

IMPROVING CRIMINAL JURY DECISION MAKING AFTER THE *BLAKELY* REVOLUTION

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*The shift in sentencing fact-finding responsibility triggered in many states by *Blakely v. Washington* may dramatically change the complexity and type of questions that juries will be required to answer. Among the most important challenges confronting legislatures now debating the future of their sentencing regimes is whether juries are prepared to handle this new responsibility effectively—and, if not, what can be done about it. Yet neither scholars addressing the impact of *Blakely* nor advocates of jury reform have seriously explored these questions. Nonetheless, a number of limitations on juror decision making seriously threaten the accuracy of verdicts in systems where juries are given a more prominent role in finding sentencing facts. In this article, we assess the capacity of juries to analyze and deliberate on sentencing-related facts. We consider, inter alia, problems of cognitive overload, frustration and loss of motivation due to complex structures, difficulties evaluating evidence that juries do not ordinarily consider, distortions due to the framing of nonbinary questions, and deliberation-related biases. We also propose a model for sentencing-stage jury proceedings that would minimize these problems. Its components include bifurcation of proceedings, partial application of the rules of evidence, special verdict forms that are carefully designed to minimize framing effects, structural simplification of sentencing tasks, a more active jury, and guidance for jurors on bias-reducing deliberation structures.*

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TABLE OF CONTENTS

Introduction302

I. Shaping the Post-*Blakely* Jury: Background and Objectives305

 A. *Blakely* and its Aftermath.....305

 B. Objectives of Jury Reform.....309

II. Application of the Rules of Evidence313

 A. Constitutional Requirements313

 B. Prudential Considerations315

 C. The Relevance Problem: An Argument for Bifurcation.....322

III. Framing Sentencing-Related Questions325

 A. Anchoring and Scale Problems325

 B. Tendency to Pick the Middle Option329

 C. Restructuring and Special Verdict Forms331

IV. Reducing and Managing Complexity333

 A. Sentencing Complexity and Cognitive Overload.....334

 B. Passivity and Free-Riding336

 C. Structural Simplification and Active Jury Approach340

V. Deliberation on Sentencing Facts.....345

 A. Likely Effects of Deliberation Biases.....346

 B. Improving Deliberation Outcomes.....350

VI. Conclusion.....354

INTRODUCTION

More than a year and a half after the Supreme Court’s landmark decision in *Blakely v. Washington*,¹ the future of state sentencing procedures remains uncertain. Legislatures around the country continue to grapple with the choice between abandoning binding guidelines and substantially expanding the role of juries in establishing the facts on which criminal sentences are based. Some states have already shifted this fact-finding responsibility to juries, and all states must decide (and continually reevaluate) how to allocate sentencing fact-finding power in light of the constitutional rule announced in *Blakely*.²

Two questions are central to this choice. First, policymakers must ask whether juries are competent to handle the fact-finding required at the sentencing stage, which may encompass questions that are open-ended or multiple-choice, both quantitative and qualitative in nature,

1. 524 U.S. 296 (2004).

2. Although *Blakely*’s most immediate effects will be on states with mandatory sentencing guideline schemes, its long-term implications are broader. Because the Court has imposed a permanent constitutional constraint on the design of sentencing systems, every future legislature that considers a determinate scheme of closed sentencing ranges (whether comprehensive or specific to a particular crime) will have to consider whether juries are up to the task of finding the relevant facts.

sometimes quite complicated, and often numerous. Second, and equally central, lawmakers must consider whether, even if juries are not currently well suited to find sentencing facts effectively and accurately, the procedures and evidentiary rules applicable at the sentencing stage can be altered in ways that enable juries to perform their new tasks well.

One of the major criticisms of *Blakely* and its predecessor, *Apprendi v. New Jersey*,³ raised for instance by Justice Breyer in his majority opinion in *United States v. Booker*,⁴ has been that juries are just not very good at the kinds of complex inquiries that sentencing under modern guidelines schemes requires. Neither the *Blakely* majority nor *Apprendi*'s scholarly defenders have disputed this possible incapacity, instead arguing that inefficiency and error are unavoidable consequences of honoring defendants' Sixth Amendment rights.⁵ The question of jury competence, however, has been left largely unexamined, leaving key questions unanswered. For example, in what ways are juries likely to fall short in their new fact-finding tasks? Can these failings be remedied? As we discuss in this article, juries are indeed prone to a variety of decisional errors, many of which can be expected to occur more frequently and in new ways as juries take on their post-*Blakely* responsibilities.⁶ In shaping and implementing post-*Blakely* sentencing frameworks, policymakers and judges should not assume that the jury's incapacities are fixed. Instead, *Blakely* should trigger serious attention to the ways that these incapacities might play out in the sentencing setting, and to new reforms that can enable juries to adapt successfully to their new responsibilities. The jury reform literature to date has not explored these issues.

This article thus has two goals. The first is to assess the cognitive and deliberative biases that will hamper jury performance in finding sentencing facts. The second is to present a model of jury fact-finding that will minimize the effects of these biases. It bears noting that the issue in question is jury fact-finding, not jury sentencing; we assume that even in states that increase juries' roles, judges will continue to apply the sentencing guidelines and choose sentences on the basis of the factual findings made by juries. We will address jury sentencing only to the extent that studies of it (in capital cases and, in a few states, noncapital cases) provide useful guidance as to juries' fact-finding capacities. In addition, unlike most current work on *Blakely*, we do not seek to answer the question whether and to what extent juries should be finding sentencing facts

3. 530 U.S. 466 (2000).

4. 125 S. Ct. 738 (2005).

5. *Blakely*, 542 U.S. at 310–11; see Benjamin J. Priestler, *Constitutional Formalism and the Meaning of Apprendi v. New Jersey*, 38 AM. CRIM. L. REV. 281, 303–04 (2001) (arguing that the “Apprendi principle preserves the integrity of our constitutional doctrines by requiring that the legislature respect the distinction between its offense-defining and sentencing-regulating powers”).

6. See Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1138–40 (2005).

in the first place.⁷ We do, however, seek to inform the present debate on those questions by providing a realistic assessment of juries' capacities, as well as a creative approach to reform.

We identify four categories of potential post-*Blakely* problems, addressed in Parts II through V of this article, respectively. First, effective consideration of sentencing factors will require admission of certain types of evidence that juries ordinarily do not hear at the trial stage—yet juries may be prejudiced by this evidence if it is admitted at trial, and may be ill-equipped to evaluate much of it at any stage. Second, special verdict forms or other means of presenting new and nonbinary sentencing questions to the jury run the risk of distorting fact-finding through framing effects and confusing the jury by asking it to draw ill-defined comparisons. Third, the tremendous complexity of jurors' post-*Blakely* tasks threatens to cause cognitive overload, undermining information-processing capacity and motivation. Finally, because sentencing offers jurors a wide range of verdict outcomes, they will be subject to certain deliberation biases—such as vote-trading or polarization—that typically have significantly less impact at the trial stage.

The solutions we propose to these problems address each of the obvious post-*Blakely* policy questions facing legislatures, as well as some that have heretofore been ignored. We argue for bifurcation of proceedings in order to prevent prejudice resulting from the introduction of sentencing evidence at the trial stage, and to reduce complexity and confusion at each stage of the proceedings. We recommend a partial application of the rules of evidence at jury proceedings related to sentencing, permitting the jury to consider evidence that jurors are fully capable of weighing, like hearsay, but excluding, for instance, irrelevant or highly prejudicial information. In order to minimize cognitive overload and loss of motivation, we suggest reducing the structural complexity of sentencing tasks, making jurors more active in proceedings, and permitting experimentation with division of responsibilities among jurors. And to minimize deliberation biases, we propose a shift away from the traditional model in which jurors are provided little guidance on how to deliberate, in favor of judges recommending structures that may reduce post-*Blakely* biases.

Today, legislatures across the country are facing the question whether to commit sentencing fact-finding to the jury—the *Blakely* route—or instead to transform their guidelines, as the Court did with the federal system in *Booker*, by making the guideline ranges either open-

7. Others have suggested many creative ways to reform and improve state guidelines systems in view of *Blakely*'s upending of many long established regimes, but have not addressed how to improve jury performance. See, e.g., Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1190 (2005) (surveying state guidelines systems and analyzing salient policy issues such as resource constraints and the role of guidelines in various sentencing contexts); Richard E. Myers II, *Restoring the Peers in the "Bulwark": Blakely v. Washington and the Court's Jury Project*, 83 N.C. L. REV. 1383 (2005).

ended or voluntary. Beyond that threshold decision, the states that choose the former approach face the equally critical question of how the new jury proceedings should work. But the fact that this question comes later does not mean it is secondary—the potential effectiveness of reform in improving jury decision making will influence the desirability of relying on juries to determine sentencing facts in the first place. These inter-related questions, which affect thousands of sentencing decisions each day as well as the fairness, credibility, and effectiveness of the justice system as a whole, could hardly be more important. Legislatures should neither decide hastily to avoid juries altogether—without at least considering whether they could be used effectively in carefully structured proceedings—nor commit to a major shift in fact-finding responsibility without a fuller understanding of the limitations on jury decision making.

I. SHAPING THE POST-*BLAKELY* JURY: BACKGROUND AND OBJECTIVES

A. *Blakely and Its Aftermath*

In *Blakely v. Washington*, the Supreme Court vacated, as inconsistent with the Sixth Amendment right to trial by jury, a sentence that had been enhanced under the state sentencing guidelines scheme based on a judge's finding, by a preponderance of the evidence, that the crime was committed with "deliberate cruelty."⁸ The decision built on the Court's earlier holding in *Apprendi v. New Jersey*, which involved a state statutory sentencing enhancement. In both cases, the Court held that, with the possible exception of criminal history, facts increasing a defendant's maximum sentencing exposure must be proven to a jury beyond a reasonable doubt.⁹ In reaching this conclusion, the Court rejected the traditional distinction between offense elements and "sentencing factors," reasoning that if a fact raises a defendant's maximum sentence, it is functionally indistinguishable from an element.¹⁰

The *Blakely* decision triggered a flood of litigation and mass confusion, not least concerning its implications for the federal sentencing sys-

8. 542 U.S. at 313–14.

9. *Id.* at 302; *Apprendi v. New Jersey*, 530 U.S. 466, 494–96 (2000). *But see* *Almendarez-Torres v. United States*, 523 U.S. 224, 246–47 (1998) (holding that past offenses need not be proven to the jury for the purpose of applying a recidivist statute). The Court in *Apprendi* suggested that *Almendarez-Torres* may well have been wrongly decided, 530 U.S. at 489, but found it unnecessary to revisit the issue. *Id.* at 490. In *Shepard v. United States*, a plurality of the Court again flagged the issue without deciding it. 125 S. Ct. 1254, 1262–63, n.5 (2005). The dissenting Justices argued that *Shepard*, which addressed a related issue, would portend the demise of *Almendarez-Torres*. *Id.* at 1269–70 (O'Connor, J., dissenting). Justice Thomas wrote in concurrence that *Almendarez-Torres* should be overruled. *Id.* at 1264 (Thomas, J., concurring). *But see* Douglas Berman, *Conceptualizing Blakely*, 17 FED. SENT'G REP. 89 (2004) (arguing that *Blakely's* logic only requires juries to determine characteristics of the offense, not the offender).

10. *Blakely*, 542 U.S. at 306–08; *Apprendi*, 530 U.S. at 494–96.

tem.¹¹ The Supreme Court quickly took up this question. *United States v. Booker*,¹² released in January 2005, contained two key holdings reached by different majorities. First, Justice Stevens wrote for the five Justices in the *Apprendi/Blakely* majority that *Blakely*'s Sixth Amendment holding applied to the U.S. Sentencing Guidelines.¹³ This holding meant that the Guidelines could not continue to operate as a mandatory sentencing scheme based on judicial fact-finding, but left open the question of how the system should be adapted to solve this problem. On this question, Justice Breyer wrote for the four *Apprendi/Blakely* dissenters, plus Justice Ginsburg, who was the swing vote. In contrast to the approach taken in *Blakely*, the Court in *Booker* declined to shift fact-finding to the jury and instead chose to invalidate the statutory provision that made the Guidelines mandatory, rendering them advisory instead.¹⁴ This approach solved the constitutional problem¹⁵—so long as the Guidelines did not *mandate* a lower sentence, the Sixth Amendment did not bar a judge from *choosing* a higher one on the basis of judicially determined facts—at the cost of abandoning a binding, determinate sentencing system.

The *Booker* Court's choice of remedy was based principally on practical concerns about jury fact-finding, echoing those outlined by the dissenters in *Apprendi* and *Blakely*. These included fears that jurors would become overwhelmed by the number of sentencing factors and amount of evidence involved;¹⁶ that determination of some sentencing factors would be legally difficult or factually complex;¹⁷ that defendants would be placed in a strategic bind at unitary proceedings because introducing evidence on sentencing factors might seem to admit guilt;¹⁸ that sentencing-related guilt determinations would generally prejudice the jury in determining guilt, and bifurcation to solve this problem would be too costly;¹⁹ and that some facts relevant to sentencing (such as probation reports or evidence of the defendant's perjury or misconduct at trial) are not available until after trial.²⁰ Plea bargaining would not eliminate these problems, the Court observed, for these considerations would affect each

11. See Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of United States v. Booker and United States v. Fanfan*, 56 MERCER L. REV. 1131, 1145–46 (2005).

12. 125 S. Ct. 738 (2005).

13. *Id.* at 749–50.

14. *Id.* at 743.

15. The Justices unanimously concluded that the *Booker* remedy satisfied the Sixth Amendment's requirements, although at least one scholar has disagreed. See Frank O. Bowman, III, *Beyond BandAids: A Proposal for Reconfiguring Federal Sentencing After Booker*, 2005 U. CHI. LEGAL F. 149, 181–83 (2005) (arguing that only fully advisory guidelines can be squared with the Sixth Amendment, while the post-*Booker* Guidelines are not fully advisory because departures from them can be reviewed for reasonableness).

16. See *Apprendi v. New Jersey*, 530 U.S. 466, 556–57 (2000) (Breyer, J., dissenting).

17. See *Booker*, 125 S. Ct. at 762 (citing, e.g., determination of loss in securities fraud cases).

18. See *Apprendi*, 530 U.S. at 557–58 (Breyer, J., dissenting).

19. See *Blakely v. Washington*, 542 U.S. 296, 319 (2004) (O'Connor, J., dissenting).

20. *Id.* See generally *Booker*, 125 S. Ct. at 779 (Stevens, J., dissenting) (arguing that these practical concerns are overstated and have not been borne out in states' experiences after *Blakely* and *Apprendi*).

side's incentives to enter a plea agreement.²¹ The Court acknowledged that its choice of remedy was "not the last word: The ball now lies in Congress' court."²²

Even if Congress leaves the Court's chosen remedy in place, however, the issues posed by *Blakely* and *Booker* remain open questions at the state level, the locus of more than ninety percent of criminal sentencing.²³ *Booker* puts state legislatures in guidelines states in an odd position: they have been told by *Blakely* to shift sentencing fact-finding to the jury, and yet a new majority of the Court has now declared that approach impracticable on the federal level. State sentencing schemes are less intricate than the federal guidelines, but many of the possible problems the Court raised in *Booker* are equally applicable to state regimes. States are, however, free to disagree with the Court's policy judgments, and some guidelines states have already begun moving toward jury fact-finding.²⁴ Indeed, in Kansas a system employing jury fact-finding in some cases has been in effect since before *Blakely*, following a post-*Apprendi* decision of that state's supreme court.²⁵ But states considering the adop-

21. *Booker*, 125 S. Ct. at 762; see also Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (developing this argument in the civil context). But see Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2466 (2004); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2553–58 (2004).

22. *Booker*, 125 S. Ct. at 768.

23. William H. Pryor Jr., *Lessons of a Sentencing Reformer from the Deep South*, 105 COLUM. L. REV. 943, 956 (2005).

24. As of October 2005, at least six state legislatures had already adopted "Blakely-izing" legislation shifting at least some sentencing fact-finding to the jury: Alaska, Kansas, Minnesota, North Carolina, Oregon, and Washington. For a useful compilation of these and other state responses to *Blakely*, see Douglas A. Berman, *Doug Berman's Sentencing Law Resources (Blakely in the States)*, <http://moritzlaw.osu.edu/faculty/berman/blakely-states.htm> (last visited Nov. 18, 2005). The compilation shows that in most of the other states with binding guidelines systems, the legislative response to *Blakely* remains uncertain, although Tennessee has adopted an approach along the lines of *Booker*. In addition, some nonguidelines states are moving toward jury consideration of statutory sentencing enhancements. See, e.g., INDIANA STATE LEGISLATURE, FINAL REPORT OF THE SENTENCING POLICY STUDY COMMITTEE 97, available at <http://www.in.gov/legislative/figareports/agency/reports/SPSC01.pdf> (proposing legislative changes).

25. See *State v. Gould*, 23 P.3d 801, 814 (Kan. 2001). In Kansas, factors supporting upward durational departures must be tried to a jury, and the judge determines whether to bifurcate proceedings. KAN. STAT. ANN. §§ 21-4716 to -4718 (2002). Jurors use a special verdict form. See KAN. MODEL JURY INSTRUCTIONS, 71.00, available at <http://www.ussc.gov/STATES/blakely/KS%20Forms.pdf>; see also Adam Liptak, *Justices' Sentencing Ruling May Have Model in Kansas*, N.Y. TIMES, July 13, 2004, at A12 (describing states' use of Kansas as a model). At least initially, Kansas's system has not resulted in a large number of bifurcated proceedings. Douglas A. Berman, *Doug Berman's Sentencing Law Resources (Blakely in the States—Kansas)*, <http://moritzlaw.osu.edu/faculty/berman/states/kansas.html> (last visited Nov. 18, 2005) (quoting Ron Wright). The reasons for this are uncertain, but speculation has included "fear of the unknown," which might encourage both sides to engage in plea-and sentence-bargaining to avoid jury proceedings, as well as certain peculiarities of Kansas law that give Kansas judges fairly wide discretion to impose effectively longer sentences—for example, imposing sentences consecutively—even if no aggravating factors are found. *Id.* Based on these explanations, it is not safe to assume on the basis of Kansas's early experiences that jury proceedings will be unusual even in states that follow the *Blakely* route. In states with different legal frameworks, and after some time has passed such that jury involvement is less novel, such proceedings may well become the norm. And because expectations concerning the result of jury proceedings help to shape the plea-

tion of jury fact-finding would be mistaken not to give serious attention to addressing the various problems likely to accompany jury fact-finding, including those raised by the Court in *Booker*.

It is important to note that the issues presented by this article are not limited in relevance to the fourteen states that currently rely on binding guidelines or functionally equivalent statutory schemes.²⁶ Even states without such schemes often have a number of particular statutory sentencing enhancements that depend on judicial fact-finding.²⁷ Moreover, *Blakely* and *Apprendi* impose a permanent constitutional restraint on sentencing procedure in every state, and in the federal courts. The jury's competence at fact-finding will thus be relevant to every future legislature considering adopting mandatory sentences triggered by certain facts. Even if many states choose not to switch to a jury-based sentencing system in the near term, it is important for states to have an informed understanding of how juries are likely to function at the sentencing stage.

Nonetheless, we focus on the existing state guideline regimes in order to provide a sense of the new kinds of questions jurors will likely have to answer post-*Blakely*. State guidelines are generally simpler than their federal counterparts, yet contain numerous sentencing factors that are quite diverse in kind. Some of the new questions will be objective in character—e.g., drug quantity, amount of economic injury, number of victims, age of offender, and whether the crime was committed on school property. Others will be far more subjective, involving terms that have no clear definition or that appeal to jurors' moral judgments. These include characterizations of a defendant's state of mind (for example, racial bias, as in *Apprendi*, or "deliberate cruelty," as in *Blakely*), or of offense severity relative to other instances of the same statutory offense (for instance, "excessive brutality" or whether a victim is "vulnerable").²⁸ Still others will involve both subjective and objective components.²⁹ More-

bargaining process, distortions even in a small number of jury proceedings may have an impact even on defendants who never see a jury at all. *See supra* note 21.

26. Jon Wool & Don Stemen, *Aggravated Sentencing: Blakely v. Washington—Practical Implications for State Sentencing Systems*, POL'Y & PRAC. REV. (Vera Inst. of Justice), Aug. 2004, at 2.

27. *Id.* In addition, although *Booker* makes clear that wholly *voluntary* guidelines schemes are not affected by *Blakely*, the decision may arguably still affect those states in which judges must provide justifications for departing from advisory guidelines. *See id.* at 4.

28. *See, e.g.*, KAN. STAT. ANN. § 21-4716 (2002) (excessive brutality and vulnerable victim enhancements); WASH. REV. CODE § 9.94A.535 (2005) (vulnerable victim); OR. ADMIN. R. 213-008-002(1)(b) (2004) ("The degree of harm or loss involved was significantly greater than typical for such an offense.").

29. Tennessee, for instance, applies an enhancement if an offense involved injury or property damage that was "particularly great"—requiring an objective calculation of injury amount, but a subjective characterization whether this amount is "particularly great." TENN. CODE ANN. § 40-35-114 (2004); *see also* Jenia Iontcheva Turner, *Implementing Blakely*, 17 FED. SENT'G REP. 106, 106 (Dec. 2004) ("Factors pertinent to sentencing are often complex and involve legal, factual and value judgments all at once."); R. Barry Ruback & Jonathan Wroblewski, *The Federal Sentencing Guidelines: Psychological and Policy Reasons for Simplification*, 7 PSYCHOL. PUB. POL'Y & L. 739, 765-66 (2001) (observing that different individuals define "bodily injury" differently, such that a seemingly factual determination includes a subjective judgment).

over, the complexity of juries' tasks will vary, with even many "objective" determinations proving quite difficult.³⁰

Each legislature that chooses to shift to jury fact-finding will be forced to confront several crucial structural and procedural questions: whether to shift *all* sentencing fact-finding responsibility to the jury, or instead only aggravating factors, or some other subset;³¹ whether the resulting jury proceedings should be unitary or bifurcated into trial and sentencing phases; whether and to what extent the rules of evidence should apply at such proceedings; and how questions should be posed to the jury. In addition, legislatures should also consider reforms to courtroom or deliberation procedures to improve the jury's sentence fact-finding capacities post-*Blakely*. It would be unwise for legislatures to increase and significantly change the burdens jurors face without providing them the tools they need to manage those new tasks.

B. Objectives of Jury Reform

This article aims to identify, and propose solutions to, the biases introduced by shifting sentencing fact-finding power from judges to juries. Our specific recommendations are shaped by an understanding that jury reform must balance a number of competing goals. For instance, "accuracy," in the sense of results that track the actual history of the events at issue, not only is critical to effective deterrence and incapacitation of wrongdoers, but also has a vital moral purpose.³² But achieving an accurate outcome is plainly not the only goal of the criminal justice process.³³ The reasonable doubt standard reduces the total number of "accurate" outcomes (defined in this narrow sense) because it leads to guilty people going free. Society finds this sort of inaccuracy acceptable because it values procedural fairness to criminal defendants, believing that wrongful convictions are far worse than erroneous acquittals.³⁴

Slightly broader than "accuracy," perhaps, is the concept of "rationality" in juror decision making. "Rationality" is often equated with the

30. See *infra* Part IV.

31. One important question is whether *mitigating* factors, in addition to aggravating ones, should be submitted to juries in post-*Blakely* proceedings. The Constitution imposes no such requirement, see *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), but there may be prudential reasons to consider both aggravating and mitigating factors at once—for instance, the efficiency gain from having only one sentencing fact-finding proceeding, or a desire to allow a single fact-finder to balance competing considerations.

32. See Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 532 (1989).

33. See Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1377–78 (1985) (arguing that jury verdicts serve a socializing function that is not perfectly correlated with their accuracy).

34. Some have argued that the presumption of innocence does not apply to already-convicted defendants at the sentencing stage. See Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1778 (2003). However, *Blakely* stands for the proposition that it does apply, at least as to the establishment of facts that increase a defendant's sentencing exposure. *Blakely v. Washington*, 542 U.S. 296, 311–12 (2004).

efficient maximization of one's own welfare, but we do not use it in this sense; we assume that jurors are not driven in their decision making entirely by self-interest, but at least in part by a sense of legal, civic, or moral duty.³⁵ Instead, we use the terms "rationality" and "accuracy" interchangeably to describe decision making that reaches, to the greatest extent possible in light of inevitable limits on jurors' cognitive processes,³⁶ the result the law requires based on the evidence. Thus, a rational juror would vote to find the presence of an aggravating sentencing factor if and only if the evidence supports that result beyond a reasonable doubt.

The law recognizes, of course, that the strength of evidence and credibility of witnesses is debatable, such that there may not be any *single* "rational" outcome even on the most "objective" factual questions; that is why appellate courts review jury verdicts on factual issues deferentially, reversing only when *no* reasonable jury could have come to the result that was reached.³⁷ Moreover, sentencing factors are not purely "objective." Jurors will also be asked to make value judgments, which obviously can vary among different, equally rational jurors. Nonetheless, the biases we discuss may still be described as "irrational," even if they only cause jurors to change what was already a subjective judgment call. For instance, when different ways of framing questions trigger *systematic* changes in outcomes, random variation among jurors' qualitative assessments or normative judgments is unlikely to be the cause. Instead, the wording of the question must be biasing jurors' conclusions. Distortions in value judgments due to suggestive question framing or deliberation structures may prevent the jury from reaching a result that truly represents the range of reasonable views present in a community.³⁸

Producing "rational" or "accurate" outcomes in particular cases is, however, not the only goal of criminal jury processes. Other important

35. See PUNITIVE DAMAGES: HOW JURIES DECIDE vii (Cass Sunstein et al. eds., 2002).

36. Effective jury reform must acknowledge, and work around, cognitive limits. See Craig R. Callen, *Rationality and Relevancy: Conditional Relevancy and Constrained Resources*, 2003 MICH. ST. L. REV. 1243, 1244, 1248 (2003).

37. *Id.* at 1244-49.

38. See Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2144 (1998) (describing the "growing consensus" that "both values and preferences are often constructed, rather than elicited, by social situations"). Of course, this is not to say that value judgments that *are* representative of the community are always "rational." Racial prejudice, for example, may be common in a particular community, and may well bias a jury's value judgments as well as its factual conclusions. See, e.g., Erwin Chemerinsky, *Eliminating Discrimination in Administering the Death Penalty: The Need for the Racial Justice Act*, 35 SANTA CLARA L. REV. 519, 522-24 (1995). We do not focus on racial bias here, however, believing that we could only give it short shrift in a short essay raising so many other issues, and suspecting that procedural reforms to jury fact-finding processes may offer little hope of a solution. Extensive scholarship, however, addresses race and jury decision making. See, e.g., Samuel R. Sommers & Phoebe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997 (2003).

considerations include the fairness of the justice system as a whole,³⁹ as well as the effect of jury service on jurors themselves and on society more broadly. The jury has always played an important role in American democracy,⁴⁰ and jury service is perhaps the only civic responsibility (other than paying taxes) that is legally required of most adult Americans. It is also the only way in which many Americans actively participate in government. One objective of jury reform, therefore, might be the improvement of the process from the jurors' perspective, so that jury service strengthens jurors' sense of civic membership and responsibility.⁴¹ The jury also has an important symbolic role in the "ritual" of a criminal trial.⁴² The notion of facing one's peers gives critical moral legitimacy to criminal trials—legitimacy that stems in part from the various traditions surrounding the jury trial and deliberation process.⁴³ For these reasons, although exploring ways to enhance the jury's democratic or cultural role is not the primary objective of this article,⁴⁴ we recognize the need to ensure that reforms do not undermine that role, and we shape our recommendations accordingly.

We do not consider *every* possible reform that might plausibly improve jury accuracy, but rather focus on identifying new solutions to problems stemming specifically from jurors' involvement in finding sentencing facts. Altering the size of juries, voting rules, and jury-selection processes might arguably improve decision making if done properly, but those issues have been treated extensively elsewhere.⁴⁵ We also do not focus on the issue of jury nullification, because it is quite different in kind from the other problems we address: nullification results not from cognitive-processing problems that cause an inability to apply the law correctly, but from a deliberate rejection of the result the law requires. However, we believe that *Blakely* may have significant consequences for

39. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985).

40. De Tocqueville wrote that "the jury is above all a political institution." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 273 (George Lawrence trans., J.P. Mayer ed., Anchor Books, Doubleday & Co. 1969); see also Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1153 (2005).

41. For instance, Jenia Iontcheva Turner has argued for an expansion of jury *sentencing*, as opposed to merely sentencing fact-finding, in part because citizens' engagement in democratic deliberation on critical moral issues "revitalizes and improves political life as a whole." Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 341 (2003); see also Iontcheva Turner, *supra* note 29, at 106–11 (arguing that *Blakely* provides an opportunity for state legislatures to consider implementing jury sentencing).

42. See Laurence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1376 (1971) (arguing that a trial is a "ritual" as much as it is an "objective search for historical truth," and that the jury's role in that ritual is to "mediate between 'the law' in the abstract and the human needs of those affected by it").

43. See Nesson, *supra* note 33, at 1357–69.

44. Projects with these goals already exist. See, e.g., Am. Bar Ass'n, *Principles for Juries and Jury Trials* (2005) (proposed), available at <http://www.abanet.org/juryprojectstandards/principles.pdf> (indicating the ABA's view on which jury reform issues are most pressing).

45. See generally VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* (1986).

jury nullification, and specifically raises the new possibility of “sentencing nullification,” an issue that merits further research.⁴⁶

Finally, in considering whether to allocate certain decision-making responsibilities to juries or instead to judges, it will be important to understand both sides of the comparison: what are juries’ capacities and limitations *relative to those of judges*? We draw such comparisons where relevant, but primarily focus on juries and not on judges. Some of the problems we discuss are specific to group behavior and do not apply to trial court judges at all. However, we also discuss cognitive biases affecting individual juror decision making that probably apply to some degree—and often to an equal or even greater degree—to judges.⁴⁷ Even those biases shared equally by judges and juries are relevant to post-*Blakely* policy debates for two reasons.

First, these debates should not be limited to the question of how to allocate decision-making responsibilities between judges and juries, but should also focus on how to improve and develop the capacities of those decision makers. The allocation question may be constitutionally determined: *Blakely* means that if a state wants to maintain mandatory sentencing guidelines, it will have no choice but to shift to juries the responsibility to find certain sentencing-related facts.⁴⁸ Given that constitutional fact, it should be an overriding policy priority to ensure that juries can perform those tasks well. Because judges are less likely to have wholly new responsibilities—although they will regain some of their traditional discretion in systems that follow the *Booker* route—focusing

46. Jury nullification is today fairly uncommon. See Kaimipono David Wenger & David A. Hoffman, *Nullificatory Juries*, 2003 WIS. L. REV. 1115, 1130 (2003). But we speculate that a new form of it might emerge after *Blakely*: sentencing-related findings that contravene the evidence. This could result for a number of reasons: residual doubt or disagreement as to guilt on the underlying offense; sympathy for a defendant or anger at the state combined with reluctance to acquit entirely; and jurors’ beliefs that the sentences for particular crimes are too high. Cf. Kristin L. Sommer, Irwin A. Horowitz & Martin J. Bourgeois, *When Modern Juries Fail to Comply With the Law: Biased Evidence Processing in Individual and Group Decision Making*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 309, 311 (2001) (citing studies showing that “when people believe that their decisions may result in unfair (e.g., overly punitive) outcomes for others, these decision makers may augment the importance of information leading to particular (i.e., fair) conclusions”). On the other hand, the existence of the compromise option of “sentencing nullification” might, we speculate, *reduce* the incidence of jury nullification at the threshold guilt stage. See *infra* notes 140–45 and accompanying text (discussing the compromise effect).

Although jury nullification is widely decried as lawless, many scholars have defended it, arguing that it ensures that the jury’s judgment truly reflects the community’s judgment of the defendant’s moral culpability, gives a voice to disempowered minorities, and provides a check on abuses of government power. See, e.g., Wenger & Hoffman, *supra*, at 1138–43. Similar arguments might be made (perhaps more effectively) in the sentencing context, wherein nullification might be seen as a check on inflexible determinate sentencing systems that bar judges from tailoring sentences to the demands of justice in individual cases.

47. W. Kip Viscusi, *Do Judges Do Better?*, in PUNITIVE DAMAGES, *supra* note 35, at 186, 206 (“Judges are human and may reflect the same kinds of irrationalities as other individuals.”).

48. See *Blakely v. Washington*, 542 U.S. 296, 313–14 (2004); see also Nancy J. King & Susan R. Klein, *Beyond Blakely*, 16 FED SENT’G REP. 316, 318 (2004).

on improving the structures and processes by which judges find facts is less urgent.

Second, even where similar problems afflict juries and judges, juries may arguably offer more opportunity for successful reforms. Judges are experts who tend to be confident in their abilities and to have developed longstanding patterns, and may therefore, we speculate, be more resistant to change. Moreover, separation of powers concerns may as a practical matter preclude political interference with judicial processes. Also, a judge can instruct jurors to follow particular procedures, can control the framing of the questions jurors are asked, and can exclude evidence from the jury's consideration. There is no supervisor who can perform a similar directing/gate-keeping role for judges, making it generally harder to implement reforms.⁴⁹

II. APPLICATION OF THE RULES OF EVIDENCE

In every state and in the federal courts, the rules of evidence applicable at trial do not apply at judicial sentencing proceedings.⁵⁰ Indeed, at federal sentencing, there is “no limit” on the evidence judges can consider.⁵¹ As new procedures for jury fact-finding related to sentencing are considered and designed in the wake of *Blakely*, one of the most important issues will be whether and to what extent the rules of evidence must or should apply to those proceedings. This Part addresses, in turn, the constitutional limits on this policy choice; the extent to which the prudential rationales underlying the rules of evidence suggest that they should apply at such proceedings; and the problem of prejudice resulting from sentencing-related evidence being introduced at trial, which we think weighs heavily in favor of bifurcation of proceedings. We principally refer to the Federal Rules of Evidence, despite our focus on state systems, because they have been the model for many states' rules of evidence.⁵²

A. Constitutional Requirements

Most of the Federal Rules of Evidence, and their state counterparts, are not required by the Constitution even at trial, and thus presumably would not be constitutionally required at sentencing-related jury pro-

49. See Suja A. Thomas, *Judicial Modesty and the Jury*, 76 U. COLO. L. REV. 767, 782 (2005).

50. See *United States v. Tucker*, 404 U.S. 443, 446 (1972); see also *United States v. Anaya*, 32 F.3d 308, 311–12 (7th Cir. 1999).

51. 18 U.S.C. § 3661 (2000). The U.S. Sentencing Guidelines modify that rule, stating that courts can consider any “relevant” evidence bearing “sufficient indicia of reliability to support its probable accuracy.” U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a) (2004).

52. See Eric D. Green, Charles R. Nesson & Peter L. Murray, *Preface to FEDERAL RULES OF EVIDENCE: WITH SELECTED LEGISLATIVE HISTORY, CALIFORNIA EVIDENCE CODE, AND CASE SUPPLEMENT* xii (Eric D. Green et al. eds., 1997).

ceedings even after *Blakely*.⁵³ However, some restrictions on evidence admission are grounded in the Confrontation Clause of the Sixth Amendment and similar confrontation rights under the Due Process Clauses of the Fifth and Fourteenth Amendments.⁵⁴ For decades, the Supreme Court had held that these clauses barred admission of hearsay unless it bore certain indicia of trustworthiness roughly paralleling the hearsay exceptions in the Federal Rules of Evidence.⁵⁵ In 2004, in *Crawford v. Washington*, the Court overruled these precedents, holding that the right to confront witnesses is procedural in nature and cannot be satisfied by substantive guarantees of that evidence's reliability.⁵⁶ Specifically, the Court held that the Constitution barred admission of testimonial statements of a witness not appearing at trial unless he was unavailable and the defendant had previously had an opportunity to cross-examine him.⁵⁷ This rule overlaps considerably with the hearsay rule and its exceptions, but its restrictions on testimonial hearsay are generally stricter than most states' rules provide, while it does not restrict nontestimonial hearsay at all.⁵⁸

Courts have generally held that the Constitution provides few limits on the introduction of evidence at sentencing. In *Williams v. New York*, the Supreme Court upheld a sentencing court's reliance on hearsay contained in a presentence investigative report.⁵⁹ The Court explained that use of such reports "aid[s] a judge in exercising . . . discretion intelligently" and was consistent with hundreds of years of practice.⁶⁰ Notwithstanding the Court's subsequent decision in *Specht v. Patterson*,⁶¹ holding that confrontation rights were applicable in a proceeding to determine whether a defendant should be sentenced as a "habitual sex offender," federal courts today uniformly hold that those rights do not apply to guidelines sentencing proceedings.⁶² Some lower courts had provided a

53. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("Congress retains the ultimate authority to modify or set aside any judicially created rules of evidence and procedure that are not required by the Constitution."). As *Dickerson* illustrates, other evidentiary restrictions besides the hearsay rule may be constitutionally required. We focus, however, on those restrictions most relevant to jury decision-making processes.

54. See, e.g., *In re Oliver*, 333 U.S. 257, 273–74 (1948) (reversing a contempt charge based on secret grand jury evidence because individual had not been afforded the procedural safeguards required by due process of law).

55. See, e.g., *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

56. 541 U.S. 36, 61–63 (2004).

57. *Id.* at 68.

58. The Court suggested that its holding would not have changed the outcomes of many of its own previous decisions, *id.* at 57–59, but that many lower court decisions applying its precedents had been wrongly decided. *Id.* at 63–65.

59. 337 U.S. 241 (1949).

60. *Id.* at 245, 246.

61. 386 U.S. 605, 608 (1967).

62. Initially, after the Guidelines came into effect, there was a circuit split on this issue. See *United States v. Silverman*, No. 90-3205, 1991 WL 179608 (6th Cir. Sept. 17, 1991), *vacated*, 976 F.2d 1502 (6th Cir. 1992) (en banc); *United States v. Fortier*, 911 F.2d 100 (8th Cir. 1990), *overruled by United States v. Wise*, 976 F.2d 393 (8th Cir. 1992) (en banc); see also *United States v. Fatico*, 441 F. Supp.

lesser degree of constitutional protection to defendants at sentencing, applying a “reasonably trustworthy” standard to hearsay⁶³—but *Crawford* has abrogated these precedents. And many courts do not limit the use of hearsay at sentencing at all.⁶⁴

Blakely may change this picture, however. The text of the Sixth Amendment suggests that Confrontation Clause rights apply any time the right to the jury trial applies—namely, during “all criminal prosecutions.”⁶⁵ It is not certain that the Supreme Court will reach this conclusion, however, as its construction of “criminal prosecutions” has varied based on which Sixth Amendment right is under consideration.⁶⁶ We take no position on this constitutional question. Nonetheless, in light of the *Apprendi/Blakely* rationale that facts increasing the defendant’s maximum sentence exposure are functionally indistinguishable from elements of the offense, it seems probable (although far from certain) that Sixth Amendment confrontation rights apply at jury proceedings to determine sentencing facts.⁶⁷ Importantly, the Confrontation Clause only provides rights to defendants, so its application at sentencing will not restrict the defendant’s own introduction of evidence.⁶⁸

B. Prudential Considerations

Of course, policy concerns may support application of the rules of evidence at sentencing-related jury proceedings, even if they are not constitutionally required. This prudential analysis requires us to consider *why* we exclude certain evidence at trial but not at sentencing: does it

1285 (E.D.N.Y. 1977), *rev’d*, 579 F.2d 707, 713 (2d Cir. 1978) (holding that “Due Process does not prevent use in sentencing of out-of-court declarations by an unidentified informant”).

63. See *United States v. Kikumura*, 918 F.2d 1084, 1103 (3d Cir. 1990); see also Michaels, *supra* note 34, at 38–39.

64. See, e.g., *United States v. Beaulieu*, 893 F.2d 1137, 1181 (10th Cir. 1990) (noting that “the Federal Rules of Evidence, which might bar hearsay evidence from the guilt phase at trial, do not apply at sentencing”).

65. See U.S. CONST. amend. VI; see also Adam Thurschwell, *After Ring*, 15 FED. SENT’G REP. 97 (2002).

66. See Michaels, *supra* note 34, at 1780–81 (collecting cases and giving examples).

67. At least one court has essentially concluded as much in the death penalty context, after *Ring v. Arizona*, 536 U.S. 584 (2002), applied *Apprendi*’s requirement to aggravating factors in capital cases. See *United States v. Fell*, 217 F. Supp. 2d 469, 483–84 (D. Vt. 2002). *Fell* held that all of the Rules of Evidence must apply in capital sentencing proceedings, but that holding was based in part on the “heightened reliability” considerations applicable in the death penalty context. Thurschwell, *supra* note 65. In noncapital cases, it is not likely that courts would hold that all of the rules apply.

Notably, if the same Confrontation Clause standards are applied at sentencing as at trial, *Crawford* suggests that testimonial portions of presentence reports may well be excluded. See *Crawford v. Washington*, 541 U.S. 36, 56 (2004) (“Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse . . .”).

68. At capital sentencing proceedings, defendants have an affirmative right to introduce mitigating evidence unrestricted by the rule against hearsay, see *Lockett v. Ohio*, 438 U.S. 586, 595 (1978), but this Eighth Amendment right does not appear to apply at noncapital proceedings. See *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (holding that the Eighth Amendment provides no right to individualized sentencing in noncapital cases). Still, as discussed in Part II.B, *infra*, there may be strong prudential reasons for introducing further asymmetries in application of the evidentiary rules.

turn on juries' and judges' relative skills as decision makers, or on other differences between trial and sentencing proceedings? Neither explanation fully accounts for the current differential application of the rules of evidence in the federal system: the rules do not apply at bench trials, supporting the "judges are different" view;⁶⁹ but they also do not apply at jury capital sentencing, suggesting that it is sentencing (or at least capital sentencing) that is different.⁷⁰ Similarly, in many states, the rules of evidence do not apply to jury proceedings in capital sentencing; in other states, the rules do apply to the state's evidence but not to the defendant's; and in a few, the rules nominally apply to all evidence, although their application is in practice limited by constitutional considerations.⁷¹

The rules of evidence are not monolithic, and so these rationales, and their implications for application in federal and state courts post-*Blakely*, may vary widely. We provide only general guidance rather than a comprehensive rule-by-rule analysis.

At the outset, we note that whether particular categories of evidence should be permitted at post-*Blakely* sentencing proceedings may depend on one's view of the overarching purpose of the rules of evidence. Consider the question whether jurors should be permitted to consider a probation office's presentence investigation report. A proponent of an economic model of evidence law that weighs the gains in accuracy against the costs of gathering and weighing particular kinds of evidence,⁷² for example, might argue that presentence reports, which are prepared by experts, are likely to be reliable and to contain a great deal of useful information, and that admitting them will actually reduce costs by obviating the need for live testimony. Meanwhile, a proponent of a model of evidence law that emphasizes the traditional rituals of trial might object that basing sentencing determinations on what jurors learn from the fine print of a long government document hides critical aspects of the process

69. See Steven D. Clymer, *Assessing Proposals for Mandatory Procedural Protections for Sentencings Under the Guidelines*, 12 FED. SENT'G REP. 212, 213 (2000).

70. "Information is admissible regardless of its admissibility under the rules governing admission of evidence at criminal trials except that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury." 18 U.S.C. § 3593c (2000). It bears noting, however, that in one respect this is a *more* stringent standard than the Rules of Evidence provide: potential for prejudice need not *substantially* exceed probative value for evidence to be excluded. Cf. FED. R. EVID. 403.

71. See Robert Allan Kelly, *Applicability of the Rules of Evidence to Capital Sentencing Proceedings: Theoretical and Practical Support for Open Admissibility of Mitigating Information*, 60 UMKC L. REV. 411, 436 (1992) (noting that "the states differ markedly in their application of evidentiary rules to the sentencing phase" of capital proceedings); Carol S. Steiker, *Things Fall Apart, But the Center Holds: The Supreme Court and the Death Penalty*, 77 N.Y.U. L. REV. 1475, 1481 n.23 (2002); see also, e.g., *Whittlesey v. State*, 665 A.2d 223, 243-44 (Md. 1995). Relaxation of restrictions on the defendant's evidence is always required in capital cases because of the Eighth Amendment right to an individualized sentence. See *supra* note 68.

72. See Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1543 (1999).

from public view and undermines the legitimacy of the outcome.⁷³ Thus, the approach one brings to a question can often, unsurprisingly, dictate the result. We try here to balance the many concerns that underlie evidence law, including, for instance, “accuracy, efficiency, tradition, ritual, acceptability, and legitimacy.”⁷⁴

The reasons the rules of evidence are *not* applied at judicial sentencing proceedings are likewise complex. In *Williams v. New York*, the Supreme Court emphasized both longstanding tradition and “sound practical reasons”:

Rules of evidence . . . [were in part] designed to prevent tribunals concerned solely with the issue of guilt of a particular offense from being influenced to convict for that offense by evidence that the defendant had habitually engaged in other misconduct. A sentencing judge, however, is not confined to the narrow issue of guilt. . . . Highly relevant—if not essential—to his selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant’s life and characteristics.⁷⁵

This reasoning turns not on the nature of the judge as a decision maker *per se*, but rather on the nature of the sentencing decision. An important illustration is found in *Gregg v. Georgia*, in which the Supreme Court rejected a defendant’s challenge to the practice of substantially relaxing the rules of evidence during jury sentencing proceedings in capital cases.⁷⁶ The Court held that so long as evidence is not prejudicial to the defendant, “it is preferable not to impose restrictions. We think it is desirable for the jury to have as much information before it as possible when it makes the sentencing decision.”⁷⁷

Arguably, the implication of the policy rationale embraced by these cases is that juries who determine sentencing facts in noncapital proceedings post-*Blakely* should be given access to as much information as pos-

73. See Nesson, *supra* note 33, at 1357 (arguing that the principal function of the rules of evidence is to make the verdict acceptable to the public); Tribe, *supra* note 42, at 1391–92 (describing procedural rules, including confrontation requirements, as “partly ceremonial or ritualistic,” serving as “a reminder to the community of the principles it holds important”).

74. Michael L. Seigel, *A Pragmatic Critique of Modern Evidence Scholarship*, 88 NW. U. L. REV. 995, 1024 (1994).

75. 337 U.S. 241, 246–47 (1949).

76. 428 U.S. 153 (1976) (plurality opinion).

77. *Id.* at 203–04. Because *Gregg* concerned a defendant’s challenge to the broad-ranging admission of evidence at sentencing, this policy argument cannot be understood solely in terms of the defendant’s Eighth Amendment right to an individualized sentence in capital proceedings. See *supra* note 64; see also Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1254–63 (1993) (describing the evolution of the Supreme Court’s “all relevant evidence” doctrine regarding capital sentencing from one focused on the defendant’s rights to a broader doctrine that permitted and even encouraged broad admission of the prosecutor’s evidence, subject to the requirement of notice to the defendant and a bar on unfair prejudice). But see, e.g., *United States v. Frank*, 8 F. Supp. 2d 253, 269 (S.D.N.Y. 1998) (characterizing the suspension of the Federal Rules of Evidence at capital sentencing as a reflection of the Supreme Court’s “death is different” jurisprudence, which emphasizes the right to an individualized sentence).

sible—but *Blakely*'s rejection of the elements/sentencing factors distinction may itself be inconsistent with the reasoning in *Williams*. Moreover, many scholars have offered a different explanation: evidentiary rules do not apply at sentencing because judges are more skilled at weighing the value of particular kinds of evidence and avoiding prejudice.⁷⁸ Indeed, if juries are considerably less capable of processing and weighing certain kinds of information,⁷⁹ or more likely to be irrationally biased by it, there is a strong argument for excluding information at sentencing-related hearings by applying the rules of evidence.

Empirical studies, however, provide only mixed support for this claim: juries are fairly competent at discounting the value of certain kinds of evidence, while judges are not immune from biases and information-processing problems of their own.⁸⁰ In particular, the assumption that jurors are incapable of appropriately weighing hearsay evidence is not borne out by social science research.⁸¹ Jurors have plenty of experience with similar processes in their daily lives. We all constantly evaluate the credibility of information we receive, which generally entails treating secondhand information as less trustworthy than firsthand information unless we have some good reason for putting faith in the more distant source. So, to the extent that the Constitution permits it, permitting the liberal use of hearsay at sentencing fact-finding hearings in front of juries may make good sense. Indeed, scholars have argued in favor of liberalizing the hearsay rules at trial as well.⁸²

Scholars have reached varying conclusions as to jurors' capacity to filter out irrelevant evidence. On the one hand, jurors should generally

78. See, e.g., Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1177–78 (2001); Steven D. Clymer, *supra* note 69, at 213 (arguing that the Federal Rules recognize that judges are “better equipped” to evaluate hearsay evidence than criminal juries) (citing FED. R. EVID. 1101(d)(3)); Andrew J. Wistrich, Chris Guthrie & Jeffrey J. Rachlinski, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1256–57 (2005).

79. See Richard D. Friedman, *Minimizing the Jury Over-Valuation Concern*, 2003 MICH. ST. L. REV. 967, 969 (2003) (arguing that “over-valuation” concerns can only justify exclusion if the problem is sufficiently extreme that “the truth-determination process is worse if the jurors hear the evidence than if they do not”). We would modify Friedman’s formulation: to justify exclusion, juries’ over-valuation must be significant enough that the added accuracy from admission is insufficient to offset other *disadvantages* of admission.

80. See Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 27 (1997) (“Although far fewer studies have been conducted using judges [than using juries], few if any of them suggest judges are better able to base their decisions squarely on legally admissible information.”).

81. See, e.g., Friedman, *supra* note 79, at 976; Margaret Bull Kovera, Roger C. Park & Steven D. Penrod, *Jurors’ Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703 (1992); Stephan A. Landsman & Richard F. Rakos, 15 LAW & PSYCHOL. REV. 65 (1991); Peter Miene, Roger C. Park & Eugene Borgida, *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683 (1992). *But see* Seigel, *supra* note 74, at 1032–34 (criticizing these studies).

82. See Friedman, *supra* note 79, at 977–78; Kovera et al., *supra* note 81, at 722. These studies provide empirical support for a view long professed by proponents of hearsay reform: that juries are more capable of assessing the value of hearsay evidence than the current hearsay rules suppose. See, e.g., Jack B. Weinstein, *Alternatives to the Present Hearsay Rules*, 44 F.R.D. 375, 377 (1968).

be fairly effective at identifying what information bears on a particular issue: similar cognitive processes are again routine in daily life.⁸³ On the other hand, jurors are susceptible to “cognitive overload,” a problem we discuss in detail in Part IV. Here, we note only that reducing jurors’ cognitive burdens is one reason to impose rules, like the relevance requirement, that reduce the quantity of information with which jurors are bombarded at hearings.⁸⁴

Moreover, juries’ assessments of relevance may be distorted by overreliance on the “expert” opinion of the judge. For example, they may assume (unless they are instructed that the judge has no power to exclude irrelevant testimony) that all evidence presented to them is relevant in some way, and thus may not trust their own contrary judgments.⁸⁵ In addition, the introduction of irrelevant evidence imposes costs on the judicial system and on the parties involved.⁸⁶ This concern may be especially relevant because a shift to jury fact-finding will inevitably increase costs, and policymakers can be expected to search for ways to minimize the strain on scarce resources.⁸⁷ Because inclusion of irrelevant evidence by definition does not contribute to rational jury decision making (even if it does not significantly harm it), and does not seem to contribute to the other social and cultural purposes of jury trials,⁸⁸ there is little to be gained, and perhaps much to be lost, by eliminating the relevance rule at sentencing-related jury proceedings.

Juries may be quite susceptible to emotional appeals, some of which might be unduly prejudicial.⁸⁹ For this reason, one might justifiably exclude evidence that carries a potential for prejudice substantially outweighing its probative value in sentencing-related jury proceedings. Application of this rule might have the effect of excluding certain forms of

83. For a seminal work advocating deference to the jury’s ability to determine factual relevance, see Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 165 (1929). See also JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 265 (1898).

84. Posner, *supra* note 72, at 1523.

85. Callen, *supra* note 36, at 1275–76.

86. Posner, *supra* note 72, at 1522–24. These costs may disproportionately burden criminal defendants, who generally have fewer resources to acquire evidence. Cf. Callen, *supra* note 36, at 1296.

87. See Part II.C *infra*.

88. The empowerment of jurors to make all relevance determinations might, in theory, increase their sense of satisfaction with the trial process, but we doubt it. Cognitive fatigue and excess complexity generally tends to decrease morale. See *infra* Part IV.A.

89. This has, at least, long been the conventional wisdom about juries, and seems to be borne out by at least some practical experience. See, e.g., THURMAN ARNOLD, THE SYMBOLS OF GOVERNMENT 144 (1935); Paul Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 U. CHI. L. REV. 179, 208 (1998); Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 813 (1987); Matthew L. Zabel, *Advisory Juries and Their Use and Misuse in Federal Tort Claims Act Cases*, 2003 BYU L. REV. 185, 214–15 (2003); see also Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 705 (1989) (criticizing judicial culture for inculcating judges with an ethic of complete dispassion). But see Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 884–85 (1998) (finding that mock juries and judges give similar damages for pain and suffering, undercutting the assumption that judges’ “legal training makes them less susceptible to emotional appeals”).

victim-impact evidence, for instance.⁹⁰ But different objectives might lead to different conclusions about the relative susceptibility of judges and juries to “prejudice.” It might be reasonable, for instance, to trust a group of lay people drawn from the community to make findings that are “fair” or that reflect the community’s values more than we trust a judge to do the same.⁹¹ Moreover, when juries make sentencing judgment calls, perhaps we *want* them to some degree to be influenced by emotions (although not by certain kinds of emotional appeals, such as appeals to racial bias).⁹² Accordingly, whether rules designed to minimize “prejudice” should apply (or, at least, how judges should apply them) might also turn on what sort of determination is at issue: one for which factual “accuracy” is prized, or one for which we trust the jury’s moral judgments.

The finding of certain sentencing facts may well necessitate some relaxation of the rules of evidence in order to avoid substantial new costs. For instance, if *Blakely* is extended to include the defendant’s criminal history,⁹³ jury review of presentence reports could be far less costly than live testimony on past crimes. Other factors, like drug quantity, are similar to factual determinations juries already regularly make, and do not demand analogous relaxation.⁹⁴

One set of rules that will have to be modified, at least if proceedings are bifurcated, are the restrictions on the introduction of character evidence—specifically, the total bar on “other crimes, wrongs, or acts” being introduced to show criminal propensity.⁹⁵ Criminal history is routinely introduced for exactly that purpose at sentencing⁹⁶—it is greater criminal propensity that justifies increasing the length of recidivists’ sen-

90. Current capital-sentencing practice provides some insight into how victim-impact evidence might be assessed. Although the Supreme Court has held that the Eighth Amendment imposes no categorical bar on victim-impact evidence, states are not obligated to allow it, and generally courts may exclude such evidence (just like other forms of evidence) from the jury if it is unduly prejudicial. *See Payne v. Tennessee*, 501 U.S. 808, 831 (1991) (O’Connor, J., concurring); *see also, e.g., United States v. Sampson*, 335 F. Supp. 2d 166, 191 (D. Mass. 2004) (excluding memorial video of victim as unduly prejudicial); *State v. Allen*, 994 P.2d 728, 751 (N.M. 1999) (applying the same balancing test, but finding short video admissible); *Cargle v. State*, 909 P.2d 806, 826–27, 829–30 (Okla. Crim. App. 1995) (applying balancing test to exclude certain victim impact evidence, including photographs of victim and evidence regarding emotional impact).

91. *See Seigel, supra* note 74, at 1019–20; *cf. Williams v. New York*, 337 U.S. 241, 253 (1949) (Murphy, J., dissenting) (“In our criminal courts the jury sits as the representative of the community A judge . . . should hesitate indeed to increase the severity of such a community expression.”).

92. *See Stephen P. Garvey, “As The Gentle Rain From Heaven”: Mercy In Capital Sentencing*, 81 CORNELL L. REV. 989, 1042–43 (1996) (arguing that some degree of emotionalism is inevitable in sentencing decisions, but that emotions can serve as useful guides to “what is morally right”); *cf. Robert P. Burns, The Lawfulness of the American Trial*, 38 AM. CRIM. L. REV. 205, 205–06, 213–17 (2001) (responding to criticism of juries’ emotionalism and irrationality by arguing for a more complex understanding of the jury’s role).

93. *See supra* note 9.

94. *See Susan N. Herman, Applying Appendi to the Federal Sentencing Guidelines*, 87 IOWA L. REV. 615, 640–41 (2002).

95. FED. R. EVID. 404(b).

96. *See Roger C. Park, Character at the Crossroads*, 49 HASTINGS L.J. 717, 722 (1998).

tences. Even if *Blakely* is not extended to require jury determination of past criminal history, other “bad act” evidence will be important to enable juries to determine a defendant’s “relevant conduct” and perhaps to find such factors as racial bias. Although such evidence may run a significant risk of prejudicing the jury,⁹⁷ its exclusion in such circumstances can better be accomplished by applying the state equivalent of Rule 403 on a case-by-case basis.⁹⁸ Indeed, the character evidence rule has been described as a legislative determination that certain evidence is *per se* substantially more prejudicial than probative.⁹⁹

There is another practical reason judges are not constrained by rules of evidence: they are the ones who decide what evidence reaches the jury, and they cannot keep information from themselves.¹⁰⁰ This “gatekeeper” problem may mean that judges’ and juries’ *relative* capacities are less important than juries’ *absolute* capacities: both judges and juries may be susceptible to improper influence, but rules of evidence allow us to control that influence in the jury setting. Arguably, then, those rules should apply to jury proceedings even if there is no practical way to apply them in judicial proceedings.¹⁰¹ Relative capacities—and possibilities of improvement through evidentiary limitations—might well influence the threshold question whether to entrust certain decisions to judges or juries. If judges are far more capable of weighing certain evidence than juries are, that argues in their favor; if both have similar incapacities but the information can be kept from the jury, that argues in favor of jury proceedings.¹⁰²

Legislatures must also consider whether evidentiary restrictions should be applied equally to both parties. The rules of evidence applicable at criminal trials already include numerous asymmetries that protect defendants’ rights.¹⁰³ There is a strong prudential argument that many of

97. See Friedman, *supra* note 79, at 979–80.

98. See FED. R. EVID. 403 (“Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”).

99. See *Michelson v. United States*, 335 U.S. 469, 476 (1948) (“The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”); 1A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 58.2, 1212 (1983).

100. See Bibas, *supra* note 78, at 1177.

101. A number of prominent judges and scholars have argued that the rules of evidence, or at least some of them, *should* apply at judicial sentencing proceedings. See, e.g., KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN FEDERAL COURTS* 158 (1998); Jose A. Cabranes, *The U.S. Sentencing Guidelines: Where Do We Go from Here?*, 12 *FED. SENT’G REP.* 208, 209 (2000); Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 *CORNELL L. REV.* 299, 302 (1994); Deborah Young, *Untested Evidence: A Weak Foundation for Sentencing*, 5 *FED. SENT’G REP.* 63, 66 (1992).

102. See Saks, *supra* note 80, at 28.

103. See, e.g., FED. R. EVID. 405 (addressing the admissibility of character evidence); FED. R. EVID. 609 (varying the balancing test for determining admissibility of prior convictions for impeachment).

the rules, especially hearsay and character evidence restrictions, should not apply to the defendant's introduction of mitigating evidence. Determinate sentencing systems minimize the individualization of sentencing to an oft-criticized degree;¹⁰⁴ one way to soften their frequent harshness is to permit the defendant broad leeway to introduce mitigating evidence. Defendants enjoy that leeway now in judicial proceedings, and it would be unfortunate if *Blakely* paved the way for further erosion of the sentencing system's accommodation of individual differences. In the alternative, instead of adopting asymmetric rules—which might be politically unpopular—states that choose to commit mitigating factors to the jury might opt to drop certain rules entirely.

Together, these considerations suggest that many of the rules of evidence ought to apply at post-*Blakely* sentencing-related jury hearings. The strongest cases for relaxing major rules pertain to the rule against hearsay and the limitations on prior bad act evidence. Many of the other differences between sentencing and trial proceedings can be accounted for not by dropping rules of evidence wholesale but by applying them differently, with an understanding that concepts like “probative value” and “prejudice” are context-specific.

C. *The Relevance Problem: An Argument for Bifurcation*

Even if the rules of evidence do apply in full at jury proceedings related to sentencing after *Blakely*, a great deal of evidence that previously would have been excluded at trial is nearly certain to be admitted. Much evidence that is irrelevant to, or much more prejudicial than probative of, guilt on the underlying offense is highly probative for sentencing purposes,¹⁰⁵ such as “prior bad act” evidence. Such evidence might well distort jury decision making as to guilt, yet excluding it from a unitary proceeding would deprive the jury of essential sentencing-related evidence. This dilemma argues compellingly for bifurcation of proceedings. In a bifurcated proceeding, trial and deliberation on guilt would proceed as it does now, with no sentencing-related information introduced. After the jury voted to convict the defendant, it would then hear the evidence needed for sentencing fact-finding.¹⁰⁶

104. See, e.g., STITH & CABRANES, *supra* note 101, at 5.

105. See, e.g., Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. REV. 621, 680–84 (2004).

106. We assume that both phases of a bifurcated proceeding would involve the same jury, which would help to minimize costs because evidence related to both trial and sentencing would not have to be introduced twice and the jury selection process would not have to be repeated. In some cases, however, a substantial delay between trial and sentencing might be necessary (for instance, to gather sentencing-related information not available until after trial). In such situations it might be impractical to reconvene the same jury, for example if jurors have moved, fallen ill, died or otherwise become unavailable. Most of the advantages of bifurcation discussed in this article are equally applicable regardless of whether a new jury or the same jury is used. Moreover, in cases in which delay between the stages is necessary for some reason, unified proceedings would necessarily be impracticable.

It is very difficult to see how this “relevance problem” can be resolved without bifurcation. One possibility is to instruct jurors to use certain evidence for sentencing but not guilt purposes, but limiting instructions are notoriously ineffective. In fact, they may be counterproductive because they draw jurors’ attention to the evidence that is supposed to be ignored.¹⁰⁷ For this reason, courts have held, in ineffective assistance of counsel cases, that it is reasonable for defense counsel to decline to request a limiting instruction because the instruction would call attention to unfavorable evidence.¹⁰⁸ Nor do balancing tests along the lines of Federal Rule 403 solve the problem. Balancing might exclude victim-impact statements, for instance, because of their exceptional potential for prejudice and minimal probative value.¹⁰⁹ But evidence that might prejudice the jury in determining guilt is often *highly* probative of the proper sentence, and would therefore not likely be excluded under balancing rules that usually put a heavy burden on the party opposing admission.¹¹⁰ Exclusion would also risk compromising the accuracy and fairness of the sentencing determination.¹¹¹

This relevance problem could be partially alleviated if defendants are permitted to stipulate to certain facts they do not want the jury to hear, or if the Supreme Court declines to require past criminal convictions to be proven to the jury,¹¹² but some problems would no doubt remain. Inevitably, under a “real offense” sentencing scheme, a great deal of uncharged conduct, evidence of which would no doubt prejudice the jury at the guilt phase, is critical to the sentence. To require defendants to waive the right to contest these facts before the jury at sentencing as a condition of avoiding such prejudice at trial would deeply undercut the Sixth Amendment right *Blakely* established.

107. Lillquist, *supra* note 105, at 681–82; Posner, *supra* note 72, at 1520; see also Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL’Y & L. 677, 685–91 (2000); Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985). But see 1 WEINSTEIN’S FEDERAL EVIDENCE 105.03(1) (Joseph M. McLaughlin ed., Matthew Bender & Co., 2d ed. 2005) (arguing that limiting instructions are effective).

108. See Lillquist, *supra* note 105, at 682 n.257 (collecting ineffective assistance of counsel cases).

109. See, e.g., Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 452 (2003); Jonathan H. Levy, Note, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 STAN. L. REV. 1027, 1044–48 (1993).

110. Lillquist, *supra* note 105, at 684.

111. *Id.* at 691. Most states that employ jury sentencing in noncapital cases (Arkansas, Virginia, Texas, and Kentucky) bifurcate the proceedings, but Missouri and Oklahoma do not. In Missouri, lack of bifurcation has resulted in juries issuing sentences without knowing about defendants’ criminal history or other relevant aggravating factors; frustration with this system has led the state to abandon jury sentencing in most cases. Randall R. Jackson, *Missouri’s Jury Sentencing Law: A Relic the Legislature Should Lay to Rest*, 55 J. MO. B. 14, 14–15 (1999).

112. See *supra* note 9. In *Shepard v. United States*, 125 S. Ct. 1254, 1263 n.5 (2005), the Supreme Court recently stated in dictum that, even if *Almendarez-Torres* is eventually overruled, a defendant who fears the prejudicial effect of the introduction of past criminal convictions at trial could waive his right to a jury determination of criminal history.

Bifurcation solves this problem by permitting evidence relevant to sentencing to be admitted at sentencing-related proceedings and excluded from the initial trial phase. Capital sentencing procedures are bifurcated for this very reason. In *Gregg v. Georgia*, a plurality of the Supreme Court endorsed bifurcation of proceedings as the “best answer” to the severe risk of prejudice caused by the introduction of sentencing-related evidence in unitary proceedings.¹¹³ The Court quoted the observation of the drafters of the Model Penal Code that bifurcation of jury proceedings in capital cases would simply be “the analogue of the procedure in the ordinary case when capital punishment is not in issue; the court conducts a separate inquiry before imposing a sentence.”¹¹⁴

Moreover, bifurcation is at least a partial solution to a problem recognized by Justice O’Connor’s *Blakely* dissent: some relevant evidence is not available until after trial, for example, evidence of defendants’ contempt or perjury.¹¹⁵ It also resolves Justice Breyer’s concern that defendants would be placed in a strategic bind at unitary proceedings because contesting sentencing factors might be perceived as an admission of guilt.¹¹⁶ We explore additional advantages of bifurcation below.¹¹⁷

Requiring a separate sentencing proceeding in front of a jury may carry costs in time and resources.¹¹⁸ In Kansas, however, a state that has already adopted bifurcated proceedings, the sentencing phase has averaged just an hour in length.¹¹⁹ Moreover, much of the same evidence would also be introduced in unitary trials, and so to a considerable degree the cost problem is inherent in post-*Blakely* jury fact-finding regardless of whether proceedings are bifurcated.¹²⁰ And today, as noted above, sentencing proceedings conducted by judges are already performed separately from the trial. There might be other ways to minimize the costs of bifurcation. For example, courts could permit “sentence bargaining,” bargaining regarding disputed sentencing facts, or waiver of jury fact-finding *after* conviction.

Even if bifurcation remains costlier than the alternative of unitary proceedings in which juries decide both guilt and sentencing facts at once, bifurcation remains the best approach for court systems that

113. 428 U.S. 153, 190–91 (1976).

114. *Id.* at 191 (quoting ALI, Model Penal Code § 201.6, cmt. 5, 74–75 (Tentative Draft No. 9, 1959)).

115. *Blakely v. Washington*, 542 U.S. 296, 319 (2004) (O’Connor, J., dissenting).

116. *Apprendi v. New Jersey*, 530 U.S. 466, 557–58 (2000) (Breyer, J., dissenting).

117. See *infra* notes 195–96 and accompanying text.

118. See Jackson, *supra* note 111, at 15 (arguing that jury sentencing should simply be abolished); Lillquist, *supra* note 105, at 689; see also Jacqueline E. Ross, *Unanticipated Consequences of Turning Sentencing Factors into Offense Elements: The Apprendi Debate*, 12 FED. SENT’G REP. 197, 200 (2000) (discussing additional problems with bifurcated proceedings).

119. See Iontcheva Turner, *supra* note 29, at 110.

120. Where defendants are acquitted, bifurcation would *save* costs by making sentencing unnecessary. See Vidmar, *supra* note 89, at 871 (1998) (arguing that civil trial bifurcation makes damages proceedings unnecessary, thereby increasing efficiency). Because criminal acquittals are rare, this effect would be fairly minor.

choose to shift sentencing fact-finding responsibilities from judges to juries. Bifurcation is the only practical solution to the evidence-admission dilemma. Society may be forced to accept that the right to a jury trial recognized in *Apprendi* carries inevitable costs in terms of resources and efficiency, but that we value that right for different reasons, and that this value outweighs the costs associated with more onerous procedural requirements. As Justice Scalia wrote in *Apprendi*, the Sixth Amendment jury-trial guarantee “has never been efficient; but it has always been free.”¹²¹

III. FRAMING SENTENCING-RELATED QUESTIONS

The answers jurors and other individuals reach are heavily influenced by the way questions are posed to them. Overly numerous or poorly phrased or ordered questions and answer choices can exacerbate various kinds of cognitive biases. *Blakely* will increase the number, and change the type, of questions presented to jurors. These changes, consequently, will make understanding juror biases, and shaping questions to avoid them, particularly important in the years ahead.

A. Anchoring and Scale Problems

Individuals and groups tend to reach erratic and arbitrary conclusions when they are asked to provide some measure of the seriousness of wrongdoing but are not provided a bounded scale and, when appropriate, relevant points of comparison.¹²² These problems will likely manifest themselves in post-*Blakely* sentencing proceedings when juries are asked questions that are open-ended, lack reference points for comparison, or provide misleading benchmarks.¹²³

In general, people make judgments based on adjusting from a base anchor, and if the anchor is absent or poorly chosen, it may distort decision making.¹²⁴ For instance, mock juries reach remarkably consistent results (even across demographic categories) when they are asked to rank different scenarios of wrongdoing, relative to one another, in terms of

121. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring); see also *Blakely v. Washington*, 542 U.S. 296, 313 (2004); *United States v. Barnett*, 376 U.S. 681, 755 (1964) (Goldberg, J., dissenting) (“It may be true that a judge can dispose of a . . . criminal charge, more expeditiously and more cheaply than a jury. ‘But such trifling economies as may result have not generally been thought sufficient reason for abandoning our great constitutional safeguards aimed at protecting freedom’” (quoting *Green v. United States*, 356 U.S. 165, 216 (1958))).

122. See Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1157–59 (2002); see also Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962, 976 (2005).

123. To some degree, these problems also affect judges, although, as we discuss further below, there is reason to believe judges’ greater experience alleviates some of these biases.

124. See Ruback & Wroblewski, *supra* note 29, at 765.

the degree of outrageousness of the behavior.¹²⁵ But when asked to attach dollar values to the degree of wrongfulness, this agreement dissolves entirely, and awards chosen for the same set of facts are widely divergent.¹²⁶ That is, when jurors are given an open-ended dollar scale of zero to infinity without any points of comparison along that scale, they are forced to choose numbers relatively arbitrarily. Likewise, when given a range but no relevant points of comparison, people also reach quite arbitrary results, often picking a point around the middle of the range.¹²⁷

Furthermore, in choosing an anchor, juries tend to be highly susceptible to suggestion. For instance, if a civil plaintiff's attorney asks for a higher amount, mock juries tend to give a higher amount, even when the facts are otherwise identical.¹²⁸ Similarly, ordering effects can affect criminal jury verdicts: mock juries "tend to lean toward the verdict options with which their consideration of verdicts began," thus convicting on more serious offenses if they considered a more serious offense first.¹²⁹ Sometimes responses to suggestion may be unexpected—jurors told *not* to focus on a particular factor may in fact be drawn to focus on it.¹³⁰

Although mock jury studies may not adequately replicate the decision-making processes of real-world jurors,¹³¹ anchoring and ordering effects are also found in non-jury-related studies, providing support for the notion that they play an important role in human cognition in a variety of contexts. For individuals asked to make a numerical estimate, the mere mention of a number influences the response even when that number has little or nothing to do with the question that has been posed.¹³² Contingent valuation studies show that people value things, like environmental

125. See Daniel Kahneman, David A. Schkade & Cass R. Sunstein, *Shared Outrage, Erratic Awards*, in PUNITIVE DAMAGES, *supra* note 35, at 31, 34–36 (concluding that "[j]udgments of intent to punish . . . evidently rest on a bedrock of moral intuitions that are broadly shared in society"); see also Sunstein et al., *supra* note 38, at 2077–78; Sunstein et al., *Predictably Incoherent Judgments*, *supra* note 122, at 1157–59.

126. Kahneman et al., *supra* note 125, at 40–41. *But see* Neil Vidmar, *Experimental Simulations and Tort Reform: Reforming the Remedy, Re-Balancing the Scales*, 53 EMORY L.J. 1359, 1391–95 (2004) (criticizing this study's methodology).

127. Sunstein et al., *supra* note 38, at 2078. Giving a range, for example, by setting a fixed cap on punitive damages, may actually *increase* average awards if the cap is high because the cap can serve as an anchor. See Valerie P. Hans & Stephanie Albertson, *Empirical Research and Civil Jury Reform*, 78 NOTRE DAME L. REV. 1497, 1520–21 (2003).

128. Sunstein et al., *supra* note 38, at 2109 & n.144 (citing studies); see Saks, *supra* note 80, at 47–48; Vidmar, *supra* note 89, at 886 (arguing that the anchor effect disappears where the attorney's request is so high as to be viewed as plainly unreasonable); Vidmar, *supra* note 126, at 31–32 (arguing that the presence of a countervailing anchor presented by the defense reduces bias).

129. Saks, *supra* note 80, at 34 (citing Jeff Greenberg et al., *Considering the Harshest Verdict First: Biasing Effects on Mock Juror Verdicts*, 12 PERSONALITY & SOC. PSYCHOL. BULL. 41 (1986)). Saks argues that these ordering effects result from the harsher offense serving as an anchor. *Id.* at 25.

130. For instance, one study found that instructing jurors *not* to increase the size of their verdict in order to punish and deter the defendant *increased* verdict size; references to punishment and deterrence apparently suggested that the defendant's conduct was especially blameworthy. Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury*, 26 LAW & SOC'Y REV. 513, 535 (1992).

131. See generally Vidmar, *supra* note 126, at 7.

132. See Sunstein, *Group Judgments*, *supra* note 122, at 1048.

resources, differently depending on the order of the questions asked,¹³³ while other studies show that auditors' assessments vary based on the order of evidence they receive.¹³⁴ And individuals' susceptibility to suggestion extends beyond those situations requiring quantitative judgments. Rather, suggestive phrasing sharply influences individuals' answers to all kinds of questions—for instance, public policy questions posed on polls,¹³⁵ or personal choices about a course of action in their own lives.¹³⁶

Studies of jury sentencing in those states that allow it demonstrate that similar problems exist in the criminal sentencing context. Jury sentences are significantly more erratic than judicial sentences.¹³⁷ One explanation is jurors' lack of experience—jurors essentially consider each case in a vacuum, while judges can use previous cases as points of comparison.¹³⁸ Harshness, as well as unpredictability, may be a function of inexperience, as jurors may “overreact” to routine offenses.¹³⁹ In addition to their experience advantage, judges are also permitted to consider sentencing statistics (where available) as well as the sentences given to coconspirators in the same case.¹⁴⁰ Such information is kept from juries.

133. See Cass R. Sunstein, *Which Risks First?*, 1997 U. CHI. LEGAL F. 101, 108 (“When asked for their willingness to pay to preserve visibility in the Grand Canyon, people offer a number five times higher when this is the first question than when it is the third question.”).

134. See Sunita S. Ahlwat, *Order Effects in Memory for Evidence in Individual Versus Group Decision Making in Auditing*, 12 J. BEHAV. DEC. MAKING 71, 71–72 (1999) (reviewing studies). Interestingly, these ordering effects appear to be reduced by group deliberation processes, and that experience with a process may in fact magnify these effects, suggesting that in terms of the “recency bias” in evidence processing, if not in question-ordering, juries may have an advantage over judges. *Id.* at 73–74, 84–85.

135. See, e.g., Michael J. Hiscox, *Through a Glass and Darkly: Framing Effects and Individuals' Attitudes Toward International Trade* (forthcoming 2006), available at <http://www.people.fas.harvard.edu/~hiscox/HiscoxGlassDarkly.pdf>.

136. Cass R. Sunstein, *Moral Heuristics and Framing*, 88 MINN. L. REV. 1556, 1590 (2004) (“When people [considering undergoing a risky medical procedure] are told, ‘Of those who have this procedure, 90 percent are alive after five years,’ they are far more likely to agree to the procedure than if they are told, ‘Of those who have this procedure, 10 percent are dead after five years.’”).

137. See Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 886–90 (2004).

138. See Jeffrey Rachlinski & Chris Guthrie, *Heuristics and Biases among Experts*, 2004 AM. L. & ECON. ANN. MEETING at 37 (2004) (observing, in the context of insurance negotiations, the comparative cognitive advantages of experts), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=1059&context=alea>. This problem is exacerbated by rules of evidence that “blindfold” sentencing juries in most states from considering useful information including typical sentencing ranges. See Iontcheva, *supra* note 41, at 366 (arguing that this lack of information partially explains wide variation in jury sentences); King & Noble, *supra* note 137, at 913–16 (arguing that lack of information causes Virginia jurors to give harsher sentences than judges do); Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1376–77 (1999). An Arkansas judge has observed that jurors, who serve for six months, tend to impose more predictable sentences as they gain experience. King & Noble, *supra* note 137, at 931–32; see also Jeffrey J. Rachlinski & Forest Jourden, *The Cognitive Components of Punishment*, 88 CORNELL L. REV. 457, 462–63 (2003) (demonstrating that provision of points of comparison significantly affects mock juries' sentences of imprisonment).

139. King & Noble, *supra* note 137, at 914. The risk that a jury will issue an excessive sentence is often used as leverage by prosecutors in plea bargaining, since in some circumstances entering into a plea bargain is the only way to get a judicial sentence. *Id.* at 895.

140. See, e.g., *United States v. Nelson*, 918 F.2d 1268, 1273–75 (6th Cir. 1990) (holding that judges may depart downward under the Federal Guidelines in order to achieve proportionality among cocon-

Blakely does not require that juries issue sentences. Most likely, in states that follow *Blakely* rather than the route suggested by *Booker*, juries will make particular findings of fact that will then be “translated” into a sentence by a judge applying sentencing guidelines. Juries will thus not have to translate punitive intent into a quantified form of punishment, but are nonetheless likely to experience anchoring and adjustment problems. Jurors asked whether to characterize a particular offense as aggravated will typically have little experience evaluating other instances of the same offense. To most law-abiding citizens, for instance, almost any homicide case taken in isolation might seem “excessively brutal” or “deliberately cruel.”¹⁴¹ Thus, juries will tend to be arbitrary and perhaps overly severe in their assessments of aggravating factors if no points of comparison are provided.

Likewise, juries that are asked to make quantitative judgments regarding sentencing factors—for instance, determinations of drug quantity—may not face precisely the same anchoring and adjustment problems that juries in punitive damage cases do. Drug quantity determinations are questions of historical fact, not normative judgments, and presumably the parties will have introduced some evidence as to quantity, so that the jury’s job is less of a “stab in the dark.”¹⁴² But in cases in which jurors simply have no idea what the proper finding is—for instance, if they do not remember or did not understand the relevant testimony—they will likely be quite influenced by the ranges they are given, tending to pick a point arbitrarily around the middle of the range. This may be more likely where juries are faced with difficult quantitative determinations, such as financial loss in a securities fraud case.¹⁴³

On the bright side, as discussed above, juries do perform consistently when asked to rank the *relative* seriousness of different instances of wrongdoing. Consequently, juror performance in sentencing fact-finding might well be improved by providing jurors a set of sample circumstances to which they can compare a given case. For instance, if a defendant is convicted of conspiracy to distribute cocaine, and the ques-

spirators); Iontcheva, *supra* note 41, at 370 (some courts provide judges with regional sentencing statistics). *But see* Ruback & Wroblewski, *supra* note 29, at 953–56 (arguing that judicial sentencing is affected by cognitive biases including anchoring and adjustment problems). On the need to improve sentencing information systems, which can provide judges with real-time access to sentencing statistics, see Marc L. Miller, *A Map of Sentencing and a Compass for Judges: Sentencing Information Systems, Transparency, and the Next Generation of Reform*, 105 COLUM. L. REV. 1351, 1376–78 (2005).

141. The Supreme Court has repeatedly recognized as much in the capital sentencing context. *See* *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988) (“[A]n ordinary person could honestly believe that every unjustified, intentional taking of human life is ‘especially heinous.’”). In *Maynard*, the Court held that such language is unconstitutionally vague, in violation of the Eighth Amendment, unless accompanied by jury instructions specifically defining the terms. *Id.* at 360–66. However, this Eighth Amendment rationale appears to be limited to the capital sentencing context. *See id.* at 361–62 (explaining that unique vagueness standards apply in capital sentencing, wherein arbitrariness poses special constitutional concerns); *see also* *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980).

142. Kahneman et al., *supra* note 125, at 31.

143. *See* *United States v. Booker*, 125 S. Ct. 738, 762 (2005).

tion is the defendant's role in the conspiracy, the jury could be provided with a few short descriptions of fictional cases that exemplify the relative degree of culpability for different members of a drug conspiracy.¹⁴⁴ So long as the descriptions are concise and not overly numerous, they are unlikely to substantially overload jurors, but will instead help the jury to understand the characterizations it must make.¹⁴⁵

B. *Tendency to Pick the Middle Option*

Individuals and groups, when presented with three or more options, tend to pick the middle option more than would be expected if they were acting rationally.¹⁴⁶ Mock juries presented with the option of convicting on a lesser-included offense quite frequently take that option, generating a "compromise effect."¹⁴⁷ First, conviction on *some* offense becomes more likely; that is, the defendant's odds of a complete acquittal decline. That, of course, could be the outcome of completely rational decision making. For instance, if the evidence in a certain case is sufficient to support a manslaughter conviction but *not* a murder conviction, a rational jury presented with only a murder charge will acquit, while a ra-

144. As discussed in Part I, *supra*, in discussing rules of evidence in jury sentencing states, some critics of restrictive rules of evidence argue that sentencing juries should have more access to real-world data about sentencing in other cases. For juries merely charged with finding facts at the sentencing stage rather than issuing sentences, however, no statistics or comprehensive sentencing information systems yet exist that would provide particularly useful guidance. *But see* Miller, *supra* note 140, at 1356–57 (proposing increased transparency in sentencing through the development of sentencing information systems). We suggest the use of fictional cases for comparison purposes—although they may be loosely based on real cases—because they may be easier than real cases to tailor and simplify, allowing jurors to draw the necessary comparisons without being overwhelmed by details.

145. Sunstein suggests that in the punitive damages context this approach is not realistic because either just a few examples will be provided and the choice among them will be arbitrary, or too many examples will be provided and jurors will suffer cognitive overload. *See* Sunstein, *Predictably Incoherent Judgments*, *supra* note 122, at 1181–82. We expect that such problems would be less serious in post-*Blakely* proceedings because jurors need only compare the defendant's conduct to other instances of the same statutory offense. Because jurors are not the ones that issue the ultimate sentence (unlike punitive damages juries), they are not responsible for achieving coherence *across* offense categories; the legislature or sentencing commission is. So the only examples necessary would be examples of the *same* offense committed in different ways.

Sunstein also argues that the selection of comparison cases could be manipulated to bias the jury in a particular direction. *See id.* This is a genuine concern, but we believe it could be alleviated if the examples chosen to illustrate particular sentencing factors are standardized, perhaps by the state sentencing commission, rather than left for parties or judges to decide in particular cases. Although fashioning such examples would be a significant task under state guidelines schemes, which normally do not involve an inordinate number of different sentencing factors, preparing standard forms is a realistic possibility. Still, it might be difficult to anticipate all the possible variations that specific cases could pose, so judges could be given discretion to adjust the examples in cases in which the standard forms are clearly inadequate.

146. This effect may be amplified by compromises among disagreeing jurors during deliberation, although deliberation also sometimes induces polarizing effects. *See infra* Part V.

147. *See* Daniel A. Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 286–87 (2001); Mark Kelman, Yuval Rottenstreich & Amos Twersky, *Context-Dependence in Legal Decisionmaking*, 25 J. LEGAL STUD. 287, 288 (1996); Lillquist, *supra* note 105, at 654–60; Rachlinski & Jourden, *supra* note 138, at 462; Neil Vidmar, *Effects of Decision Alternatives on the Verdicts and Social Perceptions of Simulated Jurors*, 22 J. PERSONALITY & SOC. PSYCHOL. 211, 212–14 (1972).

tional jury that is also presented the option of convicting on manslaughter will do so. Second, however, conviction of the *greater* offense becomes less likely—and that result lacks a similar rational explanation.¹⁴⁸ If the evidence supports a murder conviction, juries ought to issue a murder conviction regardless of whether a manslaughter option is available. The fact that they do so less often suggests that juries are acting in at least one of two irrational ways: either the absence of a manslaughter option is convincing juries to convict on murder charges even when the evidence only supports a manslaughter conviction, or the presence of that option is causing them to doubt the sufficiency of the murder evidence and to pick the middle option instead.

Similarly, when a greater offense is added to the options presented to mock juries, the chance of an acquittal on all charges decreases.¹⁴⁹ That outcome is also irrational. If a defendant is charged only with manslaughter and, in the jury's assessment, the evidence does not support the charge, the defendant should be acquitted. That picture does not change if the defendant is also charged with murder; the evidence still supports neither offense. In Lillquist's terminology, the addition of the greater offense creates a "decoy effect": the presence of a third option C that increases the *range* of choices available distorts the choice between options A and B by making B (which is closer to C, the "decoy") seem like it must be a better choice than the outlier, A.¹⁵⁰ Similar decoy and compromise effects have been demonstrated in mock jury sentencing,¹⁵¹ as well as in other contexts.¹⁵²

148. See Lillquist, *supra* note 105, at 655–59; Vidmar, *supra* note 147, at 215.

149. See Lillquist, *supra* note 105, at 657–58; see also Kelman et al., *supra* note 147, at 290–95 (showing same effect when a third, more severe offense option is added to two existing options).

150. Lillquist, *supra* note 105, at 654. These mock jury studies are consistent with real world experience. See *id.* at 663. An understanding of jurors' tendency to pick the middle option is the very reason that defense lawyers often request lesser-included-offense instructions. See *id.* If juries behaved rationally, such instructions could only harm the defendant: a jury would convict of the greater offense regardless of the instruction if the evidence supported it, and otherwise would acquit entirely absent the instruction.

151. See Kelman et al., *supra* note 147, at 296–97 (finding that the addition of sentencing option C that was similar to B made subjects more likely to choose B than A, apparently because it made B, being closer to another option, appear more reasonable).

152. See Chris Guthrie, *Panacea or Pandora's Box? The Cost of Options in Negotiation*, 88 IOWA L. REV. 601, 621–25 (2003) (demonstrating compromise effects in negotiators' choices); Itamar Simonson & Amos Twersky, *Choice in Context: Tradeoff Context and Extremeness Aversion*, 29 J. MARKETING RES. 281, 290–92 (1992) (showing that given a choice among multiple product options, consumers tend to choose the middle of the line). Compromise effects may explain the otherwise "surprising" fact that civil juries are more likely to hold a defendant liable in a unitary trial than in the liability phase of a bifurcated proceeding, while juries in the damage phase of bifurcated proceedings tend to issue larger judgments than do juries in unitary trials. Saks, *supra* note 80, at 33–34; Vidmar, *supra* note 89, at 872–73. A unitary civil trial essentially presents three options to the jury (no liability, liability with low damages, and liability with high damages), while bifurcated proceedings present two separate, simpler choices on liability and damages; in the unitary trial, juries tend to pick the middle option. See Vidmar, *supra* note 89, at 871–73.

C. Restructuring and Special Verdict Forms

Although decoy and compromise effects can influence traditional jury decision making when multiple alternative charges are presented to the jury, their prevalence will likely greatly increase if juries, as a consequence of *Blakely*, are employed at the sentencing stage. Depending on how special verdict forms are crafted, sentencing-stage juries in virtually every case may be presented with multiple-choice questions—sometimes many such questions. And because the same actor will now decide both guilt and sentencing factors, these effects may infect threshold guilt determinations even when there is only one charge, since juries could conflate the guilt and sentencing inquiries and, for instance, compromise by convicting but making sentencing determinations that favor the defendant.

The cognitive tendencies of jurors raise a number of policy questions. First, should proceedings be bifurcated, such that the initial decision regarding guilt remains a binary decision?¹⁵³ We argued in favor of bifurcation in Part II, and decoy and compromise effects provide another reason to endorse it. In a unitary proceeding, if a jury is asked both whether a defendant committed an underlying offense in the first place, *and* whether that offense was aggravated by the presence of one or more sentencing factors, the mere asking of the sentencing-related question may increase the likelihood that jurors behaving irrationally will convict on the underlying offense.¹⁵⁴

Second, if proceedings are *not* bifurcated, should sentencing factors be presented to jurors as separate questions in the same proceeding, or should they be incorporated in the charge just like other elements of the offense, thereby presenting a binary choice? Under the former approach, a jury could decide that a defendant possessed some amount of cocaine, for instance, and hence merited conviction for cocaine possession, and *then* proceed to answer the question how much cocaine he possessed. Under the latter approach, if a defendant were charged solely with possessing fifty grams of cocaine, and the jury found that he possessed forty-nine grams, he would be acquitted entirely. Conviction for a lesser amount would only be an option if a lesser-included offense option was also provided. The choice between these two approaches could be decided systematically as a policy (or constitutional¹⁵⁵) matter, or it could

153. See Lillquist, *supra* note 105, at 683–84 (arguing that in jury sentencing states, bifurcation is essential to avoid distortion of the initial guilt inquiry); Vidmar, *supra* note 89, at 871 (noting that bifurcation arguably makes civil jury proceedings more structured and rational).

154. See Vidmar, *supra* note 89, at 871–72. Although judges presented with multiple sentencing options may also be subject to decoy and compromise effects, these effects at least do not taint the guilt determination when the two determinations are made by different actors.

155. The *Blakely* line does not settle whether facts that must be proven to the jury must also be included in the indictment. In *Apprendi*, although avoiding the question, the Supreme Court suggested that there may be no such requirement in state cases, because the right to a grand jury indictment has never been applied against the states. 530 U.S. 466, 477 n.3 (2000).

be left to the parties to argue for particular ways of framing the question in individual cases—much the way prosecutors and defense counsel today make arguments concerning whether to include a lesser-included offense instruction.

Third, unless the all-or-nothing “elements” approach described above is adopted, some form of “special verdict form” will probably have to be submitted to the jury, regardless of whether proceedings are bifurcated.¹⁵⁶ How should the questions on these forms be formulated? Because of the decoy effect, prosecutors would have a strong interest in adding options to the form that suggest that the offense is *more* aggravated than they can reasonably prove, while defendants would want as many mitigating options as possible.¹⁵⁷ It is important to prevent options from being included on special verdict forms that are unsupported by the evidence. For this reason, the use of standard forms that list several possible ranges of drug quantities (or that list several analogous possibilities for other sentencing factors), although administratively convenient, carries dangers. It is not enough to say that judges will throw out jury conclusions if the evidence does not support them, for the power of the decoy effect is not that it convinces jurors to pick the decoy, but rather that it distorts their choices among the other options.¹⁵⁸

Thus, if a multiple-choice special verdict form is provided, the answer choices for each question should be limited to the range of options for which the parties have argued and, for the upper end of the range, for which the state has introduced evidence that is minimally sufficient to sustain a jury verdict. This will require tailoring by the judge, perhaps based on competing submissions of questions and answers by the parties, at the end of the trial. One alternative approach would be to allow jurors to fill in blanks as to quantitative assessments, rather than providing choices that could distort jury decision making. This approach carries the risk that in cases where jurors do not understand or remember the relevant evidence, they would be left completely at sea and pick a number out of thin air (or by simply following the figure alleged in the in-

156. Such forms have in fact been in use in many districts since *Blakely* was decided, and in Kansas (and possible other states) before that. Indeed, special verdict forms were sometimes used even before *Apprendi* at judges' discretion, but in most circuits these have been deemed only advisory. See Colleen Murphy, *Jury Factfinding of Offense-Related Sentencing Factors*, 5 FED. SENT'G REP. 41, 42 (1992); see also M.K.B. Darmer, *The Federal Sentencing Guidelines after Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 574 (2005).

157. For example, suppose a defendant testifies that the quantity of drugs at issue was thirty grams, while the prosecution offers witnesses who testify that the quantity was sixty grams. Either thirty, sixty, or an amount between those two options might be a rational outcome depending on credibility judgments. Fifteen grams and one hundred grams are not rational outcomes, but the defense and prosecution, respectively, would presumably want those choices on the form.

158. For example, in the hypothetical above, the reason the prosecutor wants a one-hundred-gram option is not because he wants a one-hundred-gram finding (perhaps because he knows the judge would throw out such a result), but because he thinks the option will convince or otherwise cause the jurors to pick the sixty-gram option more often than they otherwise would. Furthermore, judges cannot correct jury mistakes in defendants' favor.

dictment). But it is not necessarily better to have the jury choosing from multiple-choice options in that circumstance, and in any event the defendant would enjoy some protection from wholly arbitrary outcomes: jury findings unsupported by the evidence could be rejected by the judge, and sentences based on figures higher than that alleged in the indictment may be constitutionally barred.

IV. REDUCING AND MANAGING COMPLEXITY

Perhaps the most significant and widely raised argument against shifting sentencing fact-finding to juries is the problem of complexity: sentencing guidelines schemes involve so many factors and possible outcomes that juries are likely to be overwhelmed with their new tasks. As Justice Breyer characterized it in his *Apprendi* dissent:

There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury. As the Sentencing Guidelines state the matter,

“[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that day, while sober (or under the influence of drugs or alcohol), and so forth.”¹⁵⁹

State guidelines are less complex than the federal guidelines, but that is not saying much—state sentencing schemes still involve numerous and diverse sentencing factors. This complexity is compounded by the fact that certain individual sentencing factors are likely to be particularly multifaceted and difficult to determine. Two examples include the calculation of loss from economic crimes and the evaluation of a defendant’s role in a conspiracy; the latter task has often required sentencing courts to hold “minitrials” with physical evidence and witness testimony just to determine the portion of a conspiracy for which a conspirator should be held responsible.¹⁶⁰

Complexity raises serious problems for jury involvement at the sentencing stage. Complicated structures and excessive information can cripple decision making. And a shift from judges to juries would magnify the problems caused by guidelines’ existing complexity for two reasons. First, the predominant “passive jury” model robs jurors of the tools they need to process information and maintain effort levels. Second, overloaded jurors are more likely to give up and rely on others, creating a vi-

159. *Apprendi*, 530 U.S. at 556–57 (Breyer, J., dissenting).

160. Ruback & Wroblewski, *supra* note 29, at 751.

cious cycle in which they fall even farther behind—a problem that has to date been ignored by jury reform literature but will demand attention post-*Blakely*. An essential aspect of post-*Blakely* jury reform—an aspect so important that it should be a prerequisite to any legislative decision to shift sentencing fact-finding responsibility to the jury—is to devise means both to reduce the complexity of juries' tasks and to give juries the best possible tools for managing complexity.

A. *Sentencing Complexity and Cognitive Overload*

One of the obvious effects of increased jury involvement at the sentencing stage is that it will multiply the tasks facing criminal juries: in addition to their guilt-determination responsibility, they will be required to apply a laundry list of sentencing factors including many different types of questions, some of which will be quite difficult and evidence-intensive. This heightened responsibility will increase the cognitive burdens on jurors in two ways. First, it will make their ultimate decision-making process structurally complex because they must balance multiple discrete tasks at once. Second, it will greatly increase the amount of evidence they are expected to absorb and process during courtroom proceedings.

The structural complexity problem is a new difficulty in the criminal setting,¹⁶¹ except perhaps in the very most complex multidefendant, multicharge trials (which themselves will grow exponentially more complex if juries are involved in finding sentencing facts). Even civil juries in antitrust or other highly technical cases, while they may be forced to process a great deal of information,¹⁶² usually only face two distinct questions (liability and damages, occasionally with differentiated types of damages). In any event, even if complexity is already a problem in a few cases, it is safe to say that neither the criminal nor civil jury system in the United States has ever before seen the kind of across-the-board complexity—that is, in which *ordinary* cases present a large number of questions—that sentencing fact-finding responsibility would bring. The magnitude of this effect will depend on whether states shift all sentencing fact-finding to the jury, or only aggravating factors; whether juries are required to hear criminal history evidence; and whether Congress eventually decides to shift application of the far more complicated federal guidelines to juries.

161. See Vidmar, *supra* note 89, at 871.

162. We are more concerned here, because they are more relevant and newer problems post-*Blakely*, with “structural complexity” and the problem of the *magnitude* of information provided to jurors than with the oft-noted difficulties posed by technical subject matter and competing expert testimony, although these of course remain significant problems. See, e.g., *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069, 1074 (3d Cir. 1980); Friedman, *supra* note 79, at 982–86. *But see* Hans & Albertson, *supra* note 127, at 1510–11; Vidmar, *supra* note 89, at 857–66 (observing that empirical evidence does not consistently demonstrate these difficulties).

But even if the answer to all of these questions is no, the likely effect will be significant.

Even if juries' information processing and decision skills remained constant as complexity and information burdens increased, we would expect the overall reliability of jury outcomes to decrease. The unreliability of jury decision making increases exponentially with the number of different questions presented.¹⁶³ More ominously, however, jurors' skills will not remain constant. "[C]omplex structures reduce performance on complex tasks" as a general matter.¹⁶⁴ Specifically, increased difficulty and complexity of tasks, especially when combined with a significant onslaught of information, can trigger "cognitive overload," a state that severely impairs cognitive processes.¹⁶⁵ Jurors, like all individuals, are subject to this effect.¹⁶⁶ Cognitive overload has a neurological basis: assigning too many tasks to the cognitive processing portions of the brain means that the brain will perform some tasks through impulse rather than cognition.¹⁶⁷ Thus, the brain is more likely to rely on preconceived or subconscious notions than to think problems through.¹⁶⁸

In particular, cognitive overload is likely to increase jurors' reliance on load-reducing information "structures," like cognitive schemas, which can hamper juror performance at collecting and processing information. In order to deal with limitless information and inherent human limitations, individuals form stories with the data they gather, and then view additional evidence through the lens of these cognitive structures.¹⁶⁹ Although helpful in many contexts, these structures can bias jury outcomes by skewing memory and the perception of evidentiary relevancy.¹⁷⁰ Schemas can be established early, and conflicting subsequent information will be down-weighted, ignored, explained away, cognitively rearranged, or forgotten because it does not square with the juror's dominant story.¹⁷¹ Individuals also forget evidence once they have acquired the

163. See, e.g., Lillquist, *supra* note 105, at 654–55 (describing "conjunction effects"). Taken alone, this problem is not new post-*Blakely*; it affects jury findings at the guilt stage and judicial sentencing.

164. Ruback & Wroblewski, *supra* note 29, at 767.

165. See David Kirsh, *A Few Thoughts on Cognitive Overload*, 30 *INTELLECTICA*, No. 1, at 19 (2000).

166. Posner, *supra* note 72, at 1523–24; Callen, *supra* note 36, at 1260–61.

167. Colin Camerer, George Loewenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience can Inform Economics* 43 (NSF and Ctr. for Advanced Study in Behavioral Scis., Working Paper, 2004), available at <http://ssrn.com/abstract=590965>.

168. *Id.* at 59–60. Such failures could exacerbate racial biases in sentencing. Moreover, they could systematically tilt sentencing fact-finding against defendants. Combining multiple defendants or charges into a single trial empirically increases each defendant's chance of conviction on every charge, perhaps because "the evidence tends to cumulate in jurors' minds or to spill over from some issues to others." Saks, *supra* note 80, at 32.

169. See generally Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory*, 77 *S. CAL. L. REV.* 1103 (2004).

170. *Id.* at 1131–32.

171. *Id.* at 1139–43. More generally, people organize facts in ways that are consistent with their experience and background, such that diverse jurors will reach diverse interpretations of the same facts. *Id.* at 1143.

“gist” of information, and will “fill gaps” by inadvertently making up information.¹⁷²

Furthermore, cognitive overload risks undermining jurors’ motivation and satisfaction as they become more and more frustrated with information-processing challenges. Organizational dynamics research, for instance, finds that “complex structures generally lower worker morale and motivation, both of which impact a system’s effectiveness.”¹⁷³ In addition to its effects on outcomes, this frustration may undercut jury service’s role in building civic responsibility and participatory democracy. The perception that jurors are being left at sea could also undermine the credibility of particular verdicts and of the criminal justice system.

B. *Passivity and Free-Riding*

Cognitive overload is a risk to which all humans are subject, judges included.¹⁷⁴ An important question, then, is whether *Blakely* simply shifts a problem inherent to complex sentencing schemes from one decision maker to another. One of the reasons why the answer to this question is no is that, relative to the pre-*Blakely* arrangement, a post-*Blakely* shift in sentencing fact-finding responsibility would concentrate the burden of complexity on a single decision maker—the jury. The division of fact-finding responsibility between judges and juries greatly reduces the intricacy of the trial jury’s task and, to some degree, reduces the burden on the sentencing judge, who is responsible for presiding but not deciding at the guilt stage. A shift to jury fact-finding at sentencing is likely to exacerbate complexity problems for an even more significant reason than the obvious effect of concentrating decision-making burdens, however. Judges and juries are very different decision makers in very different settings. Several factors will reduce jurors’ ability to withstand cognitive burdens relative to judges, at least unless and until sentencing fact-finding is structured to maximize the advantages of group decision making.

Judges preside over courtroom proceedings, providing them with considerable control over what, when, and how information is presented to them. They can ask lawyers and witnesses clarifying questions and take notes.¹⁷⁵ In contrast, American jurors have traditionally carried out their information acquisition tasks passively; they listen, watch, and read, but almost never participate actively by asking questions of witnesses,

172. *Id.* at 1159.

173. Ruback & Wroblewski, *supra* note 29, at 767; *see also* Kirsh, *supra* note 165, at 20 (explaining that workplace complexity causes “tension with colleagues, loss of job satisfaction, and strained personal relationships”).

174. Ruback & Wroblewski, *supra* note 29, at 759 n.97.

175. Judges have other advantages: they are more experienced, can rely on clerks, and may be more motivated because fact-finding is a part of their chosen career, and because they face the prospect of appellate reprimand.

judges, or lawyers.¹⁷⁶ Even if a juror anticipates a difficult deliberation, she is generally not permitted to discuss the case with fellow jurors, even if just to ask questions or clarify confusions, until deliberation begins,¹⁷⁷ and she may even be prohibited from taking notes.¹⁷⁸ Jurors are also generally left uninformed: although they enter a courtroom with a basic idea of their ultimate goal—to decide whether someone committed a crime or whether certain sentencing factors apply—they usually receive very little guidance on *how* precisely they should make the most of what they see and hear.¹⁷⁹ These problems undermine the jury's ability to process information efficiently and accurately.¹⁸⁰

Juries also differ in an important way from most groups organized to accomplish a common task: they do not coordinate their gathering and processing of information.¹⁸¹ In contrast, teams and committees, for instance, are typically quite structured, benefiting from division of labor, coordination, and sometimes leadership.¹⁸² This difference may well be justified—jurors play an important role as “peers” and as fellow citizens in a democracy, not solely as information processing cogs.¹⁸³ Coordination might undermine these functions by weakening the perception that twelve of a defendant's peers have independently reached the same conclusion about his guilt. Although the lack of coordination is less worri-

176. See generally Valerie P. Hans, *U.S. Jury Reform: The Active Jury and The Adversarial Ideal*, 21 ST. LOUIS U. PUB. L. REV. 85, 86, 96 (2002). Almost all jurisdictions now allow judges to permit jurors to ask questions. See Judge Ken Curry & M. Beth Krugler, *The Sound of Silence: Are Silent Juries the Best Juries?*, 62 TEX. B.J. 441, 442 (1999). The practice is rarely implemented. *But see* Judge John R. Stegner, *Why I Let Jurors Ask Questions in Criminal Trials*, 40 IDAHO L. REV. 541, 548–52 (2004). Jurors might ask inadmissible or otherwise biasing questions, but judges can filter out such questions. See Jeffrey Reynolds Sylvester, *Your Honor, May I Ask a Question? The Inherent Dangers of Allowing Jurors to Question Witnesses*, 7 COOLEY L. REV. 213, 220–22 (1990).

177. See David A. Anderson, *Let Jurors Talk: Authorizing Pre-Deliberation Discussion of the Evidence During Trial*, 174 MIL. L. REV. 92, 93–94 (2002); Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform*, 24 LAW & HUM. BEHAV. 359, 360 (2000).

178. Samuel N. Fraidin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 29 n.90 (2004).

179. See Phoebe C. Ellsworth, *One Inspiring Jury*, 101 MICH. L. REV. 1387, 1389 (2003) (Jurors “may be given a brief lecture by the judge, or shown an orientation videotape, [that contains] a combination of solemn reminders of the vital importance of the jury in a democratic society, earnest exhortations to take their responsibility seriously . . . and occasionally jurors will be told a little about the law, such as the distinction between civil and criminal cases. Usually this is all the advance information they get.”).

180. See B. Michael Dann, *From the Bench: Free the Jury*, 23 LITIG. 1, 6 (Fall 1996) (noting that passive juries, for example, result in “juror confusion, impairment of opportunities for learning, distraction, and boredom”).

181. Juries do select a foreman, but this might not happen until deliberations begin; and juries differ in how they structure their deliberations. See Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 214–16 (1989).

182. See, e.g., Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777, 779–81 (1972); Klaas J. Beniers & Otto H. Swank, *On the Composition of Committees*, 20 J.L. ECON. & ORG. 353, 378 (2004) (listing references).

183. See, e.g., Gerken, *supra* note 40, at 1099, 1152–54 nn.142–48 (2005); Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 547–60 (1986).

some in an adversarial setting in which defendants and prosecutors compete by investigating, sifting, and presenting what is relevant in a way that is intended to be comprehensible to each juror,¹⁸⁴ it nonetheless raises significant hurdles in complex cases involving many separate multiple-choice questions. Even if critically needed, juror coordination is simply not available to ensure that vital information is gathered.

Sentencing-stage jurors will, moreover, likely suffer from one of the major disadvantages facing groups relative to individuals: the free rider problem. As jurors face increased cognitive burdens, they are likely to reduce their per-issue effort levels, opting to rely more on their fellow jurors to acquire information. The underlying dynamic of free-riding is straightforward: in groups faced with a collective responsibility, individual members cannot capture the full benefits of their efforts, and so they work less hard. If a juror's labors are driven by a desire to see the correct outcome in a particular case, he will invest in obtaining information only if his efforts can be translated directly into the verdict and sentence. But a juror knows that he will not (in fact, cannot) make decisions without the input of his peers, so individual efforts will be dampened at least somewhat by the group setting of jury fact-finding.¹⁸⁵

Historically, juror free-riding in criminal trials has probably been fairly minor,¹⁸⁶ and it has thus been virtually ignored by the jury reform literature.¹⁸⁷ This is likely to change if jurors are given substantial sentencing fact-finding responsibility. Increasing the procedural and substantive complexity of criminal proceedings will significantly raise jurors' cognitive costs while only fractionally increasing the benefits of ferreting out the right answer. More tasks and more complexity will lead to reduced juror effort, or at least reduced per-task effort. The shift might make little difference if jurors had endless time and physical and cognitive energy, but humans have limits and adding each additional task generates incrementally larger costs.¹⁸⁸ Sentencing-stage jurors may therefore see free-riding as not merely a shortcut but a necessity. Moreover, deciding sentencing facts accurately, unlike correctly determining guilt,

184. However, adversarial competition alone is insufficient to ensure that juries can acquire and process all of the information they need. See Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18, 18 (1986).

185. Assuming the jurisdiction requires unanimity, as almost all do, a juror's incentive to acquire information may be greater if he believes himself to be in the minority, since he is more likely to alter the outcome. See Ellsworth, *supra* note 179, at 1388.

186. See SUNSTEIN ET AL., *supra* note 35, at vii (describing jurors' "moral seriousness" and the fact that they "almost never engage in selfish or strategic behavior").

187. We have found just one theoretical piece addressing the issue. See Kaushik Mukhopadhyaya, *Jury Size and the Free Rider Problem*, 19 J.L. ECON. & ORG. 24, 24 (2003).

188. This problem would be less significant if there were substantial overlap in a juror's tasks—for example, if mastering one factual issue meant that the juror had already learned eighty percent of what he needed to answer the next question. But sentencing facts are often quite distinct, see Part I.A *supra*, and so substantial additional effort will likely be required for each one.

may seem less important to jurors and therefore provide less “benefit.”¹⁸⁹ Thus, as the complexity of jurors’ tasks increase after *Blakely*, effort levels may deteriorate considerably.

Jurors’ motivations may be more complex than just increasing accuracy; individuals are also driven by a need to impress their peers.¹⁹⁰ That stimulus may partially remedy free-rider effects, because jurors may see individual benefits from personally acquiring and accurately processing information. But juror passivity during hearings and trials undercuts that effect. Jurors do not know one another prior to being empanelled, and therefore the only way for them to earn the respect of their peers is by sending signals, such as appearing prepared and knowledgeable.¹⁹¹ Passive jury settings make signaling one’s effort or skills (by, for instance, asking knowledgeable questions) during courtroom proceedings difficult. As a consequence, jurors remain uncertain during trial and sentencing hearings about the quality of their collection and processing of information, a feeling that can dramatically reduce the incentive to work.¹⁹² Moreover, if a juror believes that he is behind or has made mistakes, but is unable to discover otherwise or “catch up” by clarifying points he missed, he may give up altogether.¹⁹³

The new burdens that may be imposed on jurors at the sentencing stage threaten to generate exactly this sort of effect *en masse*. As many jurors fall farther behind due to cognitive overload or become unsure about what is important given all of the questions they are expected to answer, they may throw up their hands and expend minimal effort—accepting that they will be unable to impress their peers in deliberation and that they should instead depend on others. Or, where presented with multiple fact-finding tasks, jurors may decide that their best chance of impressing their peers (and contributing to the accuracy of results) is by focusing on just one or two of the sentencing factors and ignoring the others—a reasonable approach, but one that, if the jury is uncoordinated,

189. This would be a misperception: so far as accuracy in punishment is concerned, the correct determination of sentencing facts is actually overwhelmingly important, both to the offender and society.

190. See generally Alvin Zander, *The Psychology of Group Processes*, in 30 ANN. REV. PSYCHOL. 417, 428–30 (Mark R. Rosenzweig & Lyman W. Porter eds., 1979). Or, for instance, if jurors were motivated by a feeling of satisfaction with participation in the democratic process, see Part III.C *supra*, increased cognitive burdens and structural complexity post-*Blakely* might deeply undercut this motivation, causing an even more severe free-rider problem.

191. Cf. ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

192. See Claude Henry, *Investment Decisions Under Uncertainty: The “Irreversibility Effect,”* 64 AM. ECON. REV. 1006, 1006–07 (1974) (describing the basic problem); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263, 263 (1979) (“[P]eople underweight outcomes that are merely probable in comparison with outcomes that are obtained with certainty. This . . . contributes to risk aversion in choices involving sure gains . . .”). But see Christoph H. Loch, Bernardo A. Huberman & Suzanne Stout, *Status Competition and Performance in Work Groups*, 43 J. ECON. BEHAV. & ORG. 35, 35 (2000) (arguing that uncertainty increases effort as people work extra-hard to compensate for it).

193. See Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 858–61 (1981).

risks all jurors ignoring the *same* issues, likely the ones that are the most difficult to determine.

C. *Structural Simplification and Active Jury Approach*

We propose attacking the serious problem of cognitive overload from two angles: structuring jury proceedings at the sentencing stage to reduce complexity, and providing the jury with the tools it needs to manage that complexity. Structurally, an important first step is bifurcation of proceedings, which will essentially eliminate any increase in complexity at the guilt stage. Complexity will remain a problem during the punishment phase because multiple sentencing factors are likely to be at issue, but unitary proceedings may worsen the problem by forcing the jury to take on *all* the factual questions relevant to a defendant's culpability at once.¹⁹⁴ Furthermore, if proceedings are bifurcated, jurors will enter the sentencing stage having already deliberated on guilt, and therefore they may have developed at least some sense of community and a cache of experience, which may offset juror frustration and incentives to shirk.¹⁹⁵

Cognitive burdens can also be allayed by ensuring that each task is approached discretely. One reason complexity spurs cognitive overload is that multitasking—shifting constantly from one task to another—triggers frustration and fatigue.¹⁹⁶ That frustration is almost inevitable if post-*Blakely* sentencing proceedings are structured to parallel criminal trials—e.g., the state produces a series of witnesses, each of whom testifies on different sentencing factors and then is cross-examined on each of those issues, and then the defense produces its own series of witnesses, repeating the process. But there is no reason sentencing proceedings must follow this pattern. If sentencing can be detached from the finding of guilt, then there is no reason each sentencing fact cannot be detached from the others. We do not recommend separate deliberation for each sentencing fact (as would be necessary to avoid multitasking completely), because it would probably frustrate jurors and would certainly increase costs, but sequential introduction of evidence on each sentencing factor is an idea worthy of experimentation.

Further structural simplification could be achieved through changes to the guidelines schemes themselves.¹⁹⁷ Although a real exploration of substantive sentencing reform is beyond the scope of this article, we raise

194. See Murphy, *supra* note 156, at 43 (arguing for bifurcation to avoid “jury confusion”); see also Lillquist, *supra* note 105, at 689 (arguing for bifurcation in states with jury sentencing on similar grounds); cf. Vidmar, *supra* note 89, at 871 (describing bifurcation as a “procedural device intended to reduce trial complexity”).

195. See Gary Bornstein, Eyal Winter & Harel Goren, *Experimental Study of Repeated Team Games*, 12 EUR. J. POL. ECON. 629, 636–37 (1996); Armin Falk, Simon Gächter & Judit Kovács, *Intrinsic Motivation and Extrinsic Incentives in a Repeated Game with Incomplete Contracts*, 20 J. ECON. PSYCHOL. 251, 255 (1999).

196. See Kirsh, *supra* note 165, at 31–33.

197. See Darmer, *supra* note 156, at 572.

one possibility: condensing the consideration of separate sentencing factors into a single jury determination. Balancing a range of aggravating and mitigating factors, juries ultimately could simply characterize the offense overall as being “aggravated, mitigated, or ordinary,” or they could rank the offense somewhere on a scale of wrongfulness, where the midpoint is a “typical” example of the same offense.¹⁹⁸ Consolidation would help reduce *structural* complexity,¹⁹⁹ even though the substantive difficulty of balancing or ranking the underlying factors would not change. It thus presents an alternative solution to the multitasking problem—rather than sequencing, tasks could be consolidated to eliminate the interruptions of moving from factor to factor.²⁰⁰

Our second set of proposals is designed to improve jurors’ information-processing capacity and permit signaling to counteract collective action problems. These ideas complement reforms targeted at reducing complexity: jurors’ *responses* to complexity can also be improved,²⁰¹ even though free-riding and information structure biases can never be entirely eliminated. At the outset, in order to jolt jurors off their cognitive crutches and to increase juror effort levels, judges should give jurors a sense of individual responsibility or accountability for the acquisition of information *prior* to the jury’s taking evidence.²⁰² Judges should include language in jury instructions that encourages jurors to take individual responsibility for their roles in the decision-making process, rather than relying on their fellow jurors.²⁰³ Judicial instructions to jurors should use the cognitive power of “role schemas,” which can lead jurors to behave differently if they view their position and goals differently—as, for instance, an individual fact-finder (similar to a judge) responsible for accurately determining all the facts.²⁰⁴

Jury instructions, even if given before a jury takes evidence, often fail to achieve their goals; but carefully crafted, clear, and plain language

198. See Ruback & Wroblewski, *supra* note 29, at 769–74 (proposing similar simplification in the judicial sentencing context).

199. Such an approach to reform might make criminal sentencing determinations similar to analogous fact-finding in complex civil jury trials, issues which ultimately devolve to questions of the existence of liability and the magnitude of damages.

200. Cf. Kirsh, *supra* note 165, at 31 (noting that “task collapsing” may reduce workplace complexity).

201. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law* 15 (Harvard Law and Economics Discussion Paper 495, Sept. 2004).

202. There exists some evidence that preinstructing juries may improve their ability to process evidence more systematically, although there is substantial need for further research on the question. See Phoebe C. Ellsworth & Alan Reifman, *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL’Y & L. 788, 803 (2000).

203. To some extent, judges already do this by saying things like, “The People and the defendant are entitled to the individual opinion of each juror,” but send mixed messages later, e.g., “Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors.” See Ellsworth, *supra* note 179, at 1390 (quoting the California Instructions, CALJIC Nos. 17.40, 17.41, 17.42 (6th ed. 1996)).

204. See Chen & Hanson, *supra* note 169, at 1137, 1183, 1197.

can improve their effectiveness.²⁰⁵ Debiasing instructions, which do not seek to teach jurors abstract legal concepts, but rather to define the task and warn jurors of possible cognitive pitfalls, are more likely to succeed.²⁰⁶ Eliminating subconscious biases may be easier said than done, but instructions can hardly hurt, as long as they are not so long and complex as to contribute to the problem of cognitive overload. If properly crafted, they may yield the benefits of encouraging jurors to look for information-categorization and processing mistakes made by others and, importantly, making each juror cognizant of the fact that other jurors will be similarly searching for mistakes.²⁰⁷ Instructing jurors that they should expect other jurors to use different facts to defend competing positions in deliberation may induce every juror to be more accurate and informed, both because they will be more cognizant of schema-induced complacency and because differences of opinion can, in certain circumstances, provide a competitive spur to diligence and concentration.²⁰⁸

A post-*Blakely* increase in jury fact-finding would also significantly strengthen the arguments many scholars have long made for a shift to an “active jury” model incorporating juror note-taking, question asking, and discussions during breaks.²⁰⁹ The implementation of some version of these reforms will help jurors process information, lightening the burden of evaluating numerous sentencing factors. We will not rehash the well-

205. See, e.g., Ellsworth & Reifman, *supra* note 202, at 802–03 (describing empirical evidence that certain types of preinstructions typically do no good); Friedman, *supra* note 79, at 971; Judith L. Ritter, *Your Lips Are Moving but the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 197–201 (2004) (reviewing studies); see also *supra* note 107 (discussing the failures of limiting instructions).

206. For instance, a judge could instruct a jury along these lines: “People tend naturally to look for stories that explain the information they receive, and then to use the stories to fill in gaps in the information. And the attorneys are doing their best to create a story for you, one that can obscure facts, unless you work hard to remain critical. You must do everything you can to consider each fact on its own terms.” An instruction like this uses a judge’s authority and jurors’ relative inexperience to remind jurors of the potential biases in their thinking. See Chen & Hanson, *supra* note 169, at 1236. For a detailed summary of jury instructions and the characteristics and subjects that are likely to make them succeed or fail, see Ellsworth & Reifman, *supra* note 202, at 794.

207. See Chen & Hanson, *supra* note 169, at 1233–35.

208. Cf. Kfir Eliaz, Debraj Ray & Ronny Razin, *Group Decision-Making in the Shadow of Disagreement* (Nota Di Lavora, Paper 83, 2004); Milton Harris & Artur Raviv, *Differences of Opinion Make a Horse Race*, 6 REV. FIN. STUD. 473 (1993). If jurors believe they will have to justify their factual positions to fellow jurors, and jurors are unaware of the details of likely criticism, they will pre-emptively self-criticize and potentially change positions if they cannot answer an argument. See Chen & Hanson, *supra* note 169, at 1234–35.

209. See, e.g., B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L.J. 1229, 1251, 1260 (1993); Shari Seidman Diamond & Neil Vidmar, *Jury Room Ruminations on Forbidden Topics*, 87 VA. L. REV. 1857, 1857–62 (2001); Valerie P. Hans, *Inside the Black Box: Comment on Diamond and Vidmar*, 87 VA. L. REV. 1917, 1922–23 (2001); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 549–51 (1997). But see JURY TRIAL INNOVATIONS 139–40 (G. Thomas Munsterman, Paula L. Hannaford & G. Marc Whitehead eds., 1997); 1 WAYNE R. LAFAVE, CRIMINAL PROCEDURE § 1.4(c) (2d ed. 1999). Some aspects of the active jury approach have been recently tested in Arizona, where the state Supreme Court has sanctioned jury discussion during trials and permitted discussions and deliberations in some civil trials to be videotaped for analysis by scholars. See Diamond & Vidmar, *supra*, at 1869–74.

developed arguments for these reforms. Instead, we focus on an important advantage heretofore ignored by active jury advocates: certain types of “activity” enable jurors to communicate with or signal to (and hence monitor) each other during the presentation of evidence.²¹⁰ Thus, in addition to amplifying jurors’ *ability* to acquire information, the active jury model can help ensure that jurors have the right *incentives* to do so. Juror signals during hearings and trials can induce more effort and reduce cognitive bias.

For example, question asking by jurors will increase juror accountability and force jurors to question their take on the evidence presented. Such questions should be filtered through the judge—perhaps by jurors writing their questions down and passing them to the judge—so as to prevent undue disruption to the proceedings or questioning that violates whatever rules of evidence apply. Simply *allowing* jurors to submit questions would be a good first step: voluntary questions will reveal disagreements among jurors, thereby dispelling any belief that consensus at deliberation will be straightforward. Further, the option to ask questions might be treated as an opportunity to distinguish oneself.

Beyond this modest suggestion, it may be worth contemplating actually requiring that jurors ask questions, an option we have not seen discussed in the jury reform literature. Consider a rule in which every juror is required to submit a question—without the input of other jurors—about each factual dispute the jury will determine. If authorship of questions were revealed, jurors would recognize that asking an obvious or irrelevant question would expose their free-riding. The drawbacks of juror embarrassment or fear of embarrassment (which could cause juror frustration and thus harm performance) might well outweigh this benefit.²¹¹ However, even requiring anonymous questions would be useful. The asking of such questions would provide jurors with a window into their peers’ thinking. Jurors may consider the motivation for each question, and, in so doing, think more critically about their own approaches to the relevant factual issues in the trial and any sentencing proceedings.²¹²

210. In fact, communication has been considered a major argument *for* the passive jury, since asking questions or communication can be considered improper early deliberation. See Ellsworth & Reifman, *supra* note 202, at 802–03; Kara Lundy, Note, *Juror Questioning of Witnesses: Questioning the United States Criminal Justice System*, 85 MINN. L. REV. 2024–27 (2001).

211. On the other hand, it is well documented that juror embarrassment or shyness often keeps jurors from asking judges questions when they are confused, leading at best to delay and at worst to inaccurate outcomes. See Ellsworth & Reifman, *supra* note 202, at 804.

212. A possible drawback is that question asking might lead to a group story being (perhaps tacitly) agreed to early or, in the case of lack of consensus, to a failure to examine evidence unless it bears on the disagreement between jurors. What evidence exists, however, does not support this concern. See Shari Seidman Diamond et al., *Juror Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 74–75 (2003). Moreover, juror discussion of cases happens regardless, and jurors often talk about less useful or potentially more biasing subjects such as procedure and law. See Terry Carter, *ABA Committee Vets and Revises Proposals for Jury Standards*, A.B.A. JOURNAL, Dec. 2004, at 63, 63 (quoting Louraine C. Arkfeld).

Jury fact-finding at sentencing would also make two other reforms to the passive jury model more attractive: allowing juror note-taking and juror discussions during trial or hearings.²¹³ Note-taking helps to facilitate memory,²¹⁴ ever more important as jurors' tasks become more complex.²¹⁵ Judges should affirmatively suggest that jurors take notes, advising that good notes can be useful in deliberation. Note-taking will increase effort by serving as an imperfect, though constant (unlike question asking), signal during the presentation of evidence.²¹⁶ If taking good notes becomes a symbol of being a "quality" juror, then jurors will write things down, and this may reduce the number of misremembered facts, improve attention, and help to overcome overload or reduced effort.²¹⁷ Similarly, allowing juror conversations during breaks in proceedings will facilitate signaling. If judges tell jurors to discuss factual ambiguities and confusions during the presentation of evidence, and jurors anticipate being evaluated by their peers during breaks, they will work harder.²¹⁸ They will also succumb to fewer cognitive mistakes if they are directed to anticipate others' questions and be self-critical as to their own factual theories.²¹⁹

Finally, it is also worth considering whether juries should be better organized, for example, by enabling jurors to assign tasks among themselves prior to hearing evidence. To our knowledge, no attention has been given to the plausibility or desirability of pre-hearing juror coordination. Small groups in other contexts avoid strategies of total redundancy in which everyone does roughly the same thing. Redundancy may reduce error,²²⁰ but it also reduces effort and accountability. Therefore, coordination might well increase effort and the cognitive resources de-

213. The American Bar Association recently adopted new jury principles (February 14, 2005) that recommended similar changes, though for reasons unrelated to *Blakely* and the new burdens that will accompany it. See *Principles for Juries and Jury Trials*, *supra* note 43, at 91.

214. See Larry Heuer & Steven Pernod, *Increasing Juror Participating in Trials Through Note Taking and Question Asking*, 79 JUDICATURE 256, 262 (1995).

215. Note-taking is also likely to eliminate the biases introduced by the ordering of evidence—individuals are known to overvalue more recently acquired information—although group deliberation already alleviates this problem. See Ahlwat, *supra* note 134, at 71.

216. See David Dickinson & Marie-Claire Villeval, *Does Monitoring Decrease Work Effort? The Complementarity Between Agency and Crowding-Out Theories* 4 (Inst. for the Study of Labor, IZA Discussion Paper No. 1222, July 2004), available at <http://ssrn.com/abstract=571705> (finding in a laboratory setting that moderate levels of monitoring increase effort levels); Omer Moav & Zvika Neeman, *The Quality of Information and Incentives for Effort* 2 (Hebrew Univ., Working Paper, No. 2005-1, 2005), available at <http://ssrn.com/abstract=651204> (studying a model in which a principal's access to low quality and very high quality information about an agent's performance lowers that agent's effort and which shows that moderately accurate information about effort provides the best incentives for performance).

217. And unlike question asking as a signal, note-taking carries no negative "embarrassment" risk with its attendant drawbacks. In that sense, it is a low-cost incentive.

218. We treat jury deliberation in greater detail in Part V.

219. Chen & Hanson, *supra* note 169, at 1233–35.

220. See Jack B. Soll, *Intuitive Theories of Information: Beliefs About the Value of Redundancy*, 38 COGNITIVE PSYCHOL. 317, 319 (1999) ("Although a redundant measurement has value, nonredundant sources dominate due to the lower expected correlation in errors.").

voted to each sentencing issue. Clearly, all jurors would be expected to listen attentively at all stages of the proceedings, rather than sitting idly; task division would not be absolute. But because testimony that relates to multiple sentencing factors might be delivered too quickly for each juror to process all of the relevant points, having some jurors charged with paying special attention to particular issues might help to ensure that crucial information is not misunderstood or ignored.

Implementing a subgroup approach at the sentencing stage would be complicated, in part because a jury would need additional structure in order to assess the work quality of each subgroup. A mandatory reform would also likely face constitutional objections, because courts might determine that having aggravating sentencing factors—which *Blakely* deemed constitutionally equivalent to offense elements—resolved by only a subgroup of a jury runs afoul of the requirement that each element be decided by a jury of adequate size. To some extent, these concerns might be alleviated if it is understood that the full jury, though guided by the views offered by “expert” subgroups, still must agree unanimously on each element of the prosecution’s case. In any event, some criminal defendants might prefer a jury that divided tasks in a way that improved its information-processing capacity, and so we suggest allowing judges to permit such coordination upon the parties’ agreement. Such coordination would be easier in the sentencing stage of bifurcated proceedings because jurors would already have familiarized themselves with their collective information-gathering strengths and weaknesses. Moreover, a brand-new, separate sentencing stage of jury proceedings provides a rare opportunity to experiment with changes that might seem too radical at the trial stage, where procedures are bound up with centuries of tradition.

V. DELIBERATION ON SENTENCING FACTS

In addition to the reduced effort and amplified cognitive biases that will affect each juror’s individual assessment of sentencing facts, a shift to jury fact-finding will also introduce sentencing distortions that result from the group deliberation process. Groups that deliberate before voting often reach dramatically different outcomes than one would expect given members’ individual, pre-deliberation sentiments.²²¹ Deliberation may improve decision making through information sharing, memory and bias correction, and consensus building, but it can also generate several perverse consequences, such as groupthink, polarization, or information cascades.²²² The *Blakely* revolution marks an ideal time to consider im-

221. See, e.g., Cass R. SUNSTEIN, WHY SOCIETIES NEED DISSENT (2003); Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74–75 (2000).

222. Compare Ellsworth, *supra* note 181, at 206, and Mary E. Pritchard & Janice M. Keenan, *Does Jury Deliberation Really Improve Jurors’ Memories?*, 16 APPLIED COGNITIVE PSYCHOL. 589 (2002), with IRVING JANIS, GROUPTHINK (2d ed. 1980). There are also significant advantages to group

provements to this process. Not only does the shift from judges to juries at sentencing mean a shift from individual to deliberative decision making, but the juries of the future will be answering more, and more difficult, factual questions. This complexity risks significantly exacerbating deliberative biases (as well as reducing the benefits to which traditional advocates of deliberation point). However, structural reforms may serve to alleviate these problems, at least in part.

A. *Likely Effects of Deliberation Biases*

Cass Sunstein has described two types of biases that infect the outcomes produced by deliberating groups.²²³ The first are “informational influences, which cause group members to fail to disclose what they know because of deference to the information publicly announced by others.”²²⁴ Information problems of this sort occur during deliberation because individuals do not reveal everything they know (or think they know) simultaneously. Instead, jurors reveal small amounts of information or opinion over time; during that process, jurors are influenced by those who speak before them.²²⁵ A juror who (correctly) knows a particular fact might (incorrectly) decide either that she is wrong or that the fact is irrelevant, and thus might never share it, instead agreeing with those who have already spoken. This agreement in turn creates a false perception of consensus that will influence subsequent jurors, resulting in an “information cascade” that magnifies distortion as deliberation proceeds. The second set of biases are “social pressures, which lead people to silence themselves in order to avoid reputational sanctions.”²²⁶ Social pressures aggravate the informational influences by limiting dissent even further: even if an individual identifies a mistake in the group’s thinking, he may nevertheless agree with the group to save face.

Deliberation can thus cause juries to “not correct but instead amplify individual errors, emphasize shared information at the expense of unshared information, fall victim to cascade effects, and end up in a more extreme position in line with the predeliberation tendencies of their members.”²²⁷ Shifting sentencing decision making from judges to juries raises the possibility of deliberation (and other group effects) biasing sentencing outcomes. We do not have much new to offer on the general

decision making without deliberation (e.g., information markets). See JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004). But elimination of deliberation in the criminal jury seems exceedingly unlikely and probably ill-advised. See Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1320 (2000).

223. See Sunstein, *Group Judgments*, *supra* note 122, at 966.

224. *Id.*

225. Andrew Schotter, *Decision Making with Naive Advice*, 93 AM. ECON. REV. 196 (2003).

226. Sunstein, *Group Judgments*, *supra* note 122, at 966.

227. *Id.*; see also Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 313–14 (2004) (applying this idea to appellate judges).

subject of deliberation bias.²²⁸ Instead, we focus on the likely consequences of a shift to jury fact-finding in the specific context of fairly complicated determinate sentencing systems. Such a shift is likely to magnify deliberative biases in a number of important ways *beyond* what we see now in ordinary guilt-stage deliberations.

Post-*Blakely* cognitive overload and associated reduction in effort will result in jurors not only having less information about each issue at their disposal, but likely being less confident in their individual predeliberation conclusions.²²⁹ Greater uncertainty may reduce individual jurors' willingness to dissent from the group, and dissent is a key ingredient for self-correction when a group is heading in the wrong direction.²³⁰ A probable consequence is the exacerbation of information cascades.²³¹ Sunstein, for example, notes that in a group where most members are suffering from cognitive biases—such as framing, conjunction, and anchoring effects—individuals who might be able to steer the group back on path must “have a high degree of confidence to do so.”²³² Post-*Blakely* cognitive overload thus seems likely to dampen dissent.

Shifting sentencing fact-finding responsibilities will also magnify another deliberation bias: the common knowledge effect. Deliberating groups tend to focus on information that is held by all group members, rather than that held by only one member or a few.²³³ In part, this is because it is more likely that information held by several people will emerge or will be reiterated more frequently than information held by a single person.²³⁴ How might *Blakely* aggravate this bias? Studies that demonstrate and analyze the common knowledge effect usually proceed by distributing some set of information to everyone and other “hidden” knowledge to only a few.²³⁵ The initial distribution is held fixed. But a clear implication of these studies (and the statistical and social hypotheses underlying them) is that if each piece of hidden information were

228. See generally Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSYCHOL. PUB. POL'Y & L.* 622 (2001); Norbert L. Kerr, Robert J. MacCoun & Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 *PSYCHOL. REV.* 687 (1996).

229. See Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, 24 *COGNITIVE PSYCHOL.* 411, 413–14 (1992); Shinji Teraji, *Herd Behavior and the Quality of Opinions*, 32 *J. SOCIO-ECON.* 661, 662–64 (2003). Some jurors may recognize that everyone else is similarly less informed. Nonetheless, it is likely that the number of individuals in the group positioned to dissent will drop, which is enough to magnify cascade effects.

230. Sunstein, *Group Judgments*, *supra* note 122, at 1016.

231. See Sushil Bikhchandani, David Hirshleifer & Ivo Welch, *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 *J. ECON. PERSP.* 151, 162 (1998).

232. Sunstein, *Group Judgments*, *supra* note 122, at 993.

233. See Daniel Gigone & Reid Hastie, *The Common Knowledge Effect—Information Sharing and Group Judgments*, 65 *J. PERSONALITY & SOC. PSYCHOL.* 959, 960 (1993).

234. *Id.* Information held by fewer persons may also be disproportionately down-weighted. *Id.*

235. See Garold Stasser & William Titus, *Hidden Profiles: A Brief History*, 14 *PSYCH. INQUIRY* 304, 304 (2003); Garold Stasser & William Titus, *Pooling of Unshared Information in Group Decision Making: Biased Information Sampling During Discussion*, 48 *J. PERSONALITY & SOC. PSYCHOL.* 1467, 1468 (1985).

held by even fewer people, the bias caused by the common knowledge effect would be stronger.

To illustrate, recall that in Part IV we noted that, without coordination of some sort, jurors who are overwhelmed with information are likely to respond by ignoring certain questions or types of data, particularly if they are complicated or otherwise difficult to process. Jurors' responses to these challenges are likely to be at least somewhat correlated—i.e., people will avoid the same confusing evidence and focus on the same easier-to-understand information.²³⁶ In extreme cases, every juror might miss a crucial piece of data, meaning that the jury would not have sufficient information even absent deliberative biases. But in less extreme cases, hidden information may just be more hidden—a single juror instead of a few will notice a piece of evidence, for instance.²³⁷ The jury will still “have” this information in an important sense but, because fewer jurors will be personally aware of it, juries will become even more likely to ignore it. Put differently, common knowledge will become even more dominant. And social influences will further magnify this change: it is harder, in the face of reputational costs, for a single juror to stand on a piece of information than it is for a few jurors to do so.²³⁸

A shift to jury fact-finding at the sentencing phase would not only increase the bulk of information that jurors must process, but would also require that juries answer multiple questions with multiple answers. As we discussed in Part III, when presented with multiple answer choices, jurors will tend to pick middle options. This individual tendency may be compounded, in a deliberating jury, by compromises that groups make among their members in order to reach a single, unified answer.

Sentencing facts may be determined by group negotiation in two different ways. First, jurors might compromise with respect to one particular question—with three options for a particular fact, if there is substantial disagreement, they may agree to pick the middle option even if few or no jurors actually believe that choice to be correct. Second, jurors might “trade” across facts. A jury with one or two holdouts who wishes to acquit a defendant may be persuaded to convict in exchange for findings on sentencing facts that minimize the defendant's exposure.²³⁹ Both

236. See Part IV.B *supra*. Reducing these correlations is one argument in favor of diverse juries, or role assignment among jurors, discussed both above in Part IV and below.

237. This effect may be similar to enlarging the group, which increases the focus on common knowledge to the detriment of hidden knowledge. See Garold Stasser, Laurie A. Taylor & Coleen Hanna, *Information Sampling in Structured and Unstructured Discussions of Three and Six Person Groups*, 57 J. PERSONALITY & SOC. PSYCHOL. 67, 68 (1989). If so, additional concern is warranted, because larger groups tend to be more confident in their ultimate decisions, regardless of accuracy. *Id.* at 72.

238. See Felix C. Brodbeck et al., *The Dissemination of Critical, Unshared Information in Decision-Making Groups: The Effects of Pre-Discussion Dissent*, 32 EUR. J. SOC. PSYCHOL. 35, 37 (2002); Ellsworth, *supra* note 179, at 1397 (“A minority of two is many times stronger than a minority of one.”).

239. These deliberative effects might reduce the likelihood of hung juries, though there is not much room for improvement on that score. See Saks, *supra* note 80, at 39–40 (observing that the hung

effects will reduce sentencing accuracy, as compromise solutions may reflect no one's view of the actual facts of the case.

Moreover, deliberation over multiple sentencing factors at once will likely exacerbate inaccuracies that stem from status differences.²⁴⁰ Many scholars have documented the relationship between social status and individual behavior in the jury setting.²⁴¹ Occupation, age, gender, and race all play an important role in jury deliberation: those in low-status (i.e., less powerful) groups typically participate less and are less willing to "correct" a forming consensus even if they believe the emerging decision to be incorrect.²⁴² This bias is disturbing in any context, but in multquestion proceedings at the sentencing stage, it will likely be much worse: if a low-status person *is* willing to offer "hidden" information at odds with a growing consensus, she may only be willing to do so once. As Sunstein explains, "[L]ow-status members of groups are 'increasingly reluctant over the course of discussion to repeat unique information.' Those in a group who are inexperienced, or are thought to be low on the hierarchy, are particularly loathe to emphasize their privately held information as discussion proceeds."²⁴³

Thus, over time, status biases harden. With only one fact to find, the loss of accuracy might be negligible if people can share what they know quickly and early, even if they refuse to press that information in later discussions. But low-status individuals suffer group disapproval for offering "hidden" information, information that is helpful in ensuring that the group arrives at the right answer. And if jurors are once bitten, twice shy in the context of a single question, it seems probable that they will be even less likely to dissent from the majority over, say, the seventh fact-finding question.²⁴⁴

Blakely's requirements are also likely to worsen group polarization, another well known problem in group decision making. Polarization, which is driven principally by informational cascades and reputational pressures, occurs when "members of a deliberating group end up in a more extreme position in line with their tendencies before deliberation began."²⁴⁵ Importantly, polarization does not always produce the wrong answer, but it does introduce randomness and thus increases variance in

jury "problem" has been overstated: "the rate of hung juries has been tiny [a few percent], and consistently so for decades"). The compromise approach may also be seen as a form of jury nullification: the deliberate choice of an outcome not supported by the application of the law to the facts, in order to satisfy jurors' sense of justice.

240. Sunstein, *Group Judgments*, *supra* note 122, at 987.

241. See, e.g., Taylor-Thompson, *supra* note 222, at 1281–1308.

242. Sunstein, *Group Judgments*, *supra* note 122, at 26.

243. *Id.* (quoting Stasser & Titus, *Hidden Profiles*, *supra* note 235, at 308).

244. This problem becomes even more worrisome if low status groups are, as a result of their different backgrounds and experiences, more likely to acquire hidden information.

245. Sunstein, *Group Judgments*, *supra* note 122, at 1004 (citing ROGER BROWN, *SOCIAL PSYCHOLOGY: THE SECOND EDITION* 202–26 (1986)).

outcomes.²⁴⁶ Further, polarization can affect both factual and value judgments.²⁴⁷

Polarization will be amplified post-*Blakely* because certain sentencing factors will require that jurors choose an answer along a range, while the sentencing scheme taken as a whole inherently offers a range of possible conclusions. Before *Blakely*, jury polarization effects were principally documented in the context of compensatory or punitive damages calculations in civil trials.²⁴⁸ In criminal trials where a single binary choice rather than a range of choices is presented, polarization is likely important only in increasing confidence levels.²⁴⁹ Polarization tends to affect groups that agree at the outset; assuming all the jurors agree that a defendant is guilty beyond a reasonable doubt, if the jury is not involved in sentencing, there is no consequence to further increasing certainty of guilt or motivation to punish. A sentencing-stage jury that, through deliberation, becomes more convinced of guilt may, however, add a finding that the offense was aggravated. Moreover, the multiplicity of sentencing questions may exacerbate polarization in another way. Polarization stems in part from reinforcement of confidence, but confidence is not necessarily issue-specific. Just as low-status perception can become more problematic over time, an overconfident juror who succeeds in convincing others as to the first sentencing factor may push even harder in deliberation over the second, and so forth.²⁵⁰

Occasionally, two of the effects of *Blakely* we have discussed—compromise and polarization effects—may offset one another. But that prospect does not obviate either problem: polarization may occur in some cases and compromise in others, leading to inaccurate results in both kinds of cases. Even if the effects perfectly cancelled each other so that the average outcome across a wide range of cases was unaffected by the combination of the two biases, that fact would be cold comfort if juries were getting large numbers of individual cases wrong.

B. *Improving Deliberation Outcomes*

Groups often outperform individual experts in correctly answering factual questions so long as each group member contributes independ-

246. See David Schkade, Cass R. Sunstein & Daniel Kahneman, *Are Juries Less Erratic Than Individuals? Deliberation, Polarization, and Punitive Damages 2* (U. Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 81, 1999), available at <http://ssrn.com/abstract=177368>; Cass R. Sunstein, *The Law of Group Polarization 3–4* (U. Chicago Law Sch., John M. Olin Law & Econ. Working Paper No. 91, 1999), available at <http://ssrn.com/abstract=119668>.

247. See SUNSTEIN ET AL., *supra* note 35, at 57–58.

248. See generally, e.g., *id.* at 43, 57–58.

249. See Mark G. Frank et al., *Individual and Small Group Accuracy in Judging Truthful and Deceptive Communication*, 13 GROUP DEC. & NEGOTIATION 45, 52–53 (2004).

250. See Robert S. Baron et al., *Social Corroboration and Opinion Extremity*, 32 J. EXPERIMENTAL SOC. PSYCHOL. 537, 557 (1996).

ently and group membership is reasonably diverse.²⁵¹ Add deliberation, however, and the accuracy and reliability of group decision making becomes much less certain.²⁵² Informational and social pressures can push juries away from the right answers, even when juries are asked only to decide questions of guilt and innocence. But *Blakely*'s requirement that juries decide sentencing facts, at least in a world of determinate sentencing, will significantly dampen dissent and intensify group polarization, thereby decreasing accuracy and amplifying sentence variance. Viable reform options capable of insulating the jury from such deliberative failures do exist, however, and legislatures should consider implementing them along with other changes made necessary or attractive by *Blakely*.²⁵³

One major goal of deliberation is to induce jurors to share all the information they know. Simple instructions to this effect could have a great deal of influence;²⁵⁴ jurors respect and attempt to follow jury instructions, and if clearly worded, instructions can be effective.²⁵⁵ Therefore, when appropriate, judges should explain to juries that they are to answer factual questions that have correct answers—that is, in those circumstances in which juries are being asked simply to establish a fact (e.g., the quantity of drugs involved in the crime, or whether the defendant used a gun) rather than to pass the kinds of normative judgments that are often bound up in sentencing “fact-finding.”²⁵⁶ Groups perform better at sharing information, working as a team, and avoiding deliberative biases if members believe that the group has acquired sufficient information to

251. See Lu Hong & Scott E. Page, *Groups of Diverse Problem Solvers Can Outperform Groups of High-Ability Problem Solvers*, 101 PROC. NAT'L ACAD. SCI. 16,385 (2004); Robinson & Spellman, *supra* note 6, at 1138–46. When deliberation focuses on the meaning of law, deliberation is less clearly useful even under ideal conditions. See Ellsworth & Reifman, *supra* note 202, at 806.

252. See Sunstein, *Group Judgments*, *supra* note 122, at 982–84.

253. One possible reform that we do not discuss is changing the size of juries. Larger and more diverse juries increase the range of perspectives on information and make division of labor and subgrouping easier. But larger groups can exacerbate the biases of common knowledge and foster free-riding. There is also a cost obstacle to this reform, as well as the likelihood that, assuming unanimity remains required, hung juries would more frequently result.

254. Others have suggested that judges may improve jury decision making by offering suggestions to jurors on how to deliberate. See, e.g., COUNCIL FOR COURT EXCELLENCE, *JURIES FOR THE YEAR 2000 AND BEYOND: PROPOSALS TO IMPROVE THE JURY SYSTEMS OF WASHINGTON, DC 65* (1998), available at http://www.courtexcellence.org/juryreform/juries_2000_final_report.pdf. On the other hand, reformers must be careful not to overwhelm jurors with many new instructions, especially if they are complicated. See William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CALIF. L. REV. 731, 747 (1981). In general, there may be a “ceiling” to how much improvement can be achieved through new and better instructions, though it is clear that well-designed improvements can have dramatic effects. See Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL. PUB. POL'Y & L. 381, 381 (1997).

255. See Reid Hastie, *Experimental Evidence of Group Accuracy*, in INFORMATION POOLING AND GROUP DECISION MAKING (Bernard Grofman & Guillermo Owen eds. 1983); see also Ritter, *supra* note 205, at 199.

256. See generally Garold Stasser & Dennis D. Stewart, *Discovery of Hidden Profiles by Decision-Making Groups: Solving a Problem Versus Making a Judgment*, 63 J. PERSONALITY & SOC. PSYCHOL. 426 (1992).

determine the answer, that getting the right answer is the goal, and that accomplishing it is only a matter of time.²⁵⁷

Jurors should also be asked to record their thoughts and beliefs—some of which will be hidden information—prior to deliberation. These private, predeliberation diaries can serve as “anchors” for each juror, reducing the likelihood of polarization.²⁵⁸ Jurors should also be directed to submit their predeliberation opinions anonymously to the group.²⁵⁹ If jurors share their initial opinions regarding a defendant’s degree of culpability before any deliberation takes place—and they do this simultaneously, rather than revealing their opinions sequentially—jurors will receive a snapshot of one another’s views, one that is not influenced by informational or reputational pressures. Information sharing (perhaps in the form of an initial predeliberation vote) should occur in an iterated setting. Iteration can be used to generate feedback loops, allowing jurors to assess and respond to what other jurors believe is important, thereby prompting each to offer information not deemed relevant on the first go-around.²⁶⁰ Eventually, incorporating technology and deliberation-enhancing “devices” (for example, computers that allow anonymous exchange of information and the organization of data are already used in business settings) may succeed at reducing status problems and encouraging participation on an equal footing.²⁶¹

As we noted in Part IV, despite potential constitutional problems, reformers should consider the possibility of asking judges to direct juries to assign certain roles (perhaps particular factual questions) to individuals or subgroups of the jury prior to hearing evidence (or to allow the parties to agree to such structure). Superimposing juror roles (either self-selected or randomly assigned) over the existing jury social structures during the deliberation process would have important implications, not all of them necessarily beneficial.²⁶² One reasonably likely consequence is that assigning roles would create an “expert,” making the group less susceptible to the social and informational pressures we have

257. *Id.* at 432–33.

258. A drawback of public predeliberation voting is that jurors may find it hard to retreat from positions to which they have publicly committed themselves. For this reason, recording one’s thoughts in notes or anonymously voting seem to be superior options.

259. Anonymity can eliminate social pressures and causes more “hidden” information to be revealed. *Cf.* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES 13–15 (1995); Susanne Lohmann, *Collective Action Cascades: An Informational Rationale for the Power in Numbers*, 14 J. ECON. SURV. 655, 658 (2000).

260. *See* Sunstein, *Group Judgments*, *supra* note 122, at 1018.

261. *See* Nancy S. Marder, *Juries and Technology: Equipping Jurors for the Twenty-First Century*, 66 BROOK. L. REV. 1257, 1269–87 (2001); Marla E. Hacker, *The Effect of Decision Aids on Work Group Performance* 70–71 (Apr. 10, 1997) (unpublished Ph.D. dissertation, Virginia Polytechnic Inst. and State University).

262. *Cf.* Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 504–15 (2002); William D. Stiehl, *Insights into the Deliberative Process*, 21 ST. LOUIS U. PUB. L. REV. 11, 12 (2002).

described,²⁶³ although these might be replaced by new pressures for others in the group to defer to the experts even if they suspect the experts might be wrong. Whether such reforms would constitute an improvement will turn on whether experts or expert subgroups, having been assigned to particular factual tasks, are more likely to be right as a consequence of increased focus and reduced deliberation-induced bias.

In a similar vein, where possible, juries should be encouraged—again, through simply worded judicial instructions or suggestions²⁶⁴—toward healthy internal competition.²⁶⁵ One approach, other than using roles, would be the use of devil’s advocates,²⁶⁶ although jurors are less likely to heed criticism that is not truly believed by its defender.²⁶⁷ A second option is to assign tasks to individuals or subgroups, and then assign “discussants” directed to be critical of the factual opinions expressed. More generally, anticipated criticism (without knowledge of any specifics) will force jurors to keep open minds.²⁶⁸ Factual accuracy might even be enhanced by more radical reforms: for instance, dividing juries for deliberation purposes into two groups that initially do not communicate. The smaller groupings might more effectively unearth hidden information and, arguably, might improve performance if jurors perceive a benefit (social validation, or simply ending deliberations earlier) from arriving at the same answer as the other group.²⁶⁹

Bifurcating factual deliberations, so that each fact is deliberated on and decided sequentially, may reduce “vote trading” among jurors. The reason tracks the intuition of the Prisoner’s Dilemma: if a juror has to vote now for a concession later, he may anticipate defection by his trading partner. That is, a holdout may be unwilling to vote (against his conscience) to convict if he is not confident that other jurors will really offer sentencing leniency after another stage of the proceedings has passed. Further, to the extent bifurcation minimizes cognitive overload, it will reduce *Blakely*’s exacerbation of deliberative biases, especially at the threshold guilt stage. A further restructuring possibility would divide

263. See Garold Stasser, *The Uncertain Role of Unshared Information in Collective Choice*, in *SHARED COGNITION IN ORGANIZATIONS* 49, 56–57 (Leigh L. Thompson, John M. Levine, & David M. Messick eds., 1999); Garold Stasser, Dennis D. Stewart & Gwen Wittenbaum, *Expert Roles and Information Exchange During Discussion: The Importance of Knowing Who Knows What*, 31 *J. EXPERIMENTAL SOC. PSYCHOL.* 244, 262–64 (1995); Garold Stasser, Sandra I. Vaughn & Dennis D. Stewart, *Pooling Unshared Information: The Benefits of Knowing How Access to Information is Distributed Among Group Members*, 82 *ORG. BEHAV. & HUM. DEC. PROCESSES* 102, 105–06 (2000).

264. Because jury deliberations take place in secret, there may be no practical way to ensure that any given jury actually follows particular structural suggestions.

265. See Part IV *supra*.

266. See Sunstein, *Group Judgments*, *supra* note 122, at 1016 (“Those assuming the role of devil’s advocate will not face the reputational pressure that comes from rejecting the dominant position within the group; they have been charged with doing precisely that. And because they are asked to take a contrary position, they are freed from the informational influences that can lead to self-silencing.”).

267. See *id.* at 40.

268. See Chen & Hanson, *supra* note 169, at 1233–35.

269. Cf. Sunstein, *Group Judgments*, *supra* note 122, at 1016.

jury deliberation, perhaps on each factual question, into two distinct phases. The first stage should focus on information revelation and disagreement to elicit hidden information, with jurors expressly encouraged to avoid pressuring one another toward consensus, while the second stage should aim at the traditional goal of achieving agreement.

We recognize that some of these ideas amount to a sharp break with tradition, and courts or legislatures may be reluctant to implement them at the trial stage for this reason. Again, however, we note that there is no traditional form for separate jury hearings designed to find facts related to sentencing, and so the creation of these new proceedings may provide a window to experiment with new deliberation structures. Moreover, many of the reforms we suggest above are perfectly consistent with existing jury practice. At the very least, a requirement of predeliberation voting and/or individual recording of thoughts, arguments, and evidence should be explored.

VI. CONCLUSION

A post-*Blakely* shift to jury fact-finding at sentencing would significantly complicate the criminal jury's task, introducing certain distortions and exacerbating some existing ones. Policymakers should not underestimate the significance of these effects, for they may seriously threaten the proper functioning of the jury. A realistic appreciation of these concerns should guide state legislatures as they make the threshold policy choice whether to commit sentencing fact-finding to the jury in the first place or to follow instead the *Booker* route of abandoning mandatory sentencing guidelines.

Some will likely decide, in the end, that mandatory sentencing is not worth the "constitutional tax" that compliance with *Blakely* may impose.²⁷⁰ Yet legislatures that wish to retain determinate sentencing should not be overly discouraged, nor should the automatic response to *Booker* be the revision of their sentencing schemes so that jury involvement is unnecessary. Thoughtful structuring of sentencing fact-finding proceedings can likely alleviate many of the difficulties that will emerge. It is essential, therefore, that state policymakers turn their attention to developing solutions to the new problems juries will face at the sentencing stage. Neither the liberty of criminal defendants nor the interest of the public in effective punishment and a credible criminal justice system should turn on the performance of a jury that has not been equipped with the tools, structures, and procedures to do its job well.

By demanding that states essentially reinvent their criminal sentencing processes, *Blakely* has provided a window to test reform proposals, many of which have long been suggested in the trial context as well but

270. 542 U.S. 296, 318 (2004) (O'Connor, J., dissenting).

have encountered resistance. Because each state with binding guidelines will likely respond to *Blakely* in somewhat different ways, the coming years will provide an excellent opportunity to test and compare different approaches.²⁷¹ In responding to *Blakely*, states should remain flexible and open to policy reforms during this period of flux, learning from the successes and failures of other approaches.²⁷²

We hope, therefore, that some states adopt completely different approaches than the ones we suggest. That said, if we were designing a post-*Blakely* jury fact-finding sentencing system for a state that wished to retain mandatory guidelines, it would have a few essential features:

- Proceedings should be bifurcated, which would solve the evidentiary “relevance problem,” mitigate compromise and decoy effects, eliminate new complexities at the trial stage and reduce them at the sentencing stage, and provide an opportunity to experiment with procedural reforms that might prove too great a break with tradition at the trial phase.
- At the sentencing phase, certain rules of evidence should apply—most notably, the relevance rule and the exclusion of overly prejudicial evidence—but hearsay should be unrestricted unless it interferes with the defendant’s constitutional confrontation rights, special restrictions on prior bad act evidence should be lifted, and restrictions should not apply to the extent they interfere substantially with the defendant’s ability to introduce mitigating evidence.
- During sentencing proceedings, jurors should be permitted to take notes and discuss the case during breaks, and be permitted or possibly required to submit anonymous questions to the judge. Judges should issue instructions designed to alert jurors to the risks of reliance on heuristics, and be permitted to experiment, upon the parties’ agreement, with allowing jurors to coordinate information-gathering responsibilities, and with structuring the proceedings sequentially on a per-issue basis.
- Special verdict forms submitted to the jury should contain carefully selected answer choices excluding potentially distorting options not supported by the evidence. Where jurors are asked to make a qualitative or comparative judgment, judges should provide them with a set of concise relevant comparisons, standard-

271. Cf. Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 379 (2005).

272. See Gerard E. Lynch, *Sentencing: Learning From, and Worrying About, the States*, 105 COLUM. L. REV. 933, 942 (2005); see also *id.* at 935 (“In the area of sentencing, the states have genuinely served as laboratories for experimentation.”); see generally DAVID OSBORNE, *LABORATORIES OF DEMOCRACY* (1988).

ized by a sentencing commission for each sentencing factor and major category of underlying offense.

- Judges should advise jurors, before commencing deliberations, of certain procedures that can improve the quality of deliberations. Jurors should be directed to write down their impressions and share them anonymously, and to consider seriously a few well-thought-out ways of internally organizing discussions. Sentencing facts might also be deliberated and voted on sequentially, in order to reduce compromise effects.

Many will probably disagree with our specific proposals, but we think it is difficult to gainsay our central point: sentencing-stage juries will face diverse and complex tasks that they are in many cases ill-equipped to handle. Ensuring jury competence to carry out these tasks is absolutely critical, and so it is essential that legislatures wishing to maintain determinate sentencing think creatively about structures and procedures that might improve the accuracy of jury decision making. In that creative spirit, although some of our ideas are straightforward, relatively conservative, and low-cost, we have also raised some ideas that have never been tried before in any context, much less in jury sentencing fact-finding proceedings. There is, of course, no substitute for careful observation of how such ideas actually play out in practice. The post-*Blakely* revolution will provide us the opportunity to find out.