinquency proceedings to cases involving juveniles under age fifteen or juveniles under age eighteen whose conduct would have constituted a misdemeanor if committed by an adult); GA. CODE ANN. § 15-11-28(b)(2)(A) (2012) (providing criminal court with exclusive jurisdiction over children ages thirteen to seventeen who are alleged to have committed certain serious felonies).

72. See *Miller*, 132 S. Ct. at 2473; *Graham v. Florida*, 130 S. Ct. 2011, 2025–26 (2010); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 718–20 (1998) (noting "the possibly unanticipated interplay" of waiver and mandatory punishment statutes "often contained in disparate sections of a State's statute books" and observing that "it is unclear whether legislators comprehend the actual consequences of their radical measures to overhaul criminal justice").

73. *Miller*, 132 S. Ct. at 2474.

74. *Id.*

75. *Id.*

76. See *id.* at 2474–75. That is particularly true for elected state judges faced with a juvenile who has committed a serious crime.

regarding standards, protocols, or appropriate considerations for decision-making.<sup>77</sup> It might have added that prosecutors seeking maximum leverage frequently use waiver as a plea-bargaining chip rather than an equitable tool of individualized justice.<sup>78</sup>

These observations from *Graham* and *Miller* also touch on a broader theme. They recognize, at least implicitly, that the fundamental structure of juvenile justice is unbalanced. The same imbalances that skew criminal justice—harsh penalties, overbroad laws that shift power to prosecutors and tie judges’ hands, and a lack of safety valves—infect juvenile justice even more. *Graham* and *Miller* can be seen as the Court’s first, tentative steps to restore some checks and balances to the system, much as the Court groped its way toward a similar end in its early capital punishment cases.<sup>79</sup>

#### b. Apprendi

If the *Graham* and *Miller* approach to checks and balances was implicit and functionalist, focusing on the realities of juvenile justice and adolescent development, *Apprendi*’s approach was explicit and formalist, stressing the jury’s position as fact finder in our constitutional system of separated powers. In applying the jury-trial guarantee to New Jersey’s hate-crime statute, the Court emphasized the jury’s role in “guard[ing] against a spirit of oppression and tyranny on the part of our rulers.”<sup>80</sup> Rachel Barkow, William Stuntz, and others have shown how the jury’s historical prerogative to render unreviewable judgments of acquittal acted as a powerful check on the authority of legislatures, executives, and judges.<sup>81</sup> The Court’s bright-line rule embraced that vision, tying the jury-trial right to any facts that raise

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77. *Id.* at 2474 (quoting PATRICK GRIFFIN ET AL., OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPT. OF JUSTICE, TRYING JUVENILES AS ADULTS: AN ANALYSIS OF STATE TRANSFER LAWS AND REPORTING 5 (2011), available at <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf>).

78. See Lisa S. Beresford, Comment, *Is Lowering the Age at Which Juveniles Can Be Transferred to Adult Criminal Court the Answer to Juvenile Crime? A State-by-State Assessment*, 37 SAN DIEGO L. REV. 783, 806 (2000) (“[T]he state can use the potential for transfer and the ability to appeal transfer decisions as a bargaining chip.”); Lisa A. Cintron, Comment, *Rehabilitating the Juvenile Court System: Limiting Juvenile Transfers to Adult Criminal Court*, 90 NW. U. L. REV. 1254, 1267 (1996) (discussing the incentives for even innocent juveniles to take pleas that will keep them in juvenile court).

79. See Steiker & Steiker, *supra* note 34, at 364–403 (exhaustively reviewing the development of the Court’s capital punishment case law).

80. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); see also *Jones v. United States*, 526 U.S. 227, 245 (1999) (noting the jury’s historical “power to thwart Parliament and Crown”).

81. STUNTZ, *supra* note 13, at 30, 304; Barkow, *Recharging the Jury*, *supra* note 9, at 48–65; see also Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 750–68 (2010).

statutory or (as *Blakely* and *Booker* later made clear) guidelines-based maximum sentences.<sup>82</sup> Whereas *Graham* and *Miller* shifted authority from legislatures to judges at the front end of the process and from judges to parole boards at the back end, *Apprendi* sought to shift authority from legislatures and judges to juries.

Individualization and moral appropriateness figured critically in the *Apprendi* line as well, although it takes some work to see how. Doctrinally, we usually think of these concepts as Eighth Amendment requirements. *Apprendi* approached sentencing via the Sixth Amendment, resting on the jury's historical prerogative to find all elements of a crime.<sup>83</sup> Today, finding facts that constitute elements of a crime is not the same as determining an individual defendant's sentence.<sup>84</sup> At common law, however, "[t]he substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense."<sup>85</sup> In such cases, the jury's verdict determined the defendant's sentence. Juries also retained the power to find the defendant guilty of any lesser-included offense. Juries, as the Court observed in *Beck v. Alabama*, could thus "create[ ] their own sentencing discretion" by acquitting a defendant of a more serious charge.<sup>86</sup> Early juries in both England and the colonies did so with some regularity where they believed a sanction too harsh as applied to a particular defendant.<sup>87</sup>

The Sixth Amendment thus guarantees juries a role as the "conscience of the community," best situated to inject common-sense moral judgment into concrete cases.<sup>88</sup> The jury's role is "to fit the circumstances of individual cases"<sup>89</sup> and make the "context-specific, retrospective assessments of the offender and his wrongdoing [that] are intrinsic to just punishment."<sup>90</sup> Again, while individual prosecutors could in theory also make such judgments during charging and bargaining, the realities of prosecutorial decisionmaking

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82. *United States v. Booker*, 543 U.S. 220, 230–33 (2005); *Blakely v. Washington*, 542 U.S. 296, 303–04 (2004); *Apprendi*, 530 U.S. at 490.

83. *Apprendi*, 530 U.S. at 476–77.

84. Indeed, as we discuss below, modern juries do not even know the potential sentences that their verdicts will authorize. See *infra* notes 113–114 and accompanying text.

85. *Apprendi*, 530 U.S. at 479.

86. 447 U.S. 625, 640 (1980).

87. See THOMAS ANDREW GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200–1800*, at 313–15, 360 (1985) (analyzing the history of jury discretion together with official acquiescence in the exercise of that discretion); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 54–55 (1983).

88. *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968); see also Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 382 (2003) (arguing that "[b]ecause of its ability to render individualized judgments and to reconcile conflicting views through deliberation rather than aggregation," the jury is best suited for making democratically and morally legitimate sentencing judgments).

89. WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 28–29 (2d ed. 1994).

90. Kyron Huigens, Correspondence, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 818 (2002).

are different. Individual sentencing judges have somewhat more leeway, but even their hands are often tied by mandatory sentences, guidelines, and prosecutors' upstream decisions. Even when judges do have room to make sentencing decisions, they "lack[ ] the community perspective of the jury."<sup>91</sup> As Jenia Iontcheva explains, "Because of their deliberative capacity and democratic makeup, juries are better situated . . . to perform the sensitive tasks of deciding between contested sentencing goals and applying the law with due regard for the individual circumstances of each offender."<sup>92</sup> The jury acts as a critical institutional check on prosecutorial and legislative overreaching, bringing individualized, community judgment to bear.<sup>93</sup> That need to fit the punishment to the crime explains *Apprendi's* emphasis on the jury's role in "authoriz[ing]" a particular maximum punishment in a particular case by its guilty verdict.<sup>94</sup>

These structural aspects of the jury's role in ensuring just, individualized punishment share much in common with the institutional-design features of *Woodson/Lockett/Eddings*, *Graham*, and *Miller*. The Court's *Apprendi* jurisprudence has not engaged these parallels, rigidly tying the jury's checking function to its fact-finding power.<sup>95</sup> But some individual justices have acknowledged the connection. Justice Stevens, who authored *Apprendi*, has twice argued that the Eighth Amendment requires jury sentencing in capital cases because juries "more accurately reflect the conscience of the community than can a single judge" and are best suited for making the textured, granular, and fundamentally normative judgments that give punishment decisions their "moral and constitutional legitimacy."<sup>96</sup> Justice Breyer embraced the same view in *Ring v. Arizona*.<sup>97</sup> *Ring* applied *Apprendi* to require jury fact-finding of aggravating factors in capital cases.<sup>98</sup> Justice Breyer, the standard-bearer for the *Apprendi* dissenters, concurred in the judgment on the ground that the Eighth Amendment, not the Sixth, required jury sentencing in such cases.<sup>99</sup> Juries, he noted, possess a unique comparative advantage over judges in assigning blame because "they are more attuned to

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91. Barkow, *Recharging the Jury*, *supra* note 9, at 85. Judges also lack juries' insulation from appellate review at the behest of the government. *See id.* at 48–49, 60–61.

92. Iontcheva, *supra* note 88, at 350; *see also* Barkow, *Recharging the Jury*, *supra* note 9, at 72–93 & nn.178–81.

93. That is not to say that juries have worked perfectly in practice or that they are essential in the abstract to fair punishment. *See infra* text accompanying notes 151–152.

94. *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000); *accord* *Blakely v. Washington*, 542 U.S. 296, 305 (2004) (establishing that "the jury's verdict alone does not authorize the sentence" ultimately imposed).

95. *See* *United States v. Booker*, 543 U.S. 220, 244 (2005); *Blakely*, 542 U.S. at 312–13; *Ring v. Arizona*, 536 U.S. 584, 609 (2002).

96. *Spaziano v. Florida*, 468 U.S. 447, 483, 487, (1984) (Stevens, J., concurring in part and dissenting in part); *see also* *Harris v. Alabama*, 513 U.S. 504, 515–26 (1995) (Stevens, J., dissenting).

97. 536 U.S. at 614 (Breyer, J., concurring in the judgment).

98. *Id.* at 606–08 (majority opinion).

99. *Id.* at 613–19 (Breyer, J., concurring in the judgment).

the community's moral sensibility."<sup>100</sup> Even Justice Scalia, who rejected Justice Breyer's approach in *Ring*,<sup>101</sup> has noted the overlap. He observed that the *Woodson/Lockett/Eddings* requirement that sentencing juries be allowed to consider all mitigating evidence "meant to ensure that [they] would function as a 'link between contemporary community values and the penal system.'"<sup>102</sup>

### C. *The Limits of Rights-Based Solutions*

Despite their structural dimensions, both the *Graham* and *Apprendi* lines took a narrow doctrinal approach to the issues before them. The institutional design features just discussed are often immanent in the decisions, lying just below the surface. Doctrinally, the cases sound in individual rights: the Eighth Amendment's right to avoid suffering "cruel and unusual punishments" in *Graham* and the Sixth Amendment's "right to . . . trial[ ] by an impartial jury" on all elements of a crime in *Apprendi*.<sup>103</sup> The Court had to root its doctrinal analysis somewhere, and those Amendments may well have been the best candidates. The Constitution, after all, hardly guarantees perfection in either criminal justice or constitutional interpretation. But by hewing closely to that constitutional frame, the decisions warped the Court's responses to the problems and obscured broader systemic considerations.

Take *Graham* and *Miller* first. Both decisions rested on the Eighth Amendment's individual rights framework of substantive proportionality. But neither is easily explainable using traditional substantive-proportionality concepts, which forced the Court to bend existing doctrine to justify the cases. For example, by its own terms, *Graham* does not prevent juveniles from being denied parole and spending their lives in prison.<sup>104</sup> It is hard to see how such a discretionary life sentence is less disproportionate than a mandatory one without looking to a problematic measure of severity beyond sentence length, such as "expected value" or the hopelessness that can accompany LWOP.<sup>105</sup> Such inquiries could radically expand Eighth Amendment proportionality law, sweeping conditions of confinement and similar circumstances within its scope. *Graham*'s forward-looking focus on

100. *Id.* at 615 (quoting *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part)) (internal quotation marks omitted).

101. *Id.* at 612–13 (Scalia, J., concurring).

102. *Morgan v. Illinois*, 504 U.S. 719, 745 (1992) (Scalia, J., dissenting) (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968)).

103. U.S. CONST. amends. VI, VIII.

104. In his opinion for the Court, Justice Kennedy stressed that the Eighth Amendment neither guaranteed nor required their eventual release; nor did the Court establish any criteria to guide release decisions. *Graham v. Florida*, 130 S. Ct. 2011, 2030, 2034 (2010).

105. See Bierschbach, *supra* note 25, at 1759–64; Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 77 (2010).

juveniles' plasticity also sits uneasily with the Eighth Amendment's traditional retrospective approach to culpability.<sup>106</sup> Moreover, because the prospect of LWOP almost certainly increases deterrence, *Graham's* holding seems to undercut deterrence.<sup>107</sup> That conflicts with the Court's oft-repeated statement that a sentence is not disproportionate so long as it serves a legitimate penological end.<sup>108</sup>

The individual rights framework also masks internal inconsistencies between *Graham* and *Miller* themselves. Viewed through the lens of substantive proportionality, the decisions are not much in tension. If one sets aside the doctrinal issues just mentioned and accepts that LWOP is more severe than life with the possibility of parole, the approach makes sense: *Miller* allows discretionary imposition of the more severe punishment for juveniles who have killed, while *Graham* forbids that punishment altogether for juveniles who have committed less serious crimes.

But the picture is murkier if we look at how the decisions allocate sentencing authority. *Miller's* ban on mandatory LWOP shifts sentencing authority from legislatures and prosecutors to judges and juries, who now make the final call on life imprisonment at sentencing. It assumes that judges and juries can be trusted to individualize at the time of sentencing and to forecast whether a juvenile killer must remain in prison for life. But *Graham*, in turn, shifts authority from judges and juries to parole boards, which make the final call on life imprisonment in parole hearings. That runs counter to *Miller* because it suggests that only a parole board can reliably evaluate at a later time whether someone who committed a crime as a juvenile truly deserves a life sentence. Moreover, in requiring an opportunity for parole, *Graham* stressed that juveniles can change and that front-end sentencers cannot judge their "true character" at the outset.<sup>109</sup> But "none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific."<sup>110</sup> If that is true, then it is unclear why the two cases allocated sentencing authority differently.

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106. See Bierschbach, *supra* note 25, at 1757–59.

107. *Graham*, 130 S. Ct. at 2053–54 (Thomas, J., dissenting) ("The Court acknowledges that such sentences will deter future juvenile offenders, at least to some degree, but rejects that penological goal, not as illegitimate, but as insufficient."); see also *Roper v. Simmons*, 543 U.S. 551, 621 (2005) (Scalia, J., dissenting) ("The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false.").

108. See *Graham*, 130 S. Ct. at 2028; *Harmelin v. Michigan*, 501 U.S. 957, 999–1000 (1991) (Kennedy, J., concurring in part and concurring in the judgment). As Justice O'Connor observed in *Ewing v. California*, decisions about penological purposes are generally seen as legislative choices to which reviewing courts owe deference, particularly under principles of federalism. 538 U.S. 11, 25 (2003) (plurality opinion) ("Our traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.'" (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment))).

109. *Graham*, 130 S. Ct. at 2032–33.

110. *Miller v. Alabama*, 132 S. Ct. 2455, 2465 (2012).

The deeper problem is that the Court viewed both cases primarily as matters of substantive individual rights. Thus, it did not say nearly enough about sentencing procedures and structures. For instance, the Court neglected real issues with how parole boards exercise (or fail to exercise) their discretion. That neglect could give front-end sentencers an easy out, push sentencing discretion into an opaque body, and make parole seem possible or likely even if it is rarely granted in practice.<sup>111</sup> In *Miller*, the Court did reject exclusive reliance on wholesale legislative judgments and prosecutorial charging decisions but otherwise barely considered where sentencing discretion should lie and why.

*Apprendi* presents similar issues. The Court again cast its holding in terms of an individual right. And it linked that right to the substantive criminal law by holding that any fact that increases the maximum punishment authorized by law is an element of an offense that must be proved to a jury.<sup>112</sup> But the Court's wooden focus on the right to jury fact-finding ignored the larger goal of ensuring that the system checks and individualizes sentencing. Whereas colonial juries knew the punishment for given crimes and could mitigate sentences by convicting the defendant of a lesser-included offense, today most jurisdictions forbid judges and parties to tell jurors about penalties.<sup>113</sup> Capital juries probably understand that their affirmative findings will authorize the death penalty, but noncapital juries have no similar sense of their role in sentencing. Juries cannot tailor and individualize punishments when they do not know them, no matter how many additional facts they are empowered to find.<sup>114</sup> Thus, although *Apprendi's* and *Blakely's* reasoning sounds in individualization, their holdings fail to accomplish that end.

*Apprendi's* inattention to modern criminal justice, moreover, may have exacerbated its structural imbalances. While *Apprendi* purported to limit legislative power to delegate sentencing enhancements to judges, it could spur more delegation, not less. The formalism of the Court's rule creates incentives for evasion by legislatures that can simply draft around the rule by raising statutory maxima across the board and then allow sentencing judges to mitigate down, either on their own or employing legislatively specified

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111. See Bierschbach, *supra* note 25, at 1779–82.

112. *Apprendi v. New Jersey*, 530 U.S. 466, 495–96 (2000).

113. Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury About Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1242 (1995) (“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.”); see also *Shannon v. United States*, 512 U.S. 573, 580 (1994) (noting the “principle that jurors are not to be informed of the consequences of their verdicts”). While states are permitted to use jury sentencing, only six states use it in noncapital cases. Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886 (2004).

114. See Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 736–37 (1993) (arguing that a mere fact-finding function for the criminal jury would make it an “imperfect check[ ] on the possible abuse of power by legislators, prosecutors, or law enforcement officials”).

mitigating factors.<sup>115</sup> Although the *Apprendi* majority recognized the “hypothetical[ ]” danger of legislative evasion, it believed that “structural democratic constraints” would prevent legislatures from raising maxima above what is “generally proportional to the crime.”<sup>116</sup> But the Court’s faith in those (unspecified) constraints was too rosy because tough-on-crime legislators score points with both voters and prosecutors by circumventing pro-defendant rules when they can.<sup>117</sup>

*Apprendi*’s myopic focus on jury fact-finding at trial also likely strengthened prosecutors’ already-dominant hand in plea bargaining. Before *Apprendi*, judges could exercise at least some discretion to consider certain underlying facts when sentencing offenders after plea bargains, so long as they did so within the statutory range. *Apprendi*, however, converted many of those facts into elements of crimes that prosecutors could fix ex ante through charging and hence use as bargaining chips to exact pleas.<sup>118</sup>

By glossing over the systemic values served by the Sixth and Eighth Amendments, both lines of decisions overlooked important structural questions. For instance, if *Apprendi*’s jury-trial right really serves deep structural values, why should it be waivable, as Justice Scalia has stressed that it is?<sup>119</sup> One might think that the right should carry not less but more force in plea bargaining, which invites collusion behind closed doors and bypasses any real judicial checks. Likewise, if “structural democratic constraints” are sufficient to protect against escalating penalties and higher maxima and minima in the Sixth Amendment context, why are they not also sufficient in the Eighth Amendment context? *Miller* slighted Eighth Amendment deference to state legislative judgments, refusing to defer to a near-consensus among states that LWOP is appropriate for juveniles who have killed.<sup>120</sup> The Court’s reasons for doing so apparently had less to do with substantive proportionality concerns than with institutional competence and the inability or unwillingness of state legislatures to individualize ex ante. But it is hard to see why similar concerns should not inform the Court’s view of legislatures in *Apprendi*.

To be clear, we are not saying that the Sixth and Eighth Amendments are or should be irrelevant to curing criminal justice’s structural ills. Nor are we complaining that the Court did not use those amendments to effect more

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115. See Stephanos Bibas, *How Apprendi Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465, 468 (2002).

116. *Apprendi*, 530 U.S. at 490 n.16.

117. See Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1488–92, 1546 app. A (2001) (cataloguing repeated instances in which courts left legislatures leeway to adopt pro-prosecution rules and noting that many legislatures in fact did so); *supra* notes 19–24 and accompanying text.

118. See Bibas, *supra* note 115, at 472.

119. See *Blakely v. Washington*, 542 U.S. 296, 310 (2004) (“If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. . . . We do not understand how *Apprendi* can possibly work to the detriment of those who are free . . . to render it inapplicable.”).

120. *Miller v. Alabama*, 132 S. Ct. 2455, 2475 (2012).



sweeping structural reforms. Rather, our claim is that judicial attention to rights-based doctrines can go only so far to remedy the structural imbalances at the root of the problem. What is called for is a more direct engagement with the structural concerns underlying *Graham* and *Apprendi*, including a more sustained focus on the roles of various actors and on empowering those actors to check and balance one another throughout sentencing. The next two Parts take up that task.

## II. THE PROCEDURAL JUSTICE OF SENTENCING

While judicial reliance on individual constitutional rights alone cannot solve the problem, it can spur other actors to build on the Court's constitutional foundation. Much as the Court's procedural regulation of capital sentencing prompted nonjudicial reforms, this Part explains how a process-oriented understanding of the Court's recent turn to noncapital sentencing can illuminate how policymakers should structure criminal justice. On the most basic level, as Section II.A notes, it refocuses the constitutional sentencing inquiry less on what is decided than on who decides and how they do so. Section II.B explores the strengths and weaknesses of the various institutions and actors involved, sketching the broad outlines of how fragmented sentencing authority serves the values at the heart of the *Graham* and *Apprendi* lines. Section II.C defends that structural and process-based approach to sentencing as normatively desirable. It explains how the institutional collaboration that characterizes that approach goes hand in hand with a democratic criminal law system characterized by competing moral visions and diverse viewpoints.

### A. Structure, Process, and Punishment

At sentencing, who decides and how they decide greatly influence what gets decided. That insight is the core of our structural account. The Constitution, in other words, promotes just punishment less by adopting any particular substantive vision of punishment than by regulating the structural and procedural rules that determine punishments. Substantive criminal law, Justice Marshall observed in *Powell v. Texas*, involves a "constantly shifting adjustment of the tension between the evolving aims of the criminal law and the changing religious, moral, philosophical, and medical views of the nature of man."<sup>121</sup> A process-oriented approach embraces that view by emphasizing moral appropriateness, individualization, and checks and balances as key ingredients in determining just punishment. While retribution, loosely conceived, plays a central role, that approach is open to incorporating a mix of other goals and values as well. Each actor has a role to play in checking the others and defining or refining moral appropriateness; just punishment

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121. 392 U.S. 514, 535–36 (1968) (plurality opinion). The Court has made similar observations numerous times since. *See, e.g.*, *Harmelin v. Michigan*, 501 U.S. 957, 998–1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Payne v. Tennessee*, 501 U.S. 808, 824–25 (1991).

is the balance that emerges from that process. We see both *Apprendi* and *Graham* as proceeding from this same constitutional core, notwithstanding their different doctrinal hooks and interpretive approaches.

This process narrative that *Apprendi* and *Graham* share has received little attention in the criminal law literature. Consistent with the Court's doctrinal emphasis, the dominant approach to understanding *Graham* and *Miller* has focused on individual rights and regulating substantive outcomes.<sup>122</sup> Likewise, as Rachel Barkow notes, commentators analyzing *Apprendi* have for the most part focused on the scope of the Sixth Amendment right instead of viewing the issue broadly as one of separated powers.<sup>123</sup> Barkow is one of the few scholars who approach the topic from a structural constitutional perspective. She advocates a strict separation of powers in criminal cases, including more directly enforcing a jury's prerogative to find any facts that determine punishment.<sup>124</sup> The strength of this formalistic approach, she argues, is that it prevents shortsighted expediency from eroding long-term structural considerations.<sup>125</sup>

But that very strength of separation-of-powers formalism can also be a weakness in a criminal justice system that diverges radically from the one known by the Framers. As long as the Court is unwilling to dynamite the plea-bargaining edifice, it cannot return juries from their current cameo appearance to a starring role night after night.<sup>126</sup> Functionalism is a more promising way to translate these constitutional values into twenty-first-century criminal justice. At the same time, courts likely have neither the institutional competence nor the desire to fine-tune the constitutional law of sentencing. Other actors, prompted by the Court, must develop new structural and procedural rules that can help to check legislatures and prosecutors within the edifice of plea bargaining. Indeed, another of Barkow's articles begins down this path, suggesting ways to check and separate functions within prosecutors' offices through rules of institutional design.<sup>127</sup>

Lou Billionis, writing before *Apprendi* and *Graham*, offers a different structural account. Billionis argues that many of the Court's substantive constitutional criminal law cases—including many of the capital punishment

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122. See Bierschbach, *supra* note 25, at 1783–84, 1783 n.177.

123. Barkow, *Recharging the Jury*, *supra* note 9, at 44–45.

124. Barkow, *Separation of Powers*, *supra* note 9, at 1035–40, 1042–43; see also Barkow, *Recharging the Jury*, *supra* note 9, at 107–10, 116.

125. Barkow, *Separation of Powers*, *supra* note 9, at 1037–38.

126. This difficulty with a strict formalist approach is not limited to criminal justice. It plagues every attempt to rigidly enforce the separation of powers in the modern administrative state. See, e.g., Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 11 (1994) (defending the rigidity of formalism while acknowledging that its strict application would render the administrative state unconstitutional); Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 526 (1987) (“[F]ormalism . . . is simply incapable of describing the government we have.”).

127. Barkow, *Institutional Design*, *supra* note 9, at 895–906.

cases discussed above—rest on process considerations. Specifically, he asserts that the Court consciously privileges legislative primacy to shape criminal law and interferes only to correct legislative breakdowns or to protect politically disfavored groups.<sup>128</sup> Bilionis endorses this classic “process reinforcement” approach as respecting democracy and federalism by letting political communities shape the content of their substantive criminal laws.<sup>129</sup> His respect for structural values is admirable and rarely heard within criminal procedure. But it operates primarily *ex ante*, at a high level of legislative abstraction. It downplays the need for a range of other actors to individualize sentences *ex post*, at the retail level, to tailor legislative policy choices.<sup>130</sup>

In *Apprendi* and *Graham*, the Court took a less pure approach than either of these, applying a jumble of interpretive methodologies and constitutional provisions. The broad arc of that approach might be seen as vaguely neo-originalist. Colonial criminal justice largely put its faith in procedure, not substantive review of guilt, to check governmental power and to ensure individualized, morally appropriate judgments.<sup>131</sup> Separation of powers and checks and balances—most importantly, citizen involvement through the jury’s inscrutable province to nullify unjust laws and harsh sentences—were indispensable parts of ensuring due process for individual citizens.<sup>132</sup> The Court’s recent cases are re-creating the functional equivalents of those structures under the Sixth and Eighth Amendments, fine-tuning who decides what, when, and how.

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128. Bilionis, *supra* note 10, at 1327–32.

129. *Id.* at 1302–04. No reference to process-oriented or structural approaches to criminal law scholarship would be complete without mention of the late William Stuntz, whose work broadly unpacked the political economy of modern criminal justice and constitutional criminal procedure. For a sampling of Stuntz’s highly influential work in the field, see STUNTZ, *supra* note 13; Stuntz, *supra* note 19; William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780 (2006); and William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

130. In another article published seven years earlier, Bilionis praised the *Woodson/Lockett/Eddings* doctrine as providing a way for courts to remain agnostic among competing theories of punishment while empowering sentencers to exercise morally appropriate judgment in imposing the death penalty. He saw the need for rationality and predictability at a systemic level as quite consistent with giving sentencers discretion to judge moral appropriateness in individual cases. Bilionis, *supra* note 42, at 286–87. That article did not, however, connect these *Lockett*-specific insights to a broader understanding of the structure of modern criminal justice, checks and balances, or the design of noncapital sentencing.

131. See STUNTZ, *supra* note 13, at 74–79.

132. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS* 129–33 (1998); Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1682–84, 1703–06, 1717–20 (2012) (discussing the evolution of the jury’s role as a check against the sovereign in the Magna Carta and the incorporation of these English ideas into American law).

That approach resembles the Court's approach, beginning in the 1970s, to reforming capital sentencing. The Court's capital punishment jurisprudence was prompted by concerns about arbitrariness and unfairness in sentencing.<sup>133</sup> It has been roundly criticized for imposing enormous costs on the system and legitimizing the death penalty while doing little to achieve equality.<sup>134</sup> But, as Douglas Berman puts it, "[W]hatever one's perspective . . . on the modern administration of capital punishment, the system at least has the benefit of subjecting prosecutors' sentencing judgments and discretionary decisions . . . to a series of meaningful . . . 'second looks.' There are, in other words, considerable checks and balances surrounding the actions and discretionary decisions of prosecutors . . ." <sup>135</sup> At the same time, the Court's capital punishment jurisprudence, like its ad hoc approach in *Apprendi* and *Graham*, responded haphazardly to specific unfairnesses.<sup>136</sup> *Apprendi* and *Graham* show the Court starting down that same road. Their doctrines might be less stilted if the Court instead recognized them as creating checks and balances for giving content to punishment norms, or even as serving due process by addressing the structures needed to ensure fundamental fairness.<sup>137</sup> Rather than repeating the haphazardness of capital sentencing law, we should think more systematically at the outset about how to allocate sentencing authority.

#### B. *Punishment and Institutional Competence*

So how should different criminal justice actors share sentencing authority to best check and balance one another? While we cannot answer this question here exhaustively, we can at least glean a few broad lessons from

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133. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 193–95 (1976) (plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 293–95 (1972) (Brennan, J., concurring).

134. See, e.g., Carol S. Steiker & Jordan M. Steiker, *Atkins v. Virginia: Lessons from Substance and Procedure in the Constitutional Regulation of Capital Punishment*, 57 DEPAUL L. REV. 721, 731 (2008) (criticizing the Court's treatment of the death penalty for offenders with mental disabilities); Steiker & Steiker, *supra* note 34, at 426–38. See generally Louis D. Bilionis, *Legitimizing Death*, 91 MICH. L. REV. 1643, 1647–48 & nn.18–23 (1993) (collecting criticisms).

135. Berman, *supra* note 51, at 432–33.

136. Steiker & Steiker, *supra* note 34, at 397–98.

137. As David Ball observes, *Apprendi* gestured in that direction initially. See W. David Ball, *The Civil Case at the Heart of Criminal Procedure: In re Winship, Stigma, and the Civil–Criminal Distinction*, 38 AM. J. CRIM. L. 117, 141–42 (2011). The Court emphasized both the Sixth Amendment and due process aspects of its holding, relying on what it called “[*In re*] *Winship*'s due process and associated jury protections.” *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000); see also *id.* at 469 (“The question presented is whether the Due Process Clause of the Fourteenth Amendment requires that . . . an increase in the maximum prison sentence . . . be made by a jury on the basis of proof beyond a reasonable doubt.”). *Winship*, in turn, took a functional and flexible approach to due process, balancing the interests at stake and requiring proof beyond a reasonable doubt for juvenile commitment proceedings as an aspect of fundamental fairness. *In re Winship*, 397 U.S. 358, 365–68 (1970); see also Ball, *supra*, at 138–39.

what we have said above. The first is that legislatures cannot administer sentencing on their own. In a representative democracy, legislatures have the prerogative to establish sentencing policies that track the will of the majority. That includes “mak[ing] difficult choices among opposing moral and ideological viewpoints.”<sup>138</sup> In reality, legislatures often gloss over or punt on such issues. Even when they do not, they still craft rules and calibrate punishments only in the most general manner. Legislatures’ ex ante, abstract perspective makes them especially well suited to ranking categories of crimes and grouping broadly alike cases together to achieve some rough equality in sentencing.<sup>139</sup> But because they cannot tailor rules to capture the nuances of particular cases, they are ill suited to furthering equality’s other aspect of treating unlike cases unlike.

The same problem applies to sentencing commissions, to which legislatures often delegate their authority to make more specific sentencing rules. No matter how detailed those rules become, they cannot capture ex ante all the relevant differences among cases. Rules can promote consistency to a point, but overly precise or rigid rules risk doing the opposite. As the implementation of the Federal Sentencing Guidelines showed, overprecision exacerbates inequality by forcing dissimilar cases into the same sentencing box.<sup>140</sup> That creates the same kind of “false consistency” that the *Woodson/Lockett/Eddings* trilogy sought to remedy.<sup>141</sup> In short, ex ante rule creation is not the same as ex post applied moral judgment.<sup>142</sup>

Prosecutors, judges, juries, and parole boards are all better positioned than are legislatures and sentencing commissions to make textured, individualized sentencing determinations. Yet prosecutors have their own incentives to stack up convictions and plea-bargaining chips, and their decisions are often driven by habits of charging and plea bargaining divorced from the merits.<sup>143</sup> Thus, prosecutors’ exercise of their unreviewable charging power is suspect as a way to ensure individualized justice.<sup>144</sup>

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138. Iontcheva, *supra* note 88, at 350; *see also* Bilonis, *supra* note 10, at 1302.

139. Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. CRIM. L. & CRIMINOLOGY 709, 715–17 (2010); Robinson & Spellman, *supra* note 24, at 1134–36, 1151 tbl.

140. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 95–97, 104–06 (1998); MICHAEL TONRY, SENTENCING MATTERS 72–89 (1996).

141. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *see also* *Lockett v. Ohio*, 438 U.S. 586, 602 (1978) (plurality opinion) (“[T]he definition of crimes generally has not been thought automatically to dictate what should be the proper penalty.”); *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (“A process that accords no significance to relevant facets of the character and record . . . treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”).

142. *See* Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387, 433 (2002).

143. *See* Bowers, *supra* note 17, at 1701–02.

144. *See supra* notes 16–17 and accompanying text.

Judges, by contrast, fare better, especially where they are not hemmed in by overly restrictive statutes or binding guidelines and where they have enough case-specific information. Even then, however, “judges . . . may be ‘overconditioned’ and may not be able to appreciate the complexities and moral nuances of individual cases.”<sup>145</sup> A single judge, possibly appointed by a governor, is also a less fitting representative of community values than is a multimember lay body like a jury and is thus at greater risk of making sentencing decisions based on his own idiosyncratic political or moral views.<sup>146</sup>

Parole boards, unlike judges, are often multimember bodies, and they have the additional perspective of evaluating a defendant’s reform while in prison—a perspective that *Graham* and *Miller* viewed as critical to just sentencing for juveniles and perhaps others having the capacity for change.<sup>147</sup> But like judges, they are often badly overconditioned, and their moral judgment may well diverge from that of the community. Like prosecutors, moreover, they often succumb to incentives to protect their own (and their governors’) interests rather than to do justice in an individual case.<sup>148</sup> Prosecutors, judges, and parole boards all have valuable roles to play, but each has shortcomings that need to be checked.

That leaves juries. Juries, to use Iontcheva’s words, “bring both the legitimacy and the fresh perspective of a body made up of ordinary citizens.”<sup>149</sup> More than any other actor, juries reflect and embody community values at the retail level, giving them special competence to determine what punishment is appropriate in a given case.<sup>150</sup> Their short-term service and lay moral intuitions help them to focus on case-specific facets of individual blameworthiness. And their role is built into the Sixth Amendment and our nation’s history, not to mention our national sense of justice.

At the same time, juries’ lack of training and experience with criminal justice might make them more prone to certain biases and less able to situate sentences for particular crimes within the larger sentencing framework.<sup>151</sup> They can thus be worse at considering systemic factors such as predictability, equality across cases, and resource allocation.<sup>152</sup> Experts such as prosecutors, judges, and especially sentencing commissions are better equipped to bring statistics and data to bear on these systemic problems. Juries are not

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145. Iontcheva, *supra* note 88, at 353 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975)).

146. *See id.* at 352–53.

147. *Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012); *Graham v. Florida*, 130 S. Ct. 2011, 2030, 2032–33 (2010).

148. *See supra* notes 31, 111 and accompanying text.

149. Iontcheva, *supra* note 88, at 353.

150. *See supra* notes 85–94 and accompanying text.

151. *See* Iontcheva, *supra* note 88, at 359; *see also* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 *STAN. L. REV.* 1153, 1158–59 (2002).

152. *See, e.g.*, Charles O. Betts, *Jury Sentencing*, 2 *CRIME & DELINQ.* 369, 372 (1956); Charles W. Webster, *Jury Sentencing—Grab-Bag Justice*, 14 *SW. L.J.* 221, 228–29 (1960); Robert A. Weninger, *Jury Sentencing in Noncapital Cases: A Case Study of El Paso County, Texas*, 45 *WASH. U. J. URB. & CONTEMP. L.* 3, 24–29 (1994).

perfect and need guidance by other actors. But they add a distinctive voice to the broader conversation about how to make the punishment fit the crime, helping to check and balance legislative and professional perspectives.<sup>153</sup>

### C. *The Virtues of Multiple Viewpoints*

Legal scholars often adopt a monistic worldview. Retributivists may seek exclusively to implement a particular Kantian or other deontological approach to punishment, while law-and-economics scholars may focus on the monetizable costs and benefits of incapacitation and deterrence.<sup>154</sup> In Isaiah Berlin's terminology, both kinds of scholars are hedgehogs, drawn to a simple, theoretically pure, unified ideal of substantive criminal justice.<sup>155</sup> That approach might seem to go hand in hand with a simplified criminal procedure, giving all power to an idealized legislature, an expert judge, or a prosecutor to neutrally weigh and apply that pure theory of justice.<sup>156</sup>

But, as the *Apprendi* and *Graham* lines of cases implicitly recognize, real-world criminal justice needs both substantive and procedural pluralism. We should be foxes, not hedgehogs. Although retributive blame is at the core of punishment decisions, many actors must weigh a variety of other considerations as well. Thus, as this Section explains, *Apprendi* and *Graham* were right to nudge the constitutional regulation of sentencing in a structural and process-oriented direction. The core of our normative account is the need for institutional collaboration to specify morally appropriate punishments,

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153. For further elaboration of our vision of a polyphonic conversation including a range of lay as well as expert voices and the distinctive strengths of each, see Bierschbach & Bibas, *supra* note 27, at 20–24.

154. See Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA. L. REV. 1197, 1203–12 (2007). For useful surveys of retributivist theories, see LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 294–317 (2002), and MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 104–88 (1997). For a classic discussion of the economic approach to criminal justice, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 273–314 (8th ed. 2011).

155. See ISAAH BERLIN, *THE HEDGEHOG AND THE FOX* 3 (Ivan R. Dee 1993) (1953). Berlin builds his distinction on the ancient Greek poet Archilocus's saying: "The fox knows many things, but the hedgehog knows one big thing." *Id.* Hedgehog thinkers and writers, such as Plato and Hegel, are monistic, viewing the world through the lens of a single defining idea or value. Foxes, like Aristotle and Shakespeare, see complexity in the world and resist reducing it to a single idea. *Id.* at 3–4.

156. That is not to say that other approaches would not be possible. A retributivist might, for instance, vest power in a legislature to establish a broad ranking of the retributive punishments available for various types of crimes, and in a judge, to work within that framework to tailor specific punishments to each defendant based on the particular moral circumstances of his crime. See, e.g., Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 NW. U. L. REV. 1, 6, 12, 18–20 (2000) (discussing interplay between legislative specification and adjudicative discretion in laying down rules for grading of offenses in accordance with the community's sense of justice). But as Michael Cahill observes, most retributivists have not approached the issue that way, hewing instead to a philosopher-king approach. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 819 & n.13 (2007).

both across and within individual cases. Such a system calls for both substantive and procedural pluralism and the give-and-take between actors and perspectives that comes with it.<sup>157</sup>

### 1. Substantive Pluralism

Our democracy is pluralistic, and our system of criminal justice pursues a wide array of competing values and objectives. As Henry Hart expressed it in his classic, *The Aims of the Criminal Law*, because none of those values and objectives wholly exclude the others, society's criminal law choices demand "multivalued rather than . . . single-valued thinking."<sup>158</sup> Multivalued approaches are often messy, and no philosopher or economist will ever be satisfied with the resulting hash.<sup>159</sup> But as a matter of political theory, a process that aggregates and reconciles the competing values is more democratically legitimate and responsive than one left entirely to a single perspective.<sup>160</sup>

Criminal justice, for instance, is simultaneously forward- and backward-looking. Many law-and-economics scholars focus on criminal law's ex ante effect of making the costs of committing a crime exceed the benefits for an individual, which thus deters and reduces the costs of crime for society.<sup>161</sup> That perspective calls for ensuring that police catch suspects; that prosecutors and juries apply clear, simple "decision rules"; and that judges mete out predictable punishments.<sup>162</sup> Some advocates of equality have likewise favored

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157. Even if one disagrees with our normative stance, one could still accept the interpretive claims put forth in this Article; the two claims are analytically independent. One could, in other words, agree with us that the Court is making the turn we describe in the constitutional law of noncapital sentencing but disagree that the turn is normatively desirable.

158. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 401 (1958).

159. This is, of course, a common feature of pluralistic approaches that respect multiple competing substantive commitments. See, e.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 *DUKE L.J.* 375, 387–94 (discussing the relationship between democratic pluralism and First Amendment reform); Nelson Tebbe, *Religion and Social Constitutionalism* 14 (Nov. 7, 2012) (unpublished manuscript) (on file with authors) (discussing the "multiple commitments" inherent in pluralistic approaches to religious freedom doctrine and explaining that "there is no obvious way to prioritize among them"). See generally *PLURALISM IN ECONOMICS: NEW PERSPECTIVES IN HISTORY AND METHODOLOGY* (Andrea Salanti & Ernesto Screpanti eds., 1997).

160. For a more complete defense of this point, see Bierschbach & Bibas, *supra* note 27, at 20–24.

161. See, e.g., POSNER, *supra* note 154, at 279; Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. POL. ECON.* 169, 180 (1968) (developing a classic economic model of deterrence).

162. On the distinction between conduct rules and decision rules, see Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625 (1984).



predictable ex ante rules that minimize official discretion and the possibility of discrimination, arbitrariness, or unequal outcomes.<sup>163</sup>

But, as *Graham* and *Miller* make clear, blanket rules that look clear and simple ex ante can be unjust ex post (that is, at the retail level of deciding individual cases). Many retributivists stress the particulars of crimes and criminals in ways that resist easy codification.<sup>164</sup> Advocates of incapacitation, rehabilitation, and reform may want to focus on a particular defendant, looking at the particular danger he poses, his need for treatment, and his remorse, repentance, and action to turn his life around.<sup>165</sup> And fans of individualized justice stress that across-the-board sentencing rules promote formal equality at the expense of substantive inequality, treating unlike cases alike. Our justice system needs both perspectives, balancing the ex ante and ex post visions of the law. That means announcing fair conduct rules and applying them even-handedly to give notice and predictability, yet leaving room in applying decision rules for discretion to weigh and reflect particulars that cannot be codified.

More generally, there is great disagreement about how to weigh and apply the varying purposes of punishment. Experts vary widely in the extent to which they would direct criminal punishment toward serving public safety, just deserts, mercy, and other goals.<sup>166</sup> Scholars agree somewhat on negative retributivism—that defendants should be punished no more than they deserve—but much less on positive retributivism—that they should ordinarily be punished as much as they deserve.<sup>167</sup> Even retributivists vary

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163. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Dan Markel, *Luck or Law: Is Indeterminate Sentencing Unconstitutional?* (May 24, 2013) (unpublished manuscript) (on file with authors).

164. See, e.g., Douglas A. Berman, *Distinguishing Offense Conduct and Offender Characteristics in Modern Sentencing Reforms*, 58 *STAN. L. REV.* 277, 289 (2005); Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 *TEX. L. REV.* 1383, 1408 (2002); Dan Markel, *Against Mercy*, 88 *MINN. L. REV.* 1421, 1445 (2004). See generally Cahill, *supra* note 156, at 836 (reviewing retributive approaches to criminal justice and concluding that they struggle to offer any “firm rules about how to implement substantive criminal law”).

165. See, e.g., Stephen P. Garvey, *Punishment as Atonement*, 46 *UCLA L. REV.* 1801, 1810–27 (1999); B. Douglas Robbins, Comment, *Resurrection from a Death Sentence: Why Capital Sentences Should Be Commuted upon the Occasion of an Authentic Ethical Transformation*, 149 *U. PA. L. REV.* 1115 (2001) (arguing that an offender’s manifestation of the “trilogy” of guilt, remorse, and penance should alter his punishment).

166. See, e.g., DON C. GIBBONS, *CHANGING THE LAWBREAKER* 130 (2d ed. 1981) (arguing that the penal system should improve an offender’s future welfare through treatment); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 4–6 (2d ed. 2008) (observing that an offender deserves the punishment resulting from his freely willed choice to break the law); ANDREW VON HIRSCH, *DOING JUSTICE* 49 (1976) (rejecting the rehabilitative approach as unjust); FRANK ZIMRING & GORDON HAWKINS, *INCAPACITATION* 42–59, 131–72 (1995) (discussing the public benefits of incapacitation and deterrence); Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 *HARV. J.L. & PUB. POL’Y* 33 (2003) (criticizing consequentialism’s rejection of value judgments in determining punishment).

167. MOORE, *supra* note 154, at 153–87; Richard S. Frase, *Limiting Retributivism, in THE FUTURE OF IMPRISONMENT* 83 (Michael Tonry ed., 2004); Michael Moore, *Moral Reality*, 1982 *WIS. L. REV.* 1061, 1067–68.

widely among themselves on the extent to which blame correlates with wrongful intent, harm, and other criteria.<sup>168</sup>

Laymen agree somewhat more. Paul Robinson and his coauthors show empirically that ordinary citizens ground their punishment intuitions primarily in retribution.<sup>169</sup> But even so, citizens leave some room for other principles, such as incapacitation, to temper the sentences they would impose.<sup>170</sup> They also agree much less on how to translate their agreed-upon ordinal rankings into absolute quantities of punishment.<sup>171</sup> And there is little agreement on how to reconcile lay and expert perspectives.

Given this range of constituencies and viewpoints, criminal justice cannot afford to be theoretically pure, sacrificing most other goals on a single altar. As the Court's cases acknowledge, widely shared retributive intuitions belong at the core of our criminal justice system, founded as it is on democratic legitimacy. Even so, the law must simultaneously pursue deterrence, incapacitation, reform, equality, mercy, consistency across cases, and a host of other values that matter to both the public and professionals. It must protect the public while taking individual defendants and victims seriously. It must determine how severely to punish robbery in relation to other crimes, yet it cannot simply stereotype a defendant as a typical robber. It must individualize: that means looking at a robber's own blameworthiness and dangerousness, the harm he has done to a victim, his efforts to make amends and apologize, and so on. Various actors can strive to weigh and apply these purposes to individual cases fairly and justly, but there is no abstract metric for fitting these values together. Retribution, for example, takes shape in the crucible of these deliberations, case by case. Sentencing thus becomes a conversation involving different institutional actors, all of them bringing their own judgments to bear on how best to impose retribution, promote public safety, safeguard equality, and the like.<sup>172</sup>

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168. Compare GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 857–58 (1978) (culpability-centered approach), with Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 *UCLA L. REV.* 266, 272–97 (1975) (harm-centered approach), and David Wasserman, *Justifying Self-Defense*, 16 *PHIL. & PUB. AFF.* 356 (1987) (agency-based “forced choice” approach).

169. Kevin M. Carlsmith, *The Roles of Retribution and Utility in Determining Punishment*, 42 *J. EXPERIMENTAL SOC. PSYCHOL.* 437, 443, 446 (2006) [hereinafter Carlsmith, *The Roles of Retribution and Utility*]; Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 284, 295–97 (2002); John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 *LAW & HUM. BEHAV.* 659, 667, 676 (2000).

170. See Carlsmith, *The Roles of Retribution and Utility*, *supra* note 169, at 443–45; Darley et al., *supra* note 169, at 674–75.

171. Christopher Slobogin & Lauren Brinkley-Rubinstein, *Putting Desert in Its Place*, 65 *STAN. L. REV.* 77, 94–96 (2013).

172. *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (“[I]f petitioner’s sentence forecloses some ‘flexible techniques’ for later reducing his sentence . . . there remain the possibilities of retroactive legislative reduction and executive clemency.”); *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (stating that when a judge decides whether to impose the death penalty, “the judgments of legislatures, juries, and prosecutors weigh heavily in the balance”); *Woodson v. North Carolina*, 428 U.S. 280, 298–99 (1976) (plurality opinion) (observing that “mandatory

## 2. Procedural Pluralism

The eclectic hash of values and the institutional competencies of the different actors involved in sentencing decisions demand a pluralistic procedural system.<sup>173</sup> Procedurally, multiple actors can collaborate on designing, running, and improving not only sentencing but also criminal justice in general. For that to happen, the system must be not static but dynamic. That means giving multiple actors the flexibility to experiment, collect feedback, learn from their mistakes, and make changes. Actors and institutions need to be able to cooperate on new projects, such as the structured-sentencing systems that have evolved in recent decades. Criminal procedure should encourage and channel such cooperation while remaining sensitive to the abilities and limitations of the actors involved and the on-the-ground realities of their interactions.

Unfortunately, many of the Court's recent criminal justice interventions have fallen short of that mark, in part because the individual rights frameworks they employ have proven to be blunt tools for institutional design. One example is how the *Apprendi* line of cases has at least partly damaged sentencing reform. Before *Apprendi*, structured sentencing had evolved into a fruitful collaboration of multiple actors in various states seeking to combat the problems of sentencing inequality and arbitrariness.<sup>174</sup> Actors sought to blend the benefits of wholesale and retail decisionmaking, expertise, and popular input to create systems more predictable than indeterminate sentencing systems yet less Procrustean than mandatory statutory penalties.<sup>175</sup> Many of these experiments were successful, such as Minnesota's, Washington's, and North Carolina's use of resource-impact statements to help their commissions craft presumptive guidelines intended to "distribut[e] punishment under conditions of scarcity."<sup>176</sup> As Justice Kennedy

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death penalty statutes ha[ve] been renounced by American juries and legislatures," and that these "enactments reflect attempts by the States to retain the death penalty in a form consistent with the Constitution"); *Gregg v. Georgia*, 428 U.S. 153, 175, 181 (1976) (plurality opinion) ("[T]he constitutional test [for determining just punishment] is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. . . . The jury also is a significant reliable objective index of contemporary values because it is so directly involved.").

173. Henry Hart again put it well when he observed that the value trade-offs involved in criminal justice "do not present themselves . . . in an institutional vacuum." Hart, *supra* note 158, at 402. Thus, "each agency of decision must take account always of its own place in the institutional system and of what is necessary to maintain the integrity and workability of the system as a whole. A complex of institutional ends must be served . . . as well as a complex of substantive social ends." *Id.*

174. See, e.g., Frank O. Bowman, III, *Debate: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended*, 77 U. CHI. L. REV. 367, 374–76 (2010); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 241–46 (2006).

175. See Pfaff, *supra* note 174, at 241–46.

176. Dale G. Parent, *What Did the United States Sentencing Commission Miss?*, 101 YALE L.J. 1773, 1786 (1992); see also Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 771–87 (2005) (reviewing Minnesota's, Washington's, and North Carolina's experiences);

put it in his *Blakely* dissent, “This recurring dialogue . . . [is] an essential source for the elaboration and the evolution of the law.”<sup>177</sup> Legislatures, judges, probation officers, and others need to cooperate continually to improve sentencing.<sup>178</sup>

But *Apprendi* and *Blakely* disrupted, if not upended, many of these experiments by rigidly insisting on jury fact-finding, even though in practice plea bargaining has largely displaced juries today.<sup>179</sup> The *Apprendi* Court’s formalism blinded it to how its jury-driven check on sentencing power could fail when implemented in a world of plea bargaining. The result has been in many ways the worst of all worlds. In reality, the *Apprendi/Blakely* line of cases further skewed the balance of power toward prosecutors and away from judges based on “a faintly disguised distrust of judges,” leaving juries’ abilities to affect sentences largely unchanged.<sup>180</sup>

Different actors have differing viewpoints and strengths. Legislatures have democratic legitimacy and broad perspectives and constituencies. Judges and probation and parole officers have neutral perspectives, expertise, and firsthand experience. Prosecutors are perhaps most closely acquainted with the details of a wide variety of cases. Scholars and public policy experts apply expertise, detachment, and synoptic perspectives. Juries bring fresh, democratic perspectives to bear in the context of particular cases in all their complexity. Some of these actors look at crime *ex ante* and in the abstract, as legislatures and (very often) scholars do. Many others—prosecutors, sentencing judges, juries, and parole and clemency boards—look *ex post* at flesh-and-blood defendants and victims. Many of these actors are repeat players and professionals. Some, like juries, are deliberately not. Their rotation in office, akin to term limits, ensures freshness and diffuses the benefits of public service.<sup>181</sup> Like a rope, criminal procedure is stronger if it weaves together these overlapping perspectives.

These overlapping powers epitomize the checks and balances at the heart of the Court’s constitutional framework. Ideally, different institutions should continue to engage in interbranch dialogue. As Justice Kennedy put it in his *Blakely* dissent, it is a “fundamental principle under our constitutional

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Richard S. Frase, Panel Remarks, *Is Guided Discretion Sufficient? Overview of State Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 425, 425–26 (2000) (noting that state sentencing guidelines have been more successful than the U.S. Sentencing Guidelines).

177. *Blakely v. Washington*, 542 U.S. 296, 327 (2004) (Kennedy, J., dissenting).

178. See *Cunningham v. California*, 549 U.S. 270, 295–97 (2007) (Kennedy, J., dissenting).

179. See Stephanos Bibas, *Blakely’s Federal Aftermath*, 16 FED. SENT’G REP. 333, 341 (2004); Bibas, *supra* note 115, at 470–74; Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1158–73 (2001) [hereinafter Bibas, *Judicial Fact-Finding*].

180. *Blakely*, 542 U.S. at 327 (Kennedy, J., dissenting); see Bibas, *Judicial Fact-Finding*, *supra* note 179, at 1150–70.

181. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1189 (1991).

system that different branches of government ‘converse with each other.’”<sup>182</sup> That conversation should occur not only horizontally at the national level but also vertically between the federal and state levels so that states may “serve as laboratories for innovation and experiment[ation].”<sup>183</sup> Sentencing guidelines exemplify interbranch collaboration, which “is basic constitutional theory in action.”<sup>184</sup>

*Apprendi*, we should say, was not a complete failure. By ultimately invalidating mandatory guidelines, the Court not only returned more discretion to federal district judges but also began to prompt more give-and-take among sentencing judges, appellate courts, and the U.S. Sentencing Commission. *Booker*’s application of a reasonableness standard for review of sentences in light of the purposes of sentencing freed district courts to better fine-tune punishments.<sup>185</sup> Courts can now persuade the U.S. Sentencing Commission to revise unsound guidelines through reasoned departures that illuminate their deficiencies. The Commission, in turn, can respond and can likewise persuade courts to follow thoughtful and thorough guidelines. At least as between the Commission and the courts, then, *Apprendi* made possible the “continuous evolution” through interbranch dialogue that the Sentencing Reform Act had contemplated.<sup>186</sup>

Ironically, it did so only by implicitly abandoning the rigid adherence to the individual constitutional right to jury fact-finding that prompted *Apprendi* in the first place. As Justice Scalia’s concurrence in *Rita* explained, any common law system of sentencing that would hold some fact-based sentencing determinations made by district judges reasonable and others unreasonable seems to convert those facts into elements of crimes that, under *Apprendi*, must be found by a jury.<sup>187</sup> But the post-*Booker* remedial scheme, unlike *Apprendi* and *Blakely*, rested on practical considerations about how best to allocate sentencing discretion.<sup>188</sup> By allowing district court judges to (reasonably) depart from guidelines based both on case-specific facts and

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182. *Blakely*, 542 U.S. at 326 (Kennedy, J., dissenting) (quoting *Mistretta v. United States*, 488 U.S. 361, 408 (1989)).

183. *Id.* at 327 (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

184. *Id.*

185. *United States v. Booker*, 543 U.S. 220, 261, 264 (2005).

186. *Rita v. United States*, 551 U.S. 338, 350 (2007); see also Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1667–81 (2012) (explaining how *Booker* and its progeny have fostered interbranch dialogue on federal sentencing policy, “permitting the courts to communicate with the Commission (and with each other) in a transparent and effective manner”).

187. *Rita*, 551 U.S. at 369–73 (Scalia, J., concurring in part and concurring in the judgment).

188. See *id.* at 347–51 (majority opinion); *Booker*, 543 U.S. at 258–65. Justice Breyer, who dissented in *Apprendi*, authored the Court’s remedial opinion in *Booker* as well as its opinion in *Rita*.

policy disagreements, cases like *Rita*,<sup>189</sup> *Kimbrough*,<sup>190</sup> and *Pepper*<sup>191</sup> fragmented sentencing power in ways consistent with *Apprendi*'s overarching mission, if not its formalistic approach.

*Miller* and *Graham* likewise have a mixed record in how they confronted allocations of sentencing discretion. Both decisions shifted power from front-end to back-end sentencers to determine whether juveniles must spend the remainder of their lives in prison. The real fault line between the two cases is how far that shift should go. *Miller* left prosecutors, trial judges, and juries more discretion to make the final call, even as it put a thumb on the scale in favor of including parole boards in all but the most unusual cases. *Graham*, by contrast, required parole boards' involvement in all life sentences for juveniles who have not killed. That prompted Chief Justice Roberts to object that the Court had slighted the ability of sentencing judges to exercise their own individualized moral judgment.<sup>192</sup> (Of course, sentencing judges could still exercise their judgment to ensure that juveniles would *not* spend their lives in prison. They just could not do the reverse.) But neither Chief Justice Roberts nor the other justices engaged much with the realities of how parole boards and sentencing judges actually exercise their sentencing discretion and how competent each group is to do so.

Even so, in trying to strike a rough balance between *ex ante* and *ex post* sentencing determinations to ensure individualized, morally appropriate judgments for juveniles, the cases were steps in the right direction. Dissenting in *Miller*, Justice Alito complained that the majority had cherry-picked unusually sympathetic cases in which to invalidate mandatory juvenile LWOP.<sup>193</sup> But we need a system that can deal with such cases, sifting them rather than mechanically applying blanket rules. Thus, Chief Justice Roberts, concurring in the judgment in *Graham*, observed that reviewing courts may temper "the extraordinarily severe punishment" of mandatory LWOP for an attempted armed robbery by "consider[ing] the particular defendant and particular crime at issue."<sup>194</sup>

Some general guidance analogous to that articulated in *Rita* with respect to the division of sentencing power between district and appellate judges could have been helpful here.<sup>195</sup> Incrementalism, however, also has its benefits. It allows states to experiment with new approaches to allocating sentencing discretion without freezing any one approach in place. Pennsylvania,

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189. *Rita*, 551 U.S. at 353–54.

190. *Kimbrough v. United States*, 552 U.S. 85, 111 (2007).

191. *Pepper v. United States*, 131 S. Ct. 1229, 1247–50 (2011).

192. See *Graham v. Florida*, 130 S. Ct. 2011, 2041–42 (2010) (Roberts, C.J., concurring in the judgment).

193. *Miller v. Alabama*, 132 S. Ct. 2455, 2489 (2012) (Alito, J., dissenting).

194. *Graham*, 130 S. Ct. at 2036 (Roberts, C.J., concurring in the judgment).

195. See *Rita v. United States*, 551 U.S. 338, 350–51 (2007) (allowing appellate courts to presume that within-Guidelines sentences are reasonable in light of the sentencing judge's role in exercising discretion, "subject[ing] the defendant's sentence to . . . thorough adversarial testing," weighing whether the case falls beyond the heartland of typical cases, and setting forth reasons for the sentence imposed).

North Carolina, and other states are already doing just that, with *Graham* and *Miller* spurring new juvenile sentencing reforms aimed at better individualization.<sup>196</sup> These reforms will give courts and policymakers opportunities to examine more closely questions of procedural and institutional design.

### 3. The Interaction of Democratic and Judicial Perspectives

Here is where lessons from *Woodson/Lockett/Eddings* and the Court's capital punishment jurisprudence may be especially useful, for they help to illuminate the limitations of the Court's approach. On some level, the *Woodson/Lockett/Eddings* line is most compatible with the basic values of checks and balances, individualization, and morally appropriate punishment embodied in the *Apprendi* and *Graham* lines. These cases (along with a number of the Court's other capital punishment decisions) let legislatures specify capital-murder crimes and let prosecutors seek the death penalty, but the cases preserve plenty of space for judges and juries to tailor the penalties to the defendants and crimes that deserve them most. At the same time, like the rest of the Court's death penalty jurisprudence, the cases were largely reactive in how they tried to give effect to those values, and they did so in an ad hoc manner.<sup>197</sup> The Court's solutions, in other words, did not easily effectuate the constitutional design principles that underlie them. And the judicial posture and pull of *stare decisis* made it more difficult for the Court—and sometimes other actors—to experiment, discard failures, and collaboratively improve sentencing over time.

The most basic lesson from that experience is that judges cannot solve these complex problems of institutional design on their own. The Court has been right to acknowledge, even if sometimes implicitly, the connection between questions of structural and procedural design and substantive justice in sentencing. But the Court's unilateral rights-based solutions have often been too rigid, too constrained by the limits of the judicial role, and too removed from other perspectives.<sup>198</sup> The Court would do better to articulate the broader constitutional values at stake, start a conversation, and revisit

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196. See, e.g., S.B. 850, 195th Gen. Assemb., Reg. Sess. (Pa. 2012) (requiring a sentencing court to make findings on the record regarding seven specified factors—including the impact of an offense on victims and the community, evidence of culpability, and age-related characteristics such as maturity, mental capacity, criminal sophistication, and potential for rehabilitation—before imposing LWOP on a minor convicted of murder); S.B. 635, 2011 Gen. Assemb., 2012 Reg. Sess. (N.C. 2012) (requiring a sentencing court to hold a special hearing and to make findings on the record concerning the presence or absence of any mitigating circumstances submitted by a defendant—including age, immaturity, inability to appreciate the consequences of one's conduct, and peer pressure exerted by family or friends—before imposing LWOP on a minor convicted of murder).

197. See Steiker & Steiker, *supra* note 34, at 401, 426–29.

198. See, e.g., *id.* at 401 (arguing that the Court's capital punishment jurisprudence has amounted to “nothing more than a modest, ad hoc series of limitations” in response to particular state practices).

the issue periodically to piggyback on other actors' insights and reforms.<sup>199</sup> A better-functioning system would leave room for a sort of democratic experimentalism in sentencing design.<sup>200</sup> In particular, courts could prompt other faithful actors to build more specifically and practically on the Court's constitutional vision and its suggestions for further reform.

Another lesson is that courts and policymakers should not squelch discretion simply because it seems lawless. At least some discretion is ineradicable.<sup>201</sup> If we squeeze it out of judges and juries, at least some discretion will remain in the hands of prosecutors, but it will become unchecked and thus potentially more arbitrary. We must focus instead on helping each actor to exercise its discretion most effectively.

Finally, a more direct engagement with the design questions at stake puts a different spin on how to achieve equality in criminal sentencing. Too often, equality has led actors to overemphasize *ex ante* rules that are supposed to treat like cases alike. That tendency helps to explain mandatory minimum sentences and three-strikes laws, which superficially equalize sentences but are applied quite inconsistently.<sup>202</sup> As Rachel Barkow perceptively observes, this administrative ideal of formal equality is hostile to mercy and discretion and thus seeks to limit the roles of juries and judges. In practice, however, it has driven discretion underground, leaving prosecutors a free hand in selecting among charges.<sup>203</sup>

A more complete understanding of equality is less formal and more elastic, emphasizing both treating like cases alike and treating unlike cases unlike. Formal rules that treat all superficially similar cases alike (such as three-strikes laws and mandatory minima) threaten substantive equality,

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199. While incrementalism in constitutional adjudication can sometimes roughly approximate that approach, other judicial systems embrace it more directly. The European Court of Human Rights' "margin of appreciation" doctrine is one example. See generally STEVEN GREER, *THE MARGIN OF APPRECIATION: INTERPRETATION AND DISCRETION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2000), available at [http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-17\(2000\).pdf](http://www.echr.coe.int/library/DIGDOC/DG2/HRFILES/DG2-EN-HRFILES-17(2000).pdf) (describing the doctrine).

200. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 292–323 (1998) (advocating the decentralization of power to promote experimentation by leaving lower-level governmental institutions free to set goals and choose means, subject to national oversight and pooling of information).

201. As Kyron Huigens explains, "The existence of discretion, somewhere in the system, to make a context-sensitive evaluation of the offender's conduct and character is intrinsic to criminal law because context-specific, retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment." Huigens, *supra* note 90, at 818.

202. See, e.g., David Bjerck, *Making the Crime Fit the Penalty: The Role of Prosecutorial Discretion Under Mandatory Minimum Sentencing*, 48 J.L. & ECON. 591, 603–09 (2005); Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 24–25 (1998); Samara Marion, *Justice by Geography? A Study of San Diego County's Three Strikes Sentencing Practices from July–December 1996*, 11 STAN. L. & POL'Y REV. 29, 37 (1999).

203. See Rachel E. Barkow, Essay, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1334–35, 1340–44, 1351–53, 1360–63 (2008).



which must reflect other morally relevant criteria. Equality is not about ensuring numerical symmetry but reaching individualized, morally appropriate sentencing judgments while filtering out tangential and irrelevant factors (such as prosecutorial charging tactics). Ex ante rules may serve as valuable benchmarks and mental anchors to ground the sentencing inquiry, but they do not obviate case-specific tailoring.<sup>204</sup> That complex balance calls for cooperation among many sentencing institutions, not just legislative or appellate pronouncements from on high. Individualization, far from threatening equality, promotes substantive equality (rightly understood).

### III. SENTENCING REFORM BEYOND INDIVIDUAL RIGHTS

Over the last decade, the Court has groped its way toward importing structural and procedural design considerations into the context of noncapital sentencing. But, in squeezing those considerations into the rights-based confines of the Sixth and Eighth Amendments, it has done so haphazardly. In this Part, we suggest other, nonconstitutional ways to serve the principles embedded in the Court's turn in *Graham* and *Apprendi*. None of this is to imply that the Court's move in those cases was wrong or misguided. Constitutional rulings are often necessary to spur correction of structural imbalances that threaten constitutional values; those rulings can come almost exclusively through individual rights, interpreted by courts case by case, in light of precedent. But once courts have articulated the principles at issue, other actors can and should step in to translate those principles to practical reforms in ways that courts often cannot. After four decades, the political branches are finally beginning to do just that in capital sentencing, engaging constitutional concerns about reliability and arbitrariness by weighing measures such as death penalty moratoria, innocence commissions, access to DNA testing, and racial-impact studies.<sup>205</sup>

A similar dynamic should inform noncapital sentencing much earlier. Nonjudicial actors should experiment with procedural and structural reforms to elaborate the constitutional norms that underlie the *Graham* and

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204. For explanations of the psychological phenomenon known as anchoring, see, for example, DANIEL KAHNEMAN, THINKING, FAST AND SLOW 119–28 (2011), and Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1128–30 (1974).

205. See, e.g., BIBAS, *supra* note 23, at 92, 125–26, 163–64, 220 n.19 (discussing racial-impact studies and related moratoria); James S. Liebman & Lawrence C. Marshall, *Less Is Better: Justice Stevens and the Narrowed Death Penalty*, 74 FORDHAM L. REV. 1607, 1654–55, 1657 (2006) (discussing moratoria); Robert J. Norris et al., “*Than That One Innocent Suffer*”: *Evaluating State Safeguards Against Wrongful Convictions*, 74 ALB. L. REV. 1301, 1354–57 & tbl.5 (2010/2011) (discussing innocence commissions); THE INNOCENCE PROJECT, CRIMINAL JUSTICE REFORM COMMISSIONS: CASE STUDIES, [http://www.innocenceproject.org/Content/Criminal\\_Justice\\_Reform\\_Commissions\\_Case\\_Studies.php](http://www.innocenceproject.org/Content/Criminal_Justice_Reform_Commissions_Case_Studies.php) (last visited June 3, 2013) (discussing innocence commissions); THE INNOCENCE PROJECT, FIX THE SYSTEM: ACCESS TO DNA TESTING, <http://www.innocenceproject.org/fix/DNA-Testing-Access.php> (last visited June 3, 2013) (discussing access to DNA testing); see sources cited *supra* note 55 (discussing death penalty moratoria in Illinois and Oregon).

*Apprendi* lines. There are a variety of ways to do so, and we sketch some general proposals here. Laymen and other actors could have greater roles in sentencing, on juries or otherwise. Baseline rules and presumptions could foster the more considered use of mandatory minima, sentencing guidelines, and plea bargaining. Procedures could allow second looks to reassess initial charging and punishment decisions and could structure back-end safety valves like parole and clemency to function more effectively. And prosecutors could be required to ration their pursuit of the toughest charges and punishments or to submit to a special approval process before seeking them. Our suggestions are meant to be illustrative, not exhaustive.

Some readers may favor approaching such reforms through interpreting the Due Process Clauses, which are more flexible and hospitable than the Sixth and Eighth Amendments and are thus better suited to effectuating the structural design considerations we have discussed above. But much, if not most, of these reforms would better come through legislation, procedural rules, and changes to prosecutorial practices. While courts may take the initiative to prompt reforms, they should try to draw upon the strengths of other institutions. That means, for example, leaving sentencing commissions plenty of latitude, and prodding prosecutors to address problems without telling them precisely how to do so. That approach of instigating rather than dictating allows other actors to draw upon their own expertise, to experiment, and to fine-tune their reforms based on feedback and experience.<sup>206</sup> The idea is that reforms that judges may not be able to implement through rights-based doctrines could nevertheless do much to further the constitutional values at stake.

#### A. *Reinvigorating Lay and Judicial Involvement at Sentencing*

In theory, judges impose criminal sentences. In a majority of states, statutes give them wide discretion within broad statutory ranges.<sup>207</sup> In the minority of jurisdictions with sentencing guidelines, sentencing commissions offer guidance but still leave judges significant room to adjust or depart from those guidelines.<sup>208</sup> But in reality, as discussed, prosecutors dominate sentencing.<sup>209</sup> That concentration of power offends the sentencing design principles at the core of this Article. It bypasses checks and balances and collapses the variety of perspectives that should inform morally appropriate,

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206. For discussions of how courts and sentencing commissions can do so and have done so, with a particular focus on the experience in New Jersey, see Ronald F. Wright, *Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087-1090-103 (2005), and Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1010, 1027-42 (2005) [hereinafter Wright, *Sentencing Commissions as Provocateurs*].

207. See MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 1364, 1373-74 (4th ed. 2011).

208. See Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1196 tbl.1 (2005).

209. See *supra* Section I.A.

individualized sentencing determinations into the decision of one person, the prosecutor.<sup>210</sup>

On the broadest level, solutions should involve more robust mechanisms for checking and balancing prosecutorial power. One way to create such mechanisms is to reinvigorate the voices of laymen and other actors at sentencing.<sup>211</sup> *Woodson* rested in part on the observation that juries were nuanced in authorizing the death penalty, undercutting the constitutional case for requiring it across the board.<sup>212</sup> The *Apprendi* line of cases addressed some of these problems by requiring that juries, not judges, find facts that raise maximum sentences. Even so, *Apprendi* anachronistically stylized the battle as judges versus juries, when the most powerful actor who needs checking is the prosecutor.<sup>213</sup> *Apprendi* also rested on the fiction that juries authorize punishments in some meaningful sense. Yet plea bargaining cuts them out of the process. Even where it does not, juries in most states have only indirect roles in noncapital sentencing, as they never learn the punishments that they are supposedly authorizing.<sup>214</sup>

There are better, more targeted ways to incorporate *Apprendi*'s structural insight. Laws could specify the universe of most serious cases in which juries would have at least some sentencing authority—say, where the statutory or guideline-based sentence sought exceeds ten (or twenty) years' imprisonment. In those cases, sentencing juries would be informed of the possible punishments and asked which punishments they would authorize.<sup>215</sup> That would check one tail of the plea-bargaining bell curve: cases in which the prosecution threatens extremely long sentences, possibly to gain plea-bargaining leverage, and then feels that it must carry out the threat so that future defendants do not call its bluff. The jury would apply its sentencing judgment to offer case-specific input. That would counterbalance prosecutorial incentives, requiring prosecutors to justify their trial penalties to neutral arbiters not invested in backing plea-bargaining leverage.

Lay involvement could extend beyond jury service. Community representatives could offer input into the process of formulating and revising charging, plea-bargaining, and sentencing guidelines.<sup>216</sup> And laymen could play roles at the very back end of sentencing. For example, parole boards

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210. See Barkow, *Separation of Powers*, *supra* note 9, at 1024–28, 1047–49.

211. See Barkow, *Recharging the Jury*, *supra* note 9 at 107; Bierschbach & Bibas, *supra* note 27, at 37–56.

212. See *Woodson v. North Carolina*, 428 U.S. 280, 294 n.29 (1976) (plurality opinion).

213. See Bibas, *supra* note 115, at 466, 474.

214. See *supra* notes 113–114 and accompanying text.

215. See Iontcheva, *supra* note 88, at 370–72 (explaining the benefits of providing the jury more information about possible sentences); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1377 (1999) (reviewing STITH & CABRANES, *supra* note 140).

216. See Bierschbach & Bibas, *supra* note 27, at 40–47.

should not be limited to a governor's cronies but should include both experts and lay members. We could also consider having parole juries, even if their role were only advisory.<sup>217</sup>

Reinvigorating the judiciary's structural check is critical as well. Rule 11 of the Federal Rules of Criminal Procedure, for instance, requires that pleas have adequate factual bases. Sentencing judges could more rigorously enforce Rule 11 by conducting more in-depth plea hearings and rejecting unduly lenient or harsh sentences in light of the underlying facts. Appellate courts could encourage sentencing judges to become more involved by requiring them to justify their sentences in greater detail. Because plea-bargained sentences are almost never appealed, policymakers might consider allowing sua sponte appellate review, appeals by probation officers, or even automatic appeals for certain limited categories of sentences, much as states provide for automatic appeals in capital cases.<sup>218</sup> Many of the reform suggestions proposed in the following Sections could likewise enhance judicial involvement. They could prompt prosecutors to explain their decisions to judges and other actors and to structure sentencing in ways that encourage judges to truly judge.

#### B. *Relaxing Mandatory Sentences*

Legislatures authorize criminal sentences *ex ante*, often enacting stiff mandatory sentences to credibly threaten tough punishment and thus deter crime. Prosecutors, however, remain free to bargain away supposedly mandatory charges, turning these strictures into bargaining chips.<sup>219</sup> Thus, the law ties judges' hands but not prosecutors', making prosecutors' bargaining threats all the more credible and effective. In part for that reason, the *Miller* Court refused to defer to legislatures' and prosecutors' decisions to seek LWOP for juveniles.<sup>220</sup>

Mandatory minimum sentences are effective at greasing the wheels of plea bargaining. But they badly undermine the structural considerations that lie behind *Graham* and *Apprendi*. These laws are crude sledgehammers adopted at the wholesale level precisely to exclude later retail input. They

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217. See *e.g.*, Ball, *supra* note 30, at 407–10; Douglas A. Berman, *A Truly (and Peculiarly) American "Revolution in Punishment Theory"*, 42 ARIZ. ST. L.J. 1113, 1120 (2011) (discussing how parole juries could bring laypersons' sense of justice to parole release decisions).

218. See Bierschbach & Bibas, *supra* note 27, at 8, 57; see also ALA. CODE § 12-22-150 (LexisNexis 2012); ARIZ. R. CRIM. P. 31.2(b); CAL. PENAL CODE § 1239 (West 2004); GA. CODE ANN. § 17-10-35 (2008); NEV. REV. STAT. § 177.055 (2011); FEDERAL HABEAS MANUAL § 9B:27 (2012) (reviewing automatic appeal statutes for capital cases).

219. See BIBAS, *supra* note 23, at 45–48; Stuntz, *supra* note 19, at 535–38, 550–52; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004). Indeed, prosecutors blocked the initial version of a California law, which would have impeded charge bargaining for many serious crimes, until it was watered down to allow prosecutors to evade it through early charge bargaining. See CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 29–31 (1993).

220. *Miller v. Alabama*, 132 S. Ct. 2455, 2474–75 (2012).

bypass checks and balances, denying judges and juries any say in the appropriate punishment. And their effect is to deter, incapacitate, and exert plea-bargaining leverage in practice, not to tailor punishments to moral blameworthiness. While in theory prosecutors could drop charges *ex post* to proportion punishments to crimes, in practice they must carry out their threats against recalcitrant defendants to keep future threats from ringing hollow.<sup>221</sup>

While prosecutors need and deserve some leverage, concentrating most adjudicative power in their hands alone is dangerous. At a minimum, mandatory minimum sentences should include expanded safety-valve provisions for nonviolent offenders, especially those without criminal records, so that sentencing judges can sentence below the minimum in specified cases. That would give the judge, and perhaps a jury, more say on whether an unarmed street-corner drug dealer is dangerous enough to require imprisonment for a decade or more. Judges might also inform juries of the proposed mandatory punishment, so that their guilty verdicts authorize that punishment in some meaningful sense.<sup>222</sup> That awareness would temper mandatory sentences grossly disproportional to a particular defendant's blameworthiness.

More radically, mandatory minimum sentences might no longer be binding. Minimum sentences would be presumptive rather than mandatory (at least where a mandatory sentence exceeded some threshold such as five or ten years). They would set strong mental anchors and benchmarks, allowing sentencing judges (or juries, where they exist) to anchor and adjust from those starting points.<sup>223</sup> Sentencers would thus have the opportunity to gauge the entirety of the defendant's blameworthiness and dangerousness, the wrongfulness of the crime, the severity of the harm, and the like.

That kind of particularized assessment is a key end of both the *Graham* and *Apprendi* lines of cases.<sup>224</sup> Each side could paint the entire picture, and sentencers could explain and justify their deviations from the presumptive sentences. Trial and appellate judges could review sentences, deferring more to sentences closer to the presumptive figure, with a presumption in favor of sentences that track the statutory minimum.<sup>225</sup> That approach would mirror current review of within- and beyond-range federal guideline sentences and

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221. See Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 479 (1980); Mark Tushnet & Jennifer Jaff, *Critical Legal Studies and Criminal Procedure*, 35 CATH. U. L. REV. 361, 365 (1986) ("If a system of bargaining is to survive, the prosecutor must be allowed to carry through on the threats made in the bargaining process.").

222. Cf. Barkow, *Recharging the Jury*, *supra* note 9, at 110–16.

223. *Id.* at 119; Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 444 (2005); Iontcheva, *supra* note 88, at 370–73.

224. See, e.g., *Miller*, 132 S. Ct. at 2467–69; *Apprendi v. New Jersey*, 530 U.S. 466, 483–84 (2000); see also *Woodson v. North Carolina*, 428 U.S. 280, 303–05 (1976) (plurality opinion) (requiring individualized consideration at capital sentencing).

225. We have argued at greater length for a similar approach to sentencing elsewhere. See Bierschbach & Bibas, *supra* note 27, at 38–46, 48 (advocating a nonmandatory guideline system that would extend to prosecutors' charging decisions).

would inject more individualized judgment and checks and balances into the process.<sup>226</sup>

### C. Sentencing Guidelines and Presumptions

Many of the suggestions above for mandatory minimum sentences could apply to sentencing guidelines as well. They should serve as advisory mental anchors. Sentencing judges or juries could deviate from them, with a sliding scale of appellate review keyed to how closely trial judges and juries had followed their recommendations, but appropriate reasoning could justify even significant departures.<sup>227</sup>

A series of visual aids could structure sentencers' decisions on how to apply the guidelines. Charts and graphs could display frequency distributions for unarmed thefts of various dollar amounts, for example, with vignettes describing the median, top third, and bottom third guidepost cases.<sup>228</sup> Sentencing judges or juries could anchor on those and adjust from there. (Note that while anchoring and adjustment is often criticized as a mental heuristic, here it would have the salutary effect of promoting consistency because the anchor would be deliberately selected to be representative.)

Furthermore, courts could take into account the extent to which guidelines reflect morally appropriate sentencing judgment and the input of a variety of actors. One of the arguments for guideline sentencing is that sentencing commissions are not only broadly representative but also bring criminal justice expertise into the conversation.<sup>229</sup> But at the federal level, Congress has increasingly intervened in the process, mandating guideline enhancements without further study or reflection.<sup>230</sup> For example, Congress

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226. *Gall v. United States*, 552 U.S. 38, 51 (2007) (allowing reviewing courts to take into account the extent of any departure from the federal guideline range and to require more significant justifications for major departures than for minor ones); *Rita v. United States*, 551 U.S. 338, 350–53 (2007) (authorizing appellate courts to apply a presumption of reasonableness to within-guideline sentences).

227. See Wright, *Sentencing Commissions as Provocateurs*, *supra* note 206, at 1030–31, 1042 (describing a New Jersey reform that employs such a “departure structure”). The Federal Sentencing Guidelines’ departure provision was originally intended to function much in this way. See, e.g., Baron-Evans & Stith, *supra* note 186, at 1638–39, 1641.

228. See Wright, *supra* note 215, at 1377 (“A standard report could inform jurors of the average sentence imposed for persons convicted of the same crimes as the defendant, and for persons who have a similar criminal record. The report . . . could even describe the distribution of sentences . . . .”); see also Iontcheva, *supra* note 88, at 368–69 (suggesting that “[s]tatistics could be compiled at the county, district, or state level” and provided to jurors during sentencing deliberations); Adriaan Lanni, *The Future of Community Justice*, 40 HARV. C.R.-C.L. L. REV. 359, 404 (2005) (stating that the court could “inform[ ] sentencing jurors of the historical range of sentences imposed for similar crimes and defendants”).

229. E.g., Barkow, *Administering Crime*, *supra* note 19, at 717–18; Wright, *Sentencing Commissions as Provocateurs*, *supra* note 206, at 1036–42.

230. See William K. Sessions III, *At the Crossroads of the Three Branches: The U.S. Sentencing Commission’s Attempts to Achieve Sentencing Reform in the Midst of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 317–21, 334–36 (2011).

mandated crack-cocaine guidelines that treated one ounce of crack cocaine as severely as one hundred ounces of powder cocaine.<sup>231</sup> Those guidelines are now advisory. Because the crack-cocaine guidelines did not reflect the Commission's special expertise, the Court has held, they do not merit the same level of deference by sentencers.<sup>232</sup> The same approach could apply to other guidelines, with the caveat that reviewing courts should consider whether the guidelines blended expertise with reasoned moral evaluation by a range of actors.

Even beyond guidelines, courts could employ more presumptions to structure sentencing and force a dialogue among various sentencing actors. That approach would follow the Court's own suggestion in *Miller* that LWOP should be disfavored for juvenile killers but could be justified in particular circumstances.<sup>233</sup> The presumption places a thumb on the scale and helps to elicit individualized reasons grounded primarily in moral judgment as to why a particular defendant might deserve the harsher sentence. *Miller's* presumption shifts sentencing's focus from mechanical general deterrence ex ante by the legislature, subject to prosecutorial manipulation, to overt moral decisionmaking case by case, ex post, by accountable, reviewable sentencers.

Courts or legislatures could adopt other presumptions to temper the most extreme sentences. For example, criminological research shows that wrongdoers are most likely to commit future crimes from their teens into only their twenties and perhaps thirties.<sup>234</sup> (Those who commit fraud and other white-collar criminals may be the exception.) Thus, most inmates do not need incapacitation into their forties and beyond.<sup>235</sup> Applying that insight, long sentences that extend into criminals' forties or beyond could be disfavored and not automatic, requiring individualized retributive or deterrence-based justifications rather than generic fears of the sort underlying three-strikes laws.<sup>236</sup>

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231. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c) (2005) (amended 2012).

232. *Kimbrough v. United States*, 552 U.S. 85, 109–10 (2007).

233. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

234. Linda S. Beres & Thomas D. Griffith, *Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103, 135 (1998) (“The peak ages for criminal activity are the late teens and early twenties.”); James Q. Wilson, *Crime and Public Policy*, in CRIME AND PUBLIC POLICY 619, 624 (James Q. Wilson & Joan Petersilia eds., 2d ed. 2011) (“Typical offenders commit most of their crimes when they are in their early twenties, and very few after they reach their forties.”); see also U.S. DEP’T OF JUSTICE BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 16 tbl.3.1 (rev. 2010) (showing that 73 percent of all felony convicts were under the age of forty at the time of sentencing), available at <http://bjs.gov/content/pub/pdf/fssc06st.pdf>.

235. Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 31 (2006) (“There may be . . . justifications for confining [thirty- or forty-year-old] offenders for extended periods; but from an incapacitative perspective, such sentences are expensive, inefficient, and largely ineffective.”); see also Beres & Griffith, *supra* note 234, at 136–37.

236. A few courts have already taken tentative steps down this path in the context of reviewing denials of discretionary parole. See, e.g., *Robles v. Dennison*, 745 F. Supp. 2d 244, 287, 296 (W.D.N.Y. 2010) (noting “an extremely strong claim” that a parole board’s consistent refusal to grant release based solely on the circumstances of the original crime is arbitrary and

Similar presumptions could accommodate *Miller's* and *Graham's* concerns to lighten retributive impulses by respecting defendants' possibility of reform and redemption. A substantial fraction, if not a majority, of crime is fueled in one way or another by alcohol, drugs, mental illness, or some combination of these factors.<sup>237</sup> Defendants whose crimes involved such circumstances might presumptively be eligible for parole after successful treatment and a certain number of years of remaining clean, sober, or on needed medication.<sup>238</sup> The law could require sentencers to make individualized judgments as to when particular crimes and criminals are serious and blameworthy enough to defeat that presumption.<sup>239</sup>

#### D. *Reassessing Charges at Sentencing*

One of the thorniest separation-of-powers difficulties in criminal justice is that prosecutors set the terms of the debate by deciding which charges to file or not file. They do this on their own without meaningful outside input or process.<sup>240</sup> That power to set charges was not a problem when grand juries, petit juries, and judges meaningfully scrutinized criminal charges and when sentencing judges had substantial sentencing flexibility to offset tough

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irrational), *aff'd*, 449 F. App'x 51 (2d Cir. 2011); *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008) (holding that the "immutable circumstance" of the original offense will not "inevitably support[ ] the ultimate decision that the inmate remains a threat to public safety" in the face of overwhelming contrary evidence (emphasis omitted)); *People v. Mendez*, 114 Cal. Rptr. 3d 870, 881 (Ct. App. 2010) (agreeing with a juvenile defendant's contention that his "sentence of 84 years to life constitutes cruel and unusual punishment because it amounts to a de facto sentence of life without parole").

237. See DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at <http://www.bjs.gov/content/pub/pdf/mhppji.pdf> ("At midyear 2005 more than half of all prison and jail inmates had a mental health problem . . ."); CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004, at 2 (rev. 2007), available at <http://www.bjs.gov/content/pub/pdf/dudsp04.pdf> (stating that 33 percent of state prisoners and 26 percent of federal prisoners reported being under the influence while committing a crime).

238. *E.g.*, N.Y. CORRECT. LAW § 805 (McKinney Supp. 2013) (stating that a prisoner "serving a sentence with a minimum term of not more than eight years" who successfully completes a treatment program "shall be granted parole release at the expiration of his minimum term"); *cf.* 28 C.F.R. § 2.60(b) (2012) (making certain prisoners eligible for advancement of their presumptive release dates after "successful completion of a residential substance abuse program of at least 500 hours"); Richard C. Boldt, *Rehabilitative Punishment and the Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1209–15 (1998) (describing the advent of drug treatment courts as an alternative to imprisonment conditioned on the offender's successful adherence to and completion of a drug treatment program).

239. See *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012) ("Although we do not foreclose a sentencer's ability to [impose LWOP] in homicide cases, we require it to take into account how children are different, and how these differences counsel against irrevocably sentencing them to a lifetime in prison.").

240. Barkow, *supra* note 203, at 1351–52; Barkow, *Separation of Powers*, *supra* note 9, at 995; Standen, *supra* note 17, at 1501.



or lenient charging decisions. But today, even in the federal and state systems that still require grand jury indictments for serious crimes, grand juries are rubber stamps.<sup>241</sup> And, as discussed, mandatory sentences, sentencing guidelines, and truth-in-sentencing laws restrict judges' ability to counter-balance prosecutors.

Radical changes may be necessary. First, many crimes are initially charged as lesser felonies but then routinely bargained down to misdemeanors: think of grand versus petit larceny, or simple burglary versus breaking and entering where no weapons or injuries are involved.<sup>242</sup> The difference between the two can be significant. A felony conviction not only carries more stigma but can disqualify a defendant from a range of future jobs and benefits.<sup>243</sup> Where prosecutors follow an across-the-board charging or bargaining policy, they can—at least in theory—be held accountable for that policy *ex ante* through public criticism or at the ballot box, although that might not work well in practice.<sup>244</sup> But when prosecutors bargain selectively or haphazardly, even that check is lost.

Just as sentencers could receive frequency distributions to illuminate median sentences along a curve, they could also receive distributions of charging and bargaining patterns for felony charges that are either usually or rarely bargained away (say, more than 80 percent or less than 20 percent of the time). The sentencers would then review a case that fell in the minority, evaluating the prosecutor's proffered justification for treating that case more harshly or leniently than other like cases. Prosecutors could still use charge reductions as bargaining leverage, but they would have to explain and justify why the leverage was appropriate. Even requiring a simple paragraph in writing or a two-minute oral explanation would provide some protection. A prosecutor might, for instance, explain that a defendant had an unusually long criminal record, had refused to make restitution, and had offered no remorse or apology. The prosecutor would find it harder to threaten shocking sentencing disparities, reining in outliers. This approach would not only

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241. See Andrew D. Leipold, *Why Grand Juries Do Not (and Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 263–64 (1995). As former Chief Judge Sol Wachtler famously quipped, a grand jury would “indict a ham sandwich.” Marcia Kramer & Frank Lombardi, *New Top State Judge: Abolish Grand Juries & Let Us Decide*, DAILY NEWS, Jan. 31, 1985, at 3.

242. See, e.g., Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 952 (1983); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1152–53 (2008); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (upholding plea bargains whereby a defendant's “plea may have been induced by promise of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial”).

243. See, e.g., U.S. DEP'T OF JUSTICE OFFICE OF THE PARDON ATTORNEY, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION, available at [http://www.justice.gov/pardon/collateral\\_consequences.pdf](http://www.justice.gov/pardon/collateral_consequences.pdf).

244. For a discussion of how poorly prosecutorial elections work in practice to illuminate the issues and check prosecutorial policy decisions, see Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009). For our argument for publishing prosecutors' policies and making them accountable and reviewable *ex ante*, see Bierschbach & Bibas, *supra* note 27, at 40–47.

promote sentencing equality but would also use a retail-level check to promote individualized moral evaluation of cases that deserve tougher treatment.<sup>245</sup>

The same approach could apply to charges that are often brought as criminal charges but later dismissed in favor of civil charges, restitution, or other less severe measures. Prosecutors sometimes decide to pursue substantial white-collar criminal penalties against some fraudsters, but they often allow others to enter nonprosecution agreements and make restitution.<sup>246</sup> Some differences among these cases justify different treatment: for instance, mens rea varies and can be hard to prove, and some defendants are more proactive in trying to prevent, expose, and fix misdeeds. But observers suspect that prosecutors' self-interests in claiming high-profile scalps on Wall Street play a role, too.<sup>247</sup>

Prosecutors could have to justify their white-collar criminal charges, whether at trial, plea bargaining, or sentencing, which would make them accountable for explaining inconsistencies and variations in their practices. That would bring into the open haphazard practices—at least in cases with substantial discrepancies that produce markedly different results—which could otherwise cloak illegitimate charging variations. Yet prosecutors' burdens would be easy to meet so long as prosecutors pursued consistent policies, such as refusing to convert criminal charges involving theft or embezzlement of more than \$100,000 into civil claims.

Charging review should also extend to charges that carry significant collateral consequences but have substitutes that do not. Sexual assault charges, for example, carry significant stigma and require registration as a sex offender, while nonsexual assaults do not.<sup>248</sup> Domestic violence convictions may preclude future gun possession, while other kinds of batteries may not.<sup>249</sup> Certain nonviolent drug convictions make noncitizens automatically

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245. Cf. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 48–58, 106 (2002) (describing how a more reasoned and structured prosecutorial screening process could lead to more accurate and “honest” charging and bargaining decisions).

246. See Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439, 1453 (2004).

247. See Deniz Anginer et al., *Should Size Matter When Regulating Firms? Implications from Backdating of Executive Options*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 22–23 (2012); Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 299 n.173 (2011) (“[W]hite collar prosecutions bring significant favorable media attention.”).

248. See, e.g., Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 324–38, 360–61 (2006); Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43 (1998); Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010).

249. See Lisa D. May, *The Backfiring of the Domestic Violence Firearms Ban*, 14 COLUM. J. GENDER & L. 1, 3–8 (2005); Allen Rostron, *Protecting Gun Rights and Improving Gun Control After District of Columbia v. Heller*, 13 LEWIS & CLARK L. REV. 383, 405–06 (2009).

deportable, while others do not.<sup>250</sup> When prosecutors choose one of these charges rather than the other, they are also choosing the collateral consequences that follow. Yet our legal system largely pretends that these consequences are no part of the criminal penalty because they are labeled civil, and jurors have no idea that their verdicts are authorizing them.<sup>251</sup>

Charging review could thus apply to cases in which a collateral consequence is not bargained away even though it is frequently bargained away in other similar cases. Sentencing judges or juries would consider whether deportation, sex-offender residency restrictions, and the like should apply to this particular defendant. That would check prosecutors' unilateral charging power, bringing individualized moral judgment to bear.

### E. Plea Bargaining

Fixing sentencing also requires tackling earlier decisions upstream, such as charging and plea bargaining, that greatly shape sentencing later on. In plea bargaining, neither judges nor (nonexistent) juries provide meaningful checks or oversight of unilateral prosecutorial power. One idea we and others have floated elsewhere is to use advisory plea juries in at least the most serious cases as a check on the procedural and substantive justice of particular deals.<sup>252</sup>

Another important reform would be to ban or severely restrict the use of particularly coercive penalties as plea-bargaining chips. The threat of the death penalty, LWOP, or perhaps very long mandatory sentences for juveniles can frighten even innocent defendants into pleading guilty to lighter charges.<sup>253</sup> Conversely, carrying out those threats for the small percentage of defendants who resist them makes an enormous amount of punishment depend not on a defendant's individual moral desert but on his own or his lawyer's reckless tactical decision. While carrying out such threats may be institutionally rational for a prosecutor seeking to clear his own

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250. See 8 U.S.C. § 1227(a)(2)(B) (2006) (providing for the deportability of any alien convicted of any law "relating to a controlled substance" other than a single offense involving possession for one's own use of thirty grams or less of marijuana); see also Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1399–402 (2011) (discussing the deportation issues raised by *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)).

251. See, e.g., Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703–09 (2002); Jenny Roberts, *Ignorance Is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process*, 95 IOWA L. REV. 119, 131–34 (2009). That artificial divorce of collateral consequences from criminal cases is slowly changing. See, e.g., *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486–87 (2010) (holding that the Sixth Amendment requires criminal defense lawyers to advise clients accurately about the likelihood of deportation before they plead guilty).

252. Appleman, *supra* note 81, at 750–68; Stephanos Bibas & Richard A. Bierschbach, *Essay, Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 141, 144 (2004); see also Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 872–78 (2003) (proposing plea panels focused on the fairness and voluntariness of plea waivers).

253. See ARTHUR ROSSETT & DONALD R. CRESSEY, *JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE* 155 (1976); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1948 (1992).

docket, it is an amoral and coercive way to allocate the most severe penalties in our system.

Our model might be a scaled-down version of how the U.S. Department of Justice already handles death penalty cases. Federal prosecutors may not simply charge every death-eligible homicide as a capital crime and then bargain the death penalty away. Instead, before bargaining, federal prosecutors must first give notice to opposing counsel that a defendant is charged with a potentially capital crime, whether or not they intend to seek the death penalty.<sup>254</sup> They must then submit a death penalty evaluation form and memorandum to an internal prosecutorial committee at Main Justice in Washington, D.C.; defense lawyers also prepare their own submission as to why death is inappropriate in a particular case.<sup>255</sup> The panel compares the case to similar ones and decides whether to authorize a capital case or not.<sup>256</sup> The Department of Justice's standards instruct prosecutors not to seek or threaten the death penalty for plea-bargaining leverage, although ultimate approval of any plea bargain remains with the local U.S. Attorney and does not require approval from Main Justice.<sup>257</sup> This federal standard is quite different from that used by many district attorneys, some of whom routinely charge all or many death-eligible crimes as capital murder only to bargain that charge away.<sup>258</sup>

Our proposal would probably be bureaucratically simpler, at least for noncapital cases. Under our approach, line prosecutors would need to ask a committee of supervisory prosecutors for approval to charge crimes carrying very high sentences, such as death, life with or without parole, or very long mandatory minimum sentences.<sup>259</sup> They would document both the ability to prove the charge beyond a reasonable doubt and the culpability that makes the particular defendant deserve that punishment. The panel would compare the case to similar ones in which it had recently authorized charges. Once the panel approved the charge, the prosecutor would have to take it to

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254. Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 *FORDHAM URB. L.J.* 347, 408–10 (1999).

255. *Id.* at 408–11.

256. *See id.* at 412.

257. *Id.* at 417–19.

258. *See, e.g.*, Tina Rosenberg, *The Deadliest D.A.*, *N.Y. TIMES*, July 16, 1995, § 6 (Magazine), at 20 (reporting that Lynne Abraham, Philadelphia's district attorney, "seeks death virtually as often as the law will allow," but also that her office "does it to get a plea to life and a death-qualified jury" (quoting Robert E. Colville, district attorney, Allegheny County) (internal quotation marks omitted)); Mike Tolson, *Part 1: A Deadly Distinction—Harris County Is a Pipeline to Death Row*, *HOUS. CHRON.*, Feb. 4, 2001, at A1 ("If the death penalty substantively fits a given crime and I have enough stuff so that a jury will give it, tell me why I shouldn't prosecute it." (quoting John B. Holmes, former district attorney, Harris County) (internal quotation marks omitted)).

259. Rachel Barkow advocates a similar review system (using either individual prosecutors or a panel) on separation-of-functions grounds for all charging, bargaining, and cooperation decisions. *See Barkow, Institutional Design, supra* note 9, at 901, 915–17.

trial absent a significant change of circumstances and approval by that panel.<sup>260</sup>

Removing the tactical incentive to charge high and bargain low would refocus these most serious charging decisions on what a particular defendant deserves. It would also promote consistency and equality by introducing an important check on a single prosecutor's idiosyncratic views and self-interest in disposing of his own cases. And it would reduce the enormous trial penalties imposed on defendants for simply refusing to play ball.

#### F. Rationing Charges

Our most radical, and thus most tentative, suggestion is that the number of certain especially aggressive kinds of charges and sentences be capped, forcing prosecutors to ration these charges and sentences for the worst cases. *Woodson* sought to prevent legislatures and prosecutors from securing the death penalty across the board, forcing them to differentiate the worst of the worst. *Miller* did the same for juvenile killers facing LWOP. Although these penalties are no longer automatic, prosecutors may still threaten them in too many cases based on tactical advantage rather than blameworthiness or dangerousness.

Prosecutors are in a good position to sort the worst offenders for the worst charges. But they are tempted to threaten everyone with tough charges to exert maximum plea-bargaining leverage.<sup>261</sup> If a prosecutor's office actually seeks the death penalty at trial in only 10% of its murder cases, perhaps it should not be permitted to charge more than 15% of its murder cases as death-eligible.<sup>262</sup> As *Miller* stated that LWOP should be an "uncommon" sentence for juvenile killers,<sup>263</sup> perhaps prosecutors should be able to seek that sentence in only 20% or 25% of such cases. This approach would parallel that of Minnesota's sentencing commission. Based on the limited capacity of Minnesota's prisons, sentencing commissioners had to rank which

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260. This charging unit would thus resemble a more limited version of not only Main Justice's procedures for authorizing capital charges but also the centralized charging unit in the New Orleans District Attorney's Office. For an excellent explanation and evaluation of how that office's charging unit worked under former District Attorney Harry Connick, Sr., see Wright & Miller, *supra* note 245, at 61–64.

261. See Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 85–105 (1968) (documenting various ways prosecutors overcharge to induce guilty pleas); see also Bowers, *supra* note 17, at 1707–08 (noting prosecutors' incentives to resolve most cases quickly).

262. Cf. Steiker & Steiker, *supra* note 34, at 416 ("If the sum total of death-eligible offenders reasonably corresponded to the number of persons that were actually sentenced to death, the state would fulfill the narrowing requirement.")

263. *Miller v. Alabama*, 132 S. Ct. 2455, 2469 (2012).

inmates most needed longer sentences.<sup>264</sup> To imprison more first-time violent offenders, the sentencing commissioners chose in exchange to imprison fewer repeat property offenders.<sup>265</sup>

Another possible approach is to develop grids to sort criteria for pursuing certain charges. Empirical evidence, for example, suggests that prosecutors seek and juries return death sentences fairly consistently in certain circumstances, such as murder for hire, murder of a police officer, or when three or more aggravating factors are present.<sup>266</sup> On the other hand, juries are unlikely to return death sentences in cases with only a single aggravating factor, such as a killing in the course of robbing a store.<sup>267</sup> These patterns should develop into feedback loops to structure prosecutorial charging policies. Policies would limit capital charges to fact patterns in which juries return death sentences with some regularity so that prosecutors do not use charges simply as bargaining leverage. The same should be true of substantial mandatory sentences and sentence enhancements. Indeed, a few states have already implemented this idea. Both New Jersey and Florida have developed charging guidelines for recidivism and other enhancements to ensure that prosecutors apply them consistently.<sup>268</sup>

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264. Richard S. Frase, *The Minnesota Sentencing Guidelines*, in PENAL POPULISM, SENTENCING COUNCILS AND SENTENCING POLICY 83, 91 (Arie Freiberg & Karen Gelb eds., 2008) (describing how prison capacity acted as a restraint on the Minnesota Sentencing Commission and how “any member, constituency or interest group that proposed greater severity for one group of offenders was asked to identify other offenders who could receive correspondingly reduced severity”); Michael Tonry, *Intermediate Sanctions in Sentencing Reform*, 2 U. CHI. L. SCH. ROUNDTABLE 391, 392 (1995) (explaining that “Minnesota . . . established a ‘resource constraint’” policy in which “the projected effects of sentencing standards [must] be compatible with available and planned prison resources”).

265. Michael Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 16, 18–19 (1987); see also DALE G. PARENT, STRUCTURING CRIMINAL SENTENCES: THE EVOLUTION OF MINNESOTA’S SENTENCING GUIDELINES 28 (Daniel J. Freed ed., 1988); cf. Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 35–36 (2000) (discussing the perceived trade-off of imprisonment—preventing crime but hardening criminals—as applied to violent and nonviolent offenders); Tonry, *supra* note 264, at 399 (discussing the imprisonment trade-off in the context of diversion programs for minor crimes).

266. David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Legal and Empirical Analysis of the Nebraska Experience (1973–1999)*, 81 NEB. L. REV. 486, 548–53, 549 fig.2, 552 fig.3, 553 tbl.4 (2002); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 698–700, 699 tbl.1, 700 tbl.2 (1983).

267. See Glenn L. Pierce & Michael L. Radelet, *Race, Religion, and Death Sentencing in Illinois, 1988–1997*, 81 OR. L. REV. 39, 81–91 (2002) (providing statistics showing how often juries return death sentences given the presence or absence of certain aggravating factors); Chelsea Creo Sharon, Note, *The “Most Deserving” of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes*, 46 HARV. C.R.-C.L. L. REV. 223, 248 (2011) (“It is unlikely that any one aggravating factor could capture the kind of extreme culpability capable of provoking near-universal death sentencing among jurors.”).

268. For discussions of how New Jersey’s and Florida’s charging policies evolved and what they accomplish, see sources cited *supra* note 206, and Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 192–93 (2008). See also Bierschbach & Bibas, *supra* note 27, at 38–40.

The moral of the story is that, using feedback from judges, juries, and voters, prosecutors can do more to more finely tailor their charges to track retail-level judgments of blameworthiness reached by other actors. This approach would serve as a proactive check on and guide for the future exercise of prosecutorial discretion.

### G. *Making Back-End Sentencing a True Check*

Finally, discretionary parole and other back-end sentencing mechanisms must be reformed to tailor justice more effectively. That means, among other things, changing both the decisionmaking structures and perhaps the composition of parole boards so that they have the incentives and perspectives to act as true checks on front-end sentencers. Many of our suggestions applicable to front-end sentencing could apply here as well. Certain categories of crimes or those committed under specified circumstances could carry presumptions of release, rebuttable only by individualized justifications as to why a particular inmate should not receive the benefit of the presumption. These justifications should go beyond the pro forma, blanket references to the wrongfulness of the original crime or an offender's continuing dangerousness that are now common.<sup>269</sup> To push back against parole boards' incentives to avoid risk at all cost, parole boards might be required to explicitly consider the net costs of imprisonment versus release when making decisions.<sup>270</sup> More radically, they could have quotas, pegged to crime categories, recidivism rates, and criminological data, requiring them to recommend a specified number of prisoner releases each year. These guideposts could be clearly laid out as part of transparent guidelines.<sup>271</sup>

Other actors could participate as well. Parole juries could sit for a series of parole release hearings, much as grand juries sit for a specified period of time. This participation would bring a fresh community perspective to the fundamentally normative question about which offenders were worth the risk.<sup>272</sup> Prosecutors and (as in some European jurisdictions) even judges could likewise participate, rotating through on panels and helping to identify promising candidates for release, perhaps in conjunction with a quota

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269. See W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentences, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 903, 916, 970 (2009); Ball, *supra* note 30, at 399–400.

270. Ball, *supra* note 30, at 399–400.

271. See, e.g., Berman, *supra* note 51, at 437.

272. See Ball, *supra* note 30, at 408 (discussing the irreducibly normative nature of parole release decisions and the jury's role in making normative release judgments). To further push back against parole boards' lopsided incentives, parole juries could be encouraged "to think in terms of whether it is more important to keep this person in prison for another period of years or whether we should use that money to hire another teacher, fix another road, hire another police officer, or lower taxes." *Id.* at 409.

system.<sup>273</sup> That would create a further check on the board and would generate feedback loops that ultimately could inform prosecutorial and judicial charging, bargaining, and sentencing decisions in the first instance. More generally, judges reviewing parole board decisions could do a better job of ensuring individualized decisionmaking by requiring boards to identify the key offender-specific considerations in their decisions, discuss how those considerations influenced the outcome, and respond to significant arguments and views from other actors in the process.<sup>274</sup> A judge confronted with a given case might also insist on increasingly stronger justifications for a refusal to release as time goes by, particularly where the offender has committed a nonviolent crime or has an exemplary record, or where the victims, prosecutor, or community members either support or do not object to release.<sup>275</sup>

Similarly, beyond parole, judges or independent commissions might be given more active and structured roles in the executive clemency process. Judges could revive the time-honored tradition of recommending clemency directly to the executive in opinions or letters.<sup>276</sup> Commissions containing representatives from the defense bar, prosecutors, judges, victims, community members, and even legislators could play a similar role.<sup>277</sup> These changes could reduce the political risk involved, reinvigorating pardons and commutations as safety valves for individualized justice.<sup>278</sup>

#### CONCLUSION

The recent history of constitutional criminal procedure is one of applying rights-based solutions to what are sometimes institutional or structural problems. That is neither surprising nor troubling per se. Individual rights, after all, are “how courts translate structural values into adjudicatory claims

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273. See, e.g., Berman, *supra* note 51, at 437–38. See generally *RELEASE FROM PRISON: EUROPEAN POLICY AND PRACTICE* (Nicola Padfield et al. eds., 2010) (reviewing European approaches to parole release).

274. Bierschbach, *supra* note 25, at 1785–87.

275. See, e.g., *In re Lawrence*, 190 P.3d 535, 539 (Cal. 2008) (holding that where “evidence of the inmate’s rehabilitation and suitability for parole . . . is overwhelming,” the original circumstances of the offense and conviction will not “inevitably support[ ]” denying parole (emphasis omitted)).

276. See George Lardner, Jr. & Margaret Colgate Love, *Mandatory Sentences and Presidential Mercy: The Role of Judges in Pardon Cases, 1790–1850*, 16 *FED. SENT’G REP.* 212, 213 (2004) (describing methods whereby judges would petition the president for clemency); Joanna M. Huang, Note, *Correcting Mandatory Injustice: Judicial Recommendation of Executive Clemency*, 60 *DUKE L.J.* 131, 156 & n.165 (2010) (reviewing modern cases in which judges recommended clemency in their written opinions and requested that their opinions be sent to the Office of the Pardon Attorney).

277. See, e.g., Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 *FED. SENT’G REP.* 153, 155–56 (2009). As with parole boards, such commissions could be encouraged or required explicitly to take costs and benefits into account in their recommendations. See *id.* at 156–67.

278. See, e.g., *id.* at 155–57; Huang, *supra* note 276, at 152–57.



capable of resolution by jurists as opposed to philosophers or policymakers.<sup>279</sup> They cabin the judicial role, preventing courts from “fashioning doctrine out of whole cloth without regard to the constitutional text” and pushing judges to focus on concrete, “judicially manageable remedies.”<sup>280</sup> *Graham*, *Apprendi*, and their progeny would have been difficult to litigate and judicially resolve as abstract cases about sentencing design, divorced from the Sixth and Eighth Amendments and the precedents interpreting them.

We should not, however, ignore the underlying design principles. Rights, for all their value, tend to become reified. They can impair thinking about new reforms and obscure deeper connections among strands of individual doctrine.<sup>281</sup> Through *Graham* and *Apprendi*, the Court is awkwardly using rights-based doctrines to change the structures of criminal justice to ensure deliberation about individualized, morally appropriate sentences. The Court’s procedural approach to promoting substantive justice befits our liberal democracy, in which the competing values and considerations are diverse and pluralistic. To complete this project, other actors must pick up the Court’s constitutional baton and strive to right sentencing’s structural imbalances.

The Court can constitutionally inspire other actors, prompting them to experiment and perhaps elaborate constitutional norms. That collaboration could lead to an interactive, evolutionary learning process in which unsuccessful experiments wither while successful ones eventually solidify into best practices and even a consensus. The Court should continue to reveal and refine the architecture of criminal justice. But it cannot constitutionally tailor punishment on its own.

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279. Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1128 (2005) (reviewing RICHARD H. HASEN, *THE SUPREME COURT AND ELECTION LAW* (2003)); see also Amar, *supra* note 181, at 1132 (arguing that “[a] close look at the Bill [of Rights] reveals structural ideas tightly interconnected with language of rights” in order to empower popular majoritarian sovereignty).

280. Charles, *supra* note 279, at 1128.

281. See, e.g., Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197 (arguing that the Warren Court’s top-down, judicially enforced individual rights approach to criminal procedure has outlived its usefulness and is impeding reform in an era of greater minority enfranchisement and new approaches to community policing).