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SHOULD JURIES BE THE GUIDE FOR ADVENTURES THROUGH *APPRENDI*-LAND?

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Response to: W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 Colum. L. Rev. 893 (2009).

David Ball's article, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*,¹ merits a place on any top ten list of must-read pieces concerning the Supreme Court's modern sentencing jurisprudence. Ball's article is valuable not only for its fresh conceptual and functional perspectives on this jurisprudence, but also for its exploration of new and important regions of the sentencing universe. In particular, Ball's take on the Supreme Court's work in *Apprendi v. New Jersey*² and its progeny is a major contribution because, as he adventures through what Justice Scalia once called "*Apprendi*-land,"³ he spotlights what this jurisprudential terrain could mean for parole decisionmaking, especially in California.

It is a pleasure to travel with Ball as he seeks to better understand the topography of *Apprendi*-land. I fear, however, that Ball's impressive work places undue emphasis on a particular vision of juries which, while perhaps conceptually appealing, is functionally problematic. I am also troubled that, like other commentators and even many Justices, Ball allows an undue affinity for jury trial rights to dominate his view of *Apprendi*-land. I believe Ball and others should focus much greater attention on constitutional concepts other than the jury in their efforts to articulate and advance sound procedural rules for modern sentencing decisionmaking.

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1. W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 Colum. L. Rev. 893 (2009).

2. 530 U.S. 466 (2000).

3. *Ring v. Arizona*, 536 U.S. 584, 613 (2001) (Scalia, J., concurring).

I. BALL'S CONCEPTUAL VISION OF JURIES AND ITS FUNCTIONAL PROBLEMS

Ball's article explores the ramifications of *Apprendi* for indeterminate sentencing systems in which parole authorities continue to play a significant role, and often engage in significant factfinding, in deciding just how long a defendant will remain in prison.⁴ Ball focuses particularly on California's sentencing system, in which the parole board can transform parole eligible offenses into parole ineligible offenses based on their own findings of fact about the defendant's original crime.⁵ Rejecting a purely mechanical reading of *Apprendi* that might require jury findings of fact for all components of the parole release decision, Ball instead develops a sophisticated argument that the combination of retributive and rehabilitative elements in California's indeterminate sentencing system call for the *Apprendi* jury right to apply to some, but not all, factfinding by parole authorities.⁶

At the heart of Ball's analysis and assessment of *Apprendi* is his attraction to a particular conceptual vision of juries. Specifically, Ball views jurors as community representatives who are well positioned to make moral, retributivist judgments about criminal wrongdoing. As he explains early in his article, Ball is seeking to give meaning to the "very jury power that *Apprendi* established," and he does so by "[l]ocating the *Apprendi* right in the jury's retributive role."⁷ Ball describes and praises juries as "the moral representatives of the community," and he asserts that "the jury, [as] the conscience of the community, is uniquely suited to make moral judgments."⁸

Importantly, Ball's attraction to jury trial rights and his conceptual vision of juries seems in accord with the Framers' constitutional perspective. As Professor Akhil Reed Amar has effectively documented, the Framers viewed the jury as a critical democratizing force in the judicial branch: "Juries were, in a sense, the people themselves, tried-and-true embodiments of late eighteenth century republican ideology."⁹ As such, Professor Amar explains, jurors during the Founding Era were understood to have the "right and power to acquit against the evidence" and "to consider legal as well as factual issues." They could even "refuse to enforce any law that they deemed unconstitutional."¹⁰ Judge Jack Weinstein has similarly explained the Framers' perspective on the jury's role in this way:

The authors known to the founders had a high respect for the wide powers of the jury over law, fact and punishment. In a sense, the jury was, and remains, the direct voice of the sovereign, in a collaborative effort with the judge. It expresses

4. Ball, *supra* note 1, at 898–99.

5. *Id.* at 902–03.

6. *Id.* at 905–06.

7. *Id.* at 899.

8. *Id.* at 923–24.

9. Akhil Reed Amar, *America's Constitution: A Biography* 234 (2005).

10. *Id.* at 238–39.

the view of a sometimes compassionate free people faced with an individual miscreant in all of his or her tainted humanity, as opposed to the abstract cruelties of a more theoretical and doctrinaire distant representative government.¹¹

In other words, the Framers' vision of juries as the people's representative in the judicial branch with broad powers seems in perfect harmony with Ball's modern vision of juries serving as the conscience of the community making moral, retributivist judgments.

Unfortunately, while Ball's conceptual vision of juries may have a great historical pedigree, this vision finds no functional expression in current legal doctrines or in the practical realities of modern criminal justice systems. Though the Framers long ago may have embraced juries as the community's representatives making retributivist judgments about criminal wrongdoing, just as Ball does now, in modern times neither criminal law doctrine nor criminal justice practices allow juries to function effectively in that role.

To begin, only a precious few criminal cases in the modern American criminal justice system ever involve a jury. More than nine of every ten federal and state convictions are the result of guilty pleas, not jury trials.¹² Though a guilty plea may often be a sensible choice for a defendant, any and every plea prevents a jury from having the power or opportunity to make any sort of moral, retributivist judgments about the defendant and the charges brought by the state. In other words, our modern criminal justice system's heavy reliance on pleas formally and functionally takes juries completely out of the loop in more than ninety percent of all cases that proceed to sentencing. This reality makes it especially problematic for Ball to seek a better understanding of *Apprendi* and the meaning of punishment through the role of juries.

Moreover, even in those rare criminal cases that go to trial, jurors are only asked and are only permitted to find facts concerning whether the defendant has committed certain alleged acts. Though juries retain a raw power to nullify through an acquittal in the face of clear factual guilt, modern doctrines do not permit the litigants or the judge to inform jurors that they have the authority to acquit against the evidence or to consider legal and constitutional issues.¹³ In fact, current law generally does not even permit the litigants or the judge to inform jurors

11. *United States v. Khan*, 325 F. Supp. 2d 218, 229–30 (E.D.N.Y. 2004) (internal citations omitted).

12. See Tracey Kyckelhahn & Thomas H. Cohen, U.S. Dep't of Justice, Bureau of Justice Statistics Bulletin: Felony Defendants in Large Urban Counties, 2004, at 1 (2008), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf> (on file with the *Columbia Law Review*) (finding that, in nation's seventy-five most populous counties, more than ninety-five percent of convictions occurred through guilty plea); U.S. Sentencing Comm'n, 2008 Sourcebook of Federal Sentencing Statistics fig. C (2009), available at <http://www.ussc.gov/ANNRPT/2008/SBTOC08.htm> (on file with the *Columbia Law Review*) (reporting that 96.3% of all federal convictions in fiscal year 2008 were result of guilty pleas).

13. See generally Joshua Dressler, *Understanding Criminal Law* 5–8 (4th ed. 2006).

about the possible or likely sentencing consequences of their factfinding.¹⁴ Jurors can hardly serve as community representatives making retributivist judgments when we treat them like moral mushrooms and keep them in the dark about the true import and impact of the facts they find.

There is an important and telling exception to the formal and functional limitations placed on modern juries: In the administration of the death penalty, juries still have a profound and profoundly important role that effectuates Ball's conceptual vision. Modern death penalty statutes, which legislators created in response to the Supreme Court's Eighth Amendment jurisprudence, ensure that juries will act as the conscience of the community, making moral, retributivist judgments, in nearly every capital case. Because of special indictments and special jury selection procedures, capital jurors know from the outset of their service that they will be asked to make a moral judgment as to whether a particular offender deserves to die for his alleged crimes.¹⁵ Moreover, capital jurors are not merely asked to find whether a capital defendant is factually guilty, they also decide whether a guilty defendant should be sentenced to death for his crimes. And nearly every capital case involves a jury trial because, even if a capital defendant admits guilt, he still can (and usually will) ask jurors to impose a sentence other than death.

The fact that Ball's vision of juries finds ready expression in modern capital punishment is not really surprising; as he recognizes, his vision draws from Justice Stevens's discussion of the jury's proper role in capital cases.¹⁶ Moreover, long before *Apprendi*, the Supreme Court's capital jurisprudence focused on ensuring that jurors are able to give a "reasoned moral response" to mitigating evidence put forward by a capital defendant.¹⁷ And, tellingly, even Justices Stephen Breyer and Anthony Kennedy, both of whom have actively and urgently argued against extending *Apprendi* in other settings, did not object to its extension to death penalty proceedings in *Ring v. Arizona*.¹⁸ Put simply, the concept of giving juries a prominent role and enabling them to express moral judgment in capital punishment decisionmaking is not conceptually controversial or functionally problematic. Conceptually, few resist the idea that death sentencing involves a moral, retributivist judgment that should reflect community sentiments as expressed by a

14. See *Shannon v. United States*, 512 U.S. 573, 579 (1994) ("The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury.").

15. See generally Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 Ohio St. J. Crim. L. 117 (2004) (exploring the role of the jury in making moral judgments about whether a particular defendant deserves to die).

16. Ball, *supra* note 1, at 924–25 (describing Justice Stevens's view of juries as developed in several death penalty cases).

17. *Perry v. Linaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

18. 536 U.S. 584, 613 (2002) (Kennedy, J., concurring); *id.* at 613–14 (Breyer, J., concurring in the judgment).

jury; functionally, because death is pursued as a criminal punishment so rarely by the state, it is possible to ensure that juries are central in the capital decisionmaking process.

But, outside of the rare and high profile setting of capital cases, there is much conceptual controversy over whether and how sentencing is to incorporate moral, retributivist judgments and community sentiments. As Ball notes, not long ago criminal justice systems embraced a rehabilitative “therapeutic” model of punishment, in which sentencing judges and parole boards sought to assess and predict which offenders were more or less likely to commit future crimes.¹⁹ And, with evidence-based, risk assessment sentencing models attracting interest as prisons overflow, forward-looking utilitarian approaches to sentencing may again soon eclipse any backward-looking retributivist approaches in modern punishment systems.

Moreover, beyond these conceptual issues, it is functionally unimaginable to have jurors regularly involved in making moral, retributivist judgments in all or even most noncapital criminal cases. Dramatically limiting the number of criminal cases resolved through pleas would likely be unwise and would certainly be impracticable. Though some academics have recently urged greater jury involvement in noncapital sentencing,²⁰ nobody has seriously contended that the vast array of constitutional rules that have come to ensure jury involvement in capital cases should (or even could) be regularly incorporated into noncapital criminal cases. And yet, if taken to its logical extreme, Ball’s efforts to “locat[e] the *Apprendi* right in the jury’s retributive role”²¹ suggests that procedurally elaborate jury-centric proceedings used in capital cases can and should become a Sixth Amendment mandate for all cases.

II. CHARTING A DIFFERENT (AND SOUNDER) ADVENTURE IN *APPRENDI-LAND*

Truth be told, I am not convinced that Ball and other fans of *Apprendi* (of which I am one) are really so enamored with juries. I doubt Ball and other *Apprendi* fans would embrace and endorse reforms designed specifically to ensure greater jury involvement in noncapital criminal cases by, say, prohibiting all plea deals and requiring juries to make sentencing decisions for all defendants convicted of the low level crimes, like drug possession, burglary, and DUI, that occupy the great bulk of courts’ criminal dockets. Rather, I suspect what really motivates Ball and other *Apprendi* fans—what certainly accounts for my affinity for

19. Ball, *supra* note 1, at 926–29.

20. E.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 *Duke L.J.* 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 *Va. L. Rev.* 311 (2003); Adriaan Lanni, *Note, Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 *Yale L.J.* 1775 (1999).

21. Ball, *supra* note 1, at 899.

Apprendi—is the recognition that (1) sentencing decisions are often far more consequential than basic guilt determinations, and (2) it is highly problematic for defendants to enjoy so many procedural rights and constitutional protections for guilt determinations, but so precious few procedural rights and constitutional protections for sentencing decisions. There is, I suspect, a strong inclination to endorse and embrace broad Sixth Amendment jury trial rights because it is assumed that when a defendant has a right to a jury he will also necessarily get all the other procedural rights and constitutional protections that are associated with a traditional criminal trial.

But, in my view, it is legally sloppy and conceptually problematic to always rigidly link and analyze the jury trial right with other procedural rights and constitutional protections afforded criminal defendants. Indeed, as I have stressed in other writings,²² the Supreme Court's modern sentencing jurisprudence, which was formalized in *Apprendi* and supersized in *Blakely v. Washington*,²³ has roots in constitutional provisions and concerns beyond just the Sixth Amendment's jury trial right. Specifically, the Due Process Clause and the notice provisions of the Sixth Amendment initially played an important and foundational role in the Supreme Court's efforts in this line of cases. Unfortunately, the Supreme Court's post-*Apprendi* rulings—as well as analyses and criticisms of the Court's jurisprudence like Ball's article—have been almost exclusively concerned with the reach and limits of jury trial rights.

In the often overlooked case of *Jones v. United States*—which first set out the key concepts that *Apprendi* turned into doctrine and that *Blakely* greatly expanded—the Supreme Court expressly drew on constitutional provisions and principles beyond the Sixth Amendment's jury trial right.²⁴ Decided in 1999, *Jones* was the first case in which five Justices indicated that facts establishing higher penalties must be treated procedurally as offense elements, and the *Jones* Court asserted the basis for its ruling in expansive terms. In a critical footnote, the Court explained that “a set of constitutional concerns that have emerged through a series of our decisions over the past quarter century”²⁵ suggested the principle that, “under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”²⁶ Building upon *Jones* to establish a definitive constitutional rule, the Supreme

22. See Douglas A. Berman, *Beyond Blakely and Booker: Pondering Modern Sentencing Process*, 95 J. Crim. L. & Criminology 653, 654–55 (2005).

23. 542 U.S. 296, 303 (2004) (holding that “[t]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts”).

24. 526 U.S. 227 (1999).

25. *Id.* at 251 n.11 (emphasis added).

26. *Id.* at 243 n.6.

Court in *Apprendi* stressed the due process concepts set forth in *In re Winship* to formalize “beyond a reasonable doubt” as the standard of proof in criminal prosecutions.²⁷ The *Apprendi* Court explained that “we have made clear beyond peradventure that *Winship*’s due process and associated jury protections extend, to some degree, ‘to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.’”²⁸ In short, when *Apprendi*-land was first created, its terrain included not only a Sixth Amendment jury right region, but also Fifth Amendment due process and Sixth Amendment notice regions.

In nearly every major post-*Apprendi* ruling, however, the Supreme Court formally or implicitly restricted the importance and impact of the nonjury aspects of *Apprendi* in order to preserve pre-*Apprendi* precedents that rejected defendants’ arguments for more procedural rights at sentencing. In particular, in *Harris v. United States*, the Court reaffirmed its 1986 ruling in *McMillan v. Pennsylvania* that facts triggering mandatory minimum sentences could be found by a judge based on a preponderance standard of proof.²⁹ Similarly, in *Blakely*³⁰ and *United States v. Booker*,³¹ the Court reaffirmed its 1949 ruling in *Williams v. New York* that judges could still find facts through lax sentencing procedures in a discretionary or advisory sentencing scheme.³² In all of these critical post-*Apprendi* rulings, the Supreme Court discussed at great length the importance and reach of the Sixth Amendment jury trial right, but failed to engage seriously with the other procedural rights and principles discussed in *Jones* and *Apprendi*. In short, as the Justices took later adventures through *Apprendi*-land, considerable time was spent exploring the Sixth Amendment jury right region, while the Fifth Amendment due process and Sixth Amendment notice regions were largely ignored and have now been all but forgotten.

To his credit, Ball recognizes and discusses the fact that *Apprendi* concerns more than just the scope and application of the Sixth Amendment jury right. Unfortunately, his analysis of other parts of *Apprendi*-land gets short shrift; it appears in Part IV at the very end of his article and only after he has devoted extensive energy and many words to “locating the *Apprendi* right in the jury’s retributive role” and probing the “very jury power that *Apprendi* established.”³³ I believe the important

27. *Apprendi v. New Jersey*, 530 U.S. 466, 484 (2000).

28. *Id.* (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 251 (1998) (Scalia, J., dissenting)).

29. 536 U.S. 545, 568 (2002) (“Reaffirming *McMillan* and employing the approach outlined in that case, we conclude that . . . [b]asing a 2-year increase in the defendant’s minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments.”).

30. *Blakely v. Washington*, 542 U.S. 296, 304–05 (2004).

31. 543 U.S. 220, 233 (2005) (“We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”).

32. 337 U.S. 241, 251–52 (1949).

33. Ball, *supra* note 1, at 899.

goal of developing conceptually and functionally sound procedural rules for modern sentencing decisionmaking would be much better served if Ball and other commentators—as well as the Justices themselves—would now give jury trial rights short shrift and instead devote extensive energies toward adventuring into other now forgotten regions of *Apprendi*-land.

CONCLUSION

For both sentencing theorists and practitioners, *Apprendi*-land remains an important part of the jurisprudential universe, and Ball's article provides a helpful map and compass for those still traveling into this mysterious domain. Though Ball does extraordinary work adventuring through *Apprendi*-land guided by his lovely (and historically resonant) conceptual commitment to juries, I think his article could ultimately be most beneficial if readers come away with the realization that perhaps it is not conceptually useful or constitutionally wise to have juries serve as the chief tour guides through *Apprendi*-land.

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