RESPONSE

Can Better Juries Fix American Criminal Justice?

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The problems of American criminal justice are as familiar as they are intractable. They include, among others, indefensibly high and racially disproportionate rates of incarceration, which in turn are products largely of overly harsh sentencing laws, excessively broad criminal codes, disproportionate prosecutorial power, and too much plea bargaining. Could one discrete change in jury instructions make a dent in these entrenched practices?

Professors Daniel Epps and William Ortman argue that it could. In their Article *The Informed Jury*,[1] Epps and Ortman propose that trial judges inform juries about the authorized sentences attached to the charged offenses presented to them before they decide whether defendants are guilty of those charges. The idea flies in the face of more than a century of practice in state and federal courts; law in almost every U.S. jurisdiction prohibits jurors from being told the possible sentencing consequences of conviction (capital murder charges excepted).[2] Why, after all, do jurors need to know? Save in a half-dozen states (and again in capital cases), jurors have no role in sentencing.[3] Whether a defendant is guilty of a crime is one question; what punishment he should receive if guilty is another. Jurors are assigned the first; judges (or sometimes statutes) settle the second.

Nonetheless, Epps and Ortman make a compelling case that criminal juries should be made aware of the mandatory-minimum and maximum sentences for the offenses they adjudicate, and whether multiple sentences would necessarily run consecutively.[4] They provide

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1. Daniel Epps & William Ortman, *The Informed Jury*, 75 VAND. L. REV. 823 (2022).

2. *Id.* at 830 n.28–34.

3. *Id.* at 832 n.44 ("In all but one of the six jury sentencing states, a bifurcated process separates guilt and punishment stages.").

4. *Id.* at 855–60.

a thorough historical account that this practice would be a return to the information that English and American jurors possessed in the eighteenth and early nineteenth centuries.[5] Only in the mid-nineteenth century did state court judges begin to instruct juries "merely to answer to the question of guilt or innocence; you have nothing to do with the consequences of your decision."[6] But Epps and Ortman convincingly show that this shift was in reaction to a change in sentencing policy that contemporary courts have overlooked and that no longer holds true. Colonial criminal law mimicked England's exceedingly harsh sentencing laws—the "Bloody Code" that mandated the death penalty for a wide range of offenses including thefts.[7] In that context, jury acquittals (or "partial verdicts" convicting on a lesser offense) moderated overly harsh criminal law.[8] But in the first several decades after the founding, states, led by Pennsylvania, eliminated the death penalty for most offenses and adopted sentencing law characterized by relatively moderate prison terms.[9] In this new context, juries should no longer be worried that sanctions authorized by a guilty verdict were unduly harsh. So judges began to tell them, in effect, not to worry.[10] Epps and Ortman rightly argue that this condition for the rule of jury ignorance—rational sentencing policies—no longer holds in the contemporary United States.

Beyond this historical account, Epps and Ortman's case for informing juries about sentences is built on political theory and consequentialist claims. Giving jurors basic information about sentencing ranges, they argue, is important in order for juries to serve their "core political function of authorizing state punishment,"[11] which they do by finding defendants guilty. Additionally, they foresee that juror awareness of sentencing consequences "would make juries catalysts of criminal law reform" by triggering "a virtuous political feedback loop that could make our extraordinarily punitive criminal legal system less severe."[12]

Their political arguments, grounded in democratic theory and the jury's constitutional role in governance, are wholly convincing. It is

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5. *Id*. at 840–48, 876–84.

6. People v. Pine, 1848 WL 4929 (N.Y. Gen. Term. 1848), *quoted in* Epps & Ortman, *supra* note 1, at 881.

7. PETER KING, PUNISHING THE CRIMINAL CORPSE, 1700–1840, at 5–11, 62–64, 81 (2017); STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY 8 (2003) (describing colonial laws).

8. KING, *supra* note 7, at 81, 95; BANNER, *supra* note 7, at 91; Epps & Ortman, *supra* note 1, at 843.

9. Epps & Ortman, *supra* note 1, at 880.

10. *Id*. at 881–82.

11. *Id*. at 860.

12. *Id*. at 826.

hardly a radical notion that knowing the effects of decisions can affect how people decide, even when the questions involve a heavy dose of nominally objective determination of facts. (Ask any judge whether they would be willing to rule on whether evidence should be excluded because its seizure violated the Fourth Amendment without knowing what the evidence is.) Epps and Ortman offer the intuitive insight that, notwithstanding the beyond-a-reasonable-doubt standard of proof, jurors (and probably judges) implicitly, and appropriately, adjust the stringency of that imprecise standard depending on what is at stake in a case.[13] And more broadly, Epps and Ortman persuasively frame the jury's political and legal role as deciding whether to grant "democratic authorization" for criminal punishment.[14]

On the other hand, the multifaceted, beneficent-reform effects on criminal justice that Epps and Ortman predict from informed juries rest on a series of optimistic assumptions that merit skepticism. In brief, their premises and expectations are: (1) juries informed about mandatory and maximum sentences more often will acquit, or convict for a lesser offense when that is an option; (2) in response to more frequent acquittals, which they would dislike, legislatures will reform sentencing laws to reduce their severity; acquittal verdicts provide a political incentive that counteracts familiar "tough on crime" incentives that led to unduly severe sentencing laws;[15] and (3) informed jury acquittals will also undermine prosecutors' leverage to "strong-arm" defendants into guilty pleas by presenting them with a choice between pleading guilty to a lesser charge that the prosecutor deems appropriate or face more serious charges, with more severe sentences, at trial. In the informed-jury world, the logic goes, "[r]educing the odds that a defendant will be convicted on such a charge makes that threat less credible."[16] Defendants would be less risk averse about going to trial. Prosecutors would ease up on coercive bargaining tactics and might even lobby legislatures to moderate sentencing codes with the aim of acquittals.[17]

All of this depends, then, on informed juries returning not guilty verdicts at a sufficiently high rate and relatively consistently over a period of time. That trend, in turn, would confront legislatures and prosecutors with a state of affairs they would be unwilling to tolerate and that they would decide to remedy through sentencing reform. Epps

13. *Id*. at 837–38.
14. *Id*. at 871.
15. *Id*. at 862–64.
16. *Id*. at 868.
17. *Id.*

and Ortman recognize a hurdle to this scenario: if those policymakers like prevailing punishment policies but dislike informed juries' acquittals, why not just keep juries as they are now—uninformed—rather than reform sentencing law? For that reason, Epps and Ortman recognize that the most plausible route to a system of informed juries is through judicial lawmaking. They sketch a plausible constitutional argument for such a move but concede its precedential basis is somewhat thin and the shift unlikely in the near term. Fair enough. Part of the legal scholar's role is to identify solutions for dysfunctions they identify in law and practice, and good ideas should not be limited to those that have a more-likely-than-not path to adoption. Taking that view, the question is whether the informed-jury proposal is really a good idea—more specifically, whether it really holds promise as a route to transforming the entrenched punitive nature of state and federal criminal justice. For several reasons, I think its odds of doing so are not good.

First, there is the question of whether informed juries today really would choose to acquit defendants often enough that legislators and prosecutors would take notice, especially in the kinds of serious cases that those officials care about the most, and especially when the evidence is strong. Juries two centuries ago did so, but they were operating under different instructions than juries today receive.[18] Epps and Ortman note the familiar history that, by the end of the nineteenth century, juries had lost the power to "find" or "decide" the law as well the facts, and courts rejected instructions or arguments alerting jurors to their power of nullification.[19] The authors concede that defense lawyers would still be barred, as they are now, from urging nullification in order not to authorize harsh sentences.[20] Lawyers would be confined to emphasizing punishment severity—seemingly with a wink and nod—as a reason for jurors to "pay close attention" to the evidence and "exercise care in parsing the testimony for reasonable doubts."[21] And they would have to do so in the face of a further constraint on juries built into many contemporary instructions: in many jurisdictions, juries are told that they "must find" the defendant guilty if they conclude the evidence proves the charges beyond reasonable doubt.[22] And jury

18. *Id.* at 881.

19. *Id.* at 883.

20. *Id.* at 857.

21. *Id.*

22. *See, e.g.*, United States v. Rendon, 75 M.J. 908, 915–16, 915 n.28 (N-M. Ct. Crim. App. 2016); United States v. Stegmeier, 701 F.3d 574, 583 (8th Cir. 2012); United States v. Mejia, 597 F.3d 1329, 1340 (D.C. Cir. 2010); United States v. Carr, 424 F.3d 213 (2d Cir. 2005); Farina v. United States, 622 A.2d 50 (D.C. 1993); People v. Goetz, 532 N.E.2d 1273 (N.Y. 1988); State v. Ragland, 519 A.2d 1361 (N.J. 1986); State v. Santiago, 552 A.2d 438 (Conn. App. Ct. 1989).

instructions aside, we might wonder how willing juries will be to acquit a defendant of serious crimes—especially violent crimes, but perhaps also drug distribution or weapons offenses—when evidence of guilt is strong. And evidence often comes in stronger forms than it did two centuries ago—surveillance recordings, DNA analysis, fingerprints, digital communication records and location data, and much else. It is always especially strong on a defendant's prior convictions, a fact on which enhanced sentences turn.[23] Nonetheless, Epps and Ortman hold out hope. They propose giving that nominal question to jurors in hopes they would reject typically dispositive evidence—which reveals a defendant to be less sympathetic than they previously knew—and refuse to make the finding that triggers harsher punishment.[24]

But acquittals need not be juries' only option as a response to unduly harsh punishments for serious crimes. An alternative in some cases can be to convict of a lesser offense—what were once called "partial verdicts"[25]—that covers the same conduct but carries a more appropriate punishment even if proof on the greater offense is strong. Epps and Ortman suggest that legislatures might respond to informed-jury acquittals with reforms that increase these sorts of options for juries by distinguishing more offenses by grades that carry separate sentencing ranges.[26] On the one hand, this possibility might go a long way toward using informed juries to redress the problem of excessive sanctions that help perpetuate high incarceration rates; it could give juries a way to reduce mandatory or maximum penalties while still punishing the guilty. And a pattern of lesser-offense convictions might be a politically salient indicator, albeit a weaker one than a pattern of acquittals, that jurors disapprove of the harshest sentences. In theory, lesser-offense convictions also reduce the plea-bargaining leverage that prosecutors gain from threatening to press the most serious charges at trial. At the same time, they reduce the risk that punishment-informed juries pose to prosecutors: the odds of convicting defendants of *something* are higher if jurors have options. That reflects the original purpose of lesser-included offense doctrines—to maximize prosecutors'

23. *See, e.g.*, 18 U.S.C. § 924(e) (specifying a higher minimum sentence based on convictions for certain prior serious offenses); U.S. SENT'G GUIDELINES MANUAL § 4A1.1 (U.S. SENT'G COMM'N 2021) (specifying sentence adjustments based on criminal history).

24. Epps & Ortman, *supra* note 1, at 858.

25. *Compare* KING, *supra* note 7, at 81, *with* FED. R. CRIM. P. 31(b) (using "partial verdicts" differently to describe jury verdicts on some charges but not others or for some defendants but not all in a joint trial).

26. *See* Epps & Ortman, *supra* note 1, at 875.

odds of winning a conviction, given that double jeopardy bars a second trial after an acquittal.[27]

Yet some details in the law of jury instructions affect the prospects of this jury option as they do for acquittals. In federal courts, judges instruct juries on a lesser-included offense only if it is "necessarily included" in the greater offense[28] and if the evidence supports a verdict on the lesser offense.[29] At least in federal court, the evidentiary test is especially restrictive: "[T]he evidence at trial must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater."[30] That limitation could preclude juries considering lesser-included offense options in many scenarios like the one Epps and Ortman posit as an example—a defendant charged with possessing heroin with intent to distribute.[31] Assume prosecutors charged a defendant with possessing a kilogram of heroin and at trial presented evidence that federal agents seized a kilogram from his car. That offense carries a ten-year mandatory minimum sentence.[32] A lesser-included option could be possession of merely 100 grams of heroin, which carries a mandatory prison term only half as long.[33] But if the evidence showed a single package of heroin weighing a kilogram, how many judges would instruct on the lesser offense because "a jury could rationally . . . acquit him of the greater"?[34]

Another reason for pessimism that informed-jury acquittals will spark reform efforts in legislatures and prosecutors lies in the number of jury trials in which one might detect a new trend in acquittals. Epps and Ortman recognize that jury trials are rare in U.S. justice systems

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27. Kyron Huigens, *The Doctrine of Lesser Included Offenses*, 16 U. PUGET SOUND L. REV. 185, 192–93 (1992); *see also* James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 6–13 (1995) (providing overview of doctrine of lesser included offenses).

28. FED. R. CRIM. P. 31(c)(1); Schmuck v. United States, 489 U.S. 705, 716 (1989) ("[O]ne offense is not 'necessarily included' in another unless the elements of the lesser offense are a subset of the elements of the charged offense. Where the lesser offense requires an element not required for the greater offense, no instruction is to be given under Rule 31(c)."); *see also* CAL. PENAL CODE § 1159 ("The jury . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged . . . .").

29. *See* Michael H. Hoffheimer, *The Future of Constitutionally Required Lesser Included Offenses*, 67 U. PITT. L. REV. 585, 588–89 (2006) ("[F]ederal courts and most states require lesser included offense instructions only in cases where they are supported by the record.").

30. *Schmuck*, 489 U.S. at 716 n.8 (citing Keeble v. United States, 412 U.S. 205, 208 (1973)); *see also* 75A AM. JUR. 2D *Trial* § 1141 (2022) ("A defendant does not have a right to the instruction if the state's evidence is sufficient to satisfy its burden to prove all of the elements of the greater offense, and the defendant presents no evidence to negate those elements other than a denial.").

31. Epps & Ortman, *supra* note 1, at 856; 21 U.S.C. § 841(a).

32. 21 U.S.C. § 841(b)(1)(A)(i).

33. § 841(b)(1)(B)(i).

34. *Schmuck*, 489 U.S. at 716 n.8 (citing Keeble v. United States, 412 U.S. 205, 208 (1973)).

today; that is a key reason they want to reinvigorate juries.[35] They don't directly argue that a shift to informed juries would change this and increase the percentage of jury trials. One can imagine reasons why the change may or may not have that effect.[36] But the problem with expecting a political response to an increase in not guilty verdicts is that we now have so few trials at all that even a statistically significant rise in acquittals might garner little notice. In the federal system in 2018 and 2019, only two percent of cases were terminated by jury *or* bench trial.[37] Data on state jury trials is much harder to come by. In Virginia in 2021, only 0.3 percent of felony adjudications occurred by jury trial, a rate that has been in steady decline (from about two percent) over the past quarter century.[38] The Court Statistics Project ("CSP") collects what data is available on state criminal court caseloads and trials, though fewer than half of states report those numbers.[39] But calculating jury trial rates as a percentage of disposed cases, the CSP 2020 data on twenty states shows California with the highest rate at 0.0085 percent of dispositions.[40] These data can mislead by combining misdemeanor and felony prosecutions.[41] Prosecutions of the most serious offenses are most salient to political actors and most significant for incarceration rates. The federal data confirms that trials are more common for some categories of serious offenses. Almost seven percent of violent crime prosecutions were resolved by trial in 2019 (although the figure for drug prosecutions, where harsh sentencing laws often attach, was only 2.4 percent).[42] Still, one wonders how much a sea change in jury verdicts it would take to catch reformers' attention when the baseline numbers of jury trials are this low.

As it happens, the federal structure of U.S. criminal justice provides a limited natural experiment for speculating about the answer.

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35. Epps & Ortman, *supra* note 1, at 826.

36. On the one hand, defendants ought to demand jury trials more often in those cases in which they assess their odds of acquittal to be improved by informed juries. On the other hand, if prosecutors recognized the same thing, they ought to offer more lenient plea bargains to avoid trial, which could lead to lower incarceration rates without an increase in trials.

37. MARK MOTIVANS, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2019, at 10, 10 tbl.6 (Oct. 2021) [hereinafter MOTIVANS, 2019]; MARK MOTIVANS, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FEDERAL JUSTICE STATISTICS, 2017–2018, at 10, 10 tbl.6 (Apr. 2021).

38. *See* VA. CRIM. SENT'G COMM'N, 2021 ANNUAL REPORT 25 (2021).

39. *CSP STAT Criminal*, CT. STATS. PROJECT, https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-criminal (last updated Jan. 6, 2022) [https://perma.cc/3Q5W-EEYP].

40. *Id.*

41. For a different measure of state felony trials, see BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009–STATISTICAL TABLES 24 tbl.21 (Dec. 2013) (using data from the seventy-five largest U.S. counties and reporting two percent of state felony defendants convicted and one percent acquitted by trial).

42. *See* MOTIVANS, 2019, *supra* note 37, at 10, 10 tbl.6.

Out of fifty-two criminal justice systems,[43] Epps and Ortman note that two of them—North Carolina and Louisiana—already employ a version of their proposal; both states instruct jurors about sentencing consequences.[44] Can we tell anything from these states' track records of using punishment-informed juries? Inferences must be taken with several grains of salt because the evidence is limited, but there is little to indicate that adjudicating with informed juries has made a difference.

Nothing indicates informed juries has led to higher rates of jury trials. The CSP finds no data available for Louisiana. But its data for 2017 to 2020 shows North Carolina's criminal courts to have consistently one of the lowest jury trial rates among the states that report such data: twentieth out of twenty-one states in 2019, seventeenth out of twenty states in 2020.[45] Again, it is not clear how significant we should take this to be. North Carolina has among the highest incoming criminal case loads annually, both in raw numbers and as a percentage of population.[46] That suggests that North Carolina's low trial rate may stem from caseload pressures, which would make prosecutors and judges even less receptive to jury trials.[47] Whatever is going on here, informed juries don't seem to push up trial rates.

Nor does the evidence from these two states suggest much about the effect of informed juries on incarceration rates.[48] Incarceration data is reliable and available for every state. North Carolina's incarceration rate is below the national average, but Louisiana consistently has the highest in the nation.[49] Standing alone, those starkly different records don't suggest that informed juries have much effect on incarceration rates. Granted, confounding variables may be at play—crime rates, law

43. That figure includes fifty states, the District of Columbia, and the federal system but excludes territorial jurisdictions and the military justice system.

44. Epps & Ortman, *supra* note 1, at 833 (citing Louisiana and North Carolina sources).

45. *CSP STAT Criminal*, *supra* note 39.

46. *See id.*

47. North Carolina also has the highest rate of bench trials among states reporting such data. *See id.*

48. Epps & Ortman, *supra* note 1, at 833.

49. *See* Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/global/2021.html (Sept. 2021) [https://perma.cc/G6FV-G2JA] (reporting incarceration rates per 100,000 population; Louisiana is highest at 1,094; North Carolina at 617; U.S. average at 664); *State-by-State Data: State Imprisonment Rate*, SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR (last visited Mar. 8, 2022) [https://perma.cc/4GKA-C9QT] (per 100,000 population, Louisiana's rate in 2019 was 680 and North Carolina's was 313). Note that "imprisonment rates" counts only inmates in state prisons, while "incarceration rates" are higher because they also include detainees in local jails.

enforcement resources, prosecution and sentencing policies, and racial demographics, to name a few. Epps and Ortman recognize this, and they are consistently modest in their predictions of informed juries' effects on imprisonment rates.[50] Nor does either state's informed-jury practice likely track their proposal precisely; surely neither allows juries to determine a defendant's criminal record. Still, from what little real-world evidence we have, informing juries about sentencing consequences doesn't seem to hold a lot of promise as a route to reducing America's excessive use of imprisonment.

Nonetheless, Epps and Ortman's Article has many virtues from which scholars, and perhaps policymakers, will benefit. Its normative case for informed juries is wholly convincing. Its sketch of a path to constitutional reform of jury instructions is sound and well conceived. Its historical account of the changing relationship between jury knowledge, sentencing laws, and judicial lawmaking is full of insights. Its lament for the juries' diminished role and power is well taken. And who knows—if given a chance, perhaps informed juries, especially in combination with other reforms, would contribute to meaningfully unwinding the unprecedented American carceral state.

50. *See* Epps & Ortman, *supra* note 1, at 864.