APPLYING *APPRENDI* TO JURY SENTENCING: WHY STATE FELONY JURY SENTENCING THREATENS THE RIGHT TO A JURY TRIAL

MELISSA CARRINGTON*

Jury sentencing may offer an alternative to traditional judicial sentencing models, but at what cost? After the Supreme Court's landmark decision in Apprendi v. New Jersey *that only a jury can find aggravating factors that increase a defendant's sentence beyond the statutory maximum, interest in the possibilities of jury sentencing in noncapital cases has resurfaced in the scholarly community. In the states where jury sentencing procedures are utilized, however, prosecutors often use the threat of jury sentencing mechanisms to undermine defendants' Sixth Amendment right to a jury trial. This Note examines the problems with jury sentencing mechanisms, particularly when a jury sentence is mandatory in conjunction with a jury trial, and it disputes the notion that the* Apprendi *line of cases supports an increased sentencing role for jurors under the Sixth Amendment.*

The author begins with an overview of Apprendi *and subsequent Supreme Court cases which have caused a resurgence in juror sentencing scholarship over the past decade. She also describes the jury sentencing systems in the six states that utilize them: Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. She then analyzes* Apprendi *and juror sentencing models, determining that, based on a historical analysis, the Sixth Amendment only protects juror determination of culpability, and that mandatory and pseudomandatory juror sentencing systems undermine the Sixth Amendment right to a jury trial by causing defendants to plead guilty or elect a bench trial to avoid an arbitrary jury sentence. The author recommends that, in states where juror sentencing is utilized, states adopt elective juror sentencing systems where a defendant can choose a jury trial and judicially determined sentence. She further recommends the adoption of juror sentencing guidelines to assist jurors in making consistent sentencing determinations.*

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I. INTRODUCTION

The jury's most notorious sentencing function is its grave deliberation to put a defendant to death.[1] In six states, however, the jury's sentencing purview extends beyond the death penalty and into the broader context of general felony sentencing. Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia give juries the power both to decide guilt and to sentence a defendant in noncapital felony cases.[2] Though six out of fifty states may seem insignificant in the grand scheme of criminal justice systems across the country, juries in those six states issue approximately four thousand sentences for noncapital felonies each year,[3] more than thirty times the total number of defendants sentenced to death each year nationwide.[4]

Jury sentencing has risen to prominence in debates about the criminal justice system since *Apprendi v. New Jersey*, the Supreme Court of the United State's decision in 2000 that, under the Sixth Amendment right to a jury trial, a jury—not a judge—must find aggravating factors that increase a defendant's sentence beyond the statutory maximum.[5] Some scholars now argue that the Court, in *Apprendi* and the related cases that followed it, paved the way for jury sentencing.[6] Proponents of jury sentencing tout it as the more complete fulfillment of the Sixth Amendment's promise of a jury trial, as opposed to the current norm in

1. *See* Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 195 (2004). This Note often cites Nancy J. King's findings and observations on jury sentencing and other aspects of criminal procedure. Using her research showing that the unpredictability of jury sentencing deters defendants from seeking jury trials, this Note explains why jury sentencing in practice conflicts with the Sixth Amendment. *See* Nancy J. King & Roosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 889, 946 (2004).

2. ARK. CODE ANN. § 5-4-103 (2010); KY. REV. STAT. ANN. § 532.055 (West 2010); MO. ANN. STAT. § 557.036 (West 2010); OKLA. STAT. tit. 22, § 926.1 (2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009); VA. CODE ANN. § 19.2-295 (2011).

3. *See* King & Noble, *supra* note 1, at 887.

4. King, *supra* note 1, at 195 & n.2 ("[E]ach year the combined number of defendants sentenced by jury in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia significantly exceeds the number of defendants sentenced by juries for capital crimes nationally."). The Bureau of Justice Statistics reported that out of 8400 persons convicted of murder or non-negligent manslaughter "[i]n 2004, 29 States received 115 prisoners under sentence of death." Matthew R. Durose & Patrick A. Langan, *Felony Sentences in State Courts, 2004*, 2007 BUREAU JUST. STAT. BULL. 3, http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf. Not all of these individuals were subject to the death penalty, however. *Id.*

5. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000); JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 627 (2009); King & Noble, *supra* note 1, at 886–87; Bruce P. Smith, *Plea Bargaining and the Eclipse of the Jury*, 1 ANN. REV. L. & SOC. SCI. 131, 146 (2005) ("[A] flurry of cases decided by the U.S. Supreme Court in the past few years demonstrates that the constitutional right to trial by jury continues to flicker.").

6. *See, e.g.*, W. David Ball, *Heinous, Atrocious, and Cruel:* Apprendi*, Indeterminate Sentencing, and the Meaning of Punishment*, 109 COLUM. L. REV. 893, 896 (2009); Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 982 (2003); Jenia Iontcheva, *Jury Sentencing As Democratic Practice*, 89 VA. L. REV. 311, 335 (2003); Bertrall L. Ross II, *Reconciling the* Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 725, 725–26 (2006); *see also* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1776 (1999) (calling for jury sentencing before *Apprendi*).

most states and the federal system—a jury determination on liability and a judicial determination on punishment.[7]

While praised by scholars, jury sentencing is problematic in the states that use it, as a study by Nancy J. King and Roosevelt L. Noble reveals.[8] In Kentucky and Virginia, if defendants exercise their right to a Sixth Amendment jury trial on guilt or innocence, they must also receive their punishment from the jury.[9] In Arkansas and Oklahoma, if defendants want a jury trial on their guilt or innocence, they must take the risk that the prosecutor and trial court will not approve their request to waive a jury trial for sentencing.[10] Recent research reveals that, in practice, jury sentences in these states are wildly unpredictable,[11] and juries are not allowed to sentence below the statutory minimum or impose probation, as judges can.[12] Defendants in these states, out of fear of an arbitrary jury sentence, often choose a bench trial or guilty plea and, in doing so, surrender their right to a jury determination on their guilt or innocence.[13]

This Note first argues that advocates of jury sentencing have incorrectly understood *Apprendi* to support a broader role for the jury in sentencing.[14] Instead, *Apprendi* demonstrates that the jury's sentencing function in the Framers' time was quite limited and that the Sixth Amendment protects the right to a jury determination on guilt, not punishment.[15] Second, this Note concludes that the jury sentencing systems applied in Arkansas, Kentucky, Oklahoma, and Virginia, in which defendants give up their right to a jury trial because jury sentences are so arbitrary, conflict with the Sixth Amendment right to a jury determination of guilt or innocence.[16]

Part II explains *Apprendi* and its progeny and discusses the scholarship that has emerged after *Apprendi* in support of jury sentencing. Part II then outlines and contrasts the structure and function of jury sentencing systems in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia. Part II also discusses the problems of jury sentencing in practice that leads defendants to forgo their right to a jury trial completely.

Part III discusses how, through *Apprendi* and related cases, the Supreme Court has demonstrated that the jury's sentencing role in the Framers' time was limited, and that the Sixth Amendment protects a jury determination on guilt. Part III then applies this jurisprudence to jury sentencing practices in Arkansas, Kentucky, Oklahoma, and Virginia and concludes that these systems clash with the Sixth Amendment. Finally,

7. *See* Ross, *supra* note 6, at 725–26.
8. King & Noble, *supra* note 1, at 888.
9. *See infra* Part II.C.1.b.
10. *See infra* Part II.C.1.b.
11. King, *supra* note 1, at 197.
12. *Id.* at 201.
13. *Id.*
14. *See infra* Part III.A.
15. *See infra* Part III.A.
16. *See infra* Part III.B.

Part IV recommends: (1) that these four states adopt the model of Missouri and Texas, where defendants can exercise their right to a jury trial on guilt and independently choose either a jury or a judge to determine their sentence; and (2) that all jury sentencing states impose guidelines for jury sentencing.

II. BACKGROUND

Jury sentencing in noncapital felony cases garnered little scholarly attention before 2000, as debate about juries in capital sentencing dramatically eclipsed any discussion of noncapital sentencing.[17] Since the *Apprendi* decision, however, arguments in favor of expanding jury sentencing to noncapital cases have grown in number and strength, throwing the six states that currently use jury sentencing into the spotlight.[18] Section A discusses the Supreme Court's decision in *Apprendi* and the related cases that came after it. Section B then reviews the arguments in favor of jury sentencing that have followed the *Apprendi* line of cases. Section C.1 explains and contrasts the jury sentencing systems in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, pinpointing the critical difference that makes Arkansas, Kentucky, Oklahoma, and Virginia's systems problematic. Section C.2 then explains the difficulties of jury sentencing in practice, as shown by recent research on sentencing in these states.

A. Apprendi *and Judge/Jury Functions Under the Sixth Amendment*

In the span of five years, the Supreme Court handed down a rapid series of cases, beginning with *Apprendi v. New Jersey*, that delineated factors that juries, as opposed to judges, must find beyond a reasonable doubt in order to increase a defendant's sentence beyond the statutory maximum.[19] The cases following *Apprendi* served to affirm and, with the exception of *Harris v. United States*, expand its holding.[20]

1. Apprendi v. New Jersey

In 2000, the Court ruled in *Apprendi* that under the Fourteenth Amendment due process clause and the Sixth Amendment right to a jury trial, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved

17. *See* King, *supra* note 1, at 195–96. The lack of scholarly analysis of noncapital jury sentencing is particularly troubling because jury-sentencing states provide little to no guidance to jurors in sentencing decisions, which runs contrary to efforts of carefully guiding jurors in capital sentencing. *Id.*

18. *See infra* Part II.B.

19. *See* United States v. Booker, 543 U.S. 220, 243–44 (2005); Blakely v. Washington, 542 U.S. 296, 303–04 (2004); Harris v. United States, 536 U.S. 545, 568 (2002); Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

20. *See Harris*, 536 U.S. at 567; Smith, *supra* note 5, at 146.

beyond a reasonable doubt."[21] In *Apprendi*, the defendant pled guilty to several counts of unlawful possession of a weapon and possession of a weapon with unlawful purpose.[22] The trial judge extended his sentence beyond the statutory maximum, as allowed by a state hate crime statute.[23] Under the statute, the judge, not the jury, was to make the finding of fact that increased the defendant's sentence.[24]

Justice Stevens, writing for the majority, ruled that states cannot "define away facts necessary to constitute a criminal offense."[25] The state legislature had taken an element of an offense and instead labeled it a sentencing factor, such that: (1) the factor did not need to be proved beyond a reasonable doubt; and (2) the judge during the sentencing hearing, rather than the jury during its deliberation on the defendant's guilt or innocence, would make a finding of fact.[26] The Court held that this statutory structure violated the Fourteenth and Sixth Amendments.[27]

2. Apprendi's *Progeny*

Two years after *Apprendi*, the Court decided, in *Harris v. United States*, that judges may determine facts that increase a statutory minimum sentence, as long as that sentence is below the statutory maximum, without violating a defendant's Sixth Amendment right to a jury trial.[28] In the same year as *Harris*, the Court established in *Ring v. Arizona* that pursuant to the Sixth Amendment, a jury must find aggravating factors for a capital sentence.[29] The Court reasoned: "[c]apital defendants, no less than noncapital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[30] The Court found the Arizona statute, which required a judge to find aggravating factors, to be unconstitutional.[31]

The Court continued its rulings on judge versus jury factual findings in 2004 in *Blakely v. Washington*, when it reaffirmed *Apprendi* and ap-

21. *Apprendi*, 530 U.S. at 490; Smith, *supra* note 5, at 146.
22. *Apprendi*, 530 U.S. at 469–70.
23. *Id.* at 470–71.
24. *Id.*
25. *Id.* at 486.
26. *Id.* at 491–92.
27. *Id.* at 476.
28. Harris v. United States, 536 U.S. 545, 568–69 (2002); *see also* Iontcheva, *supra* note 6, at 313. In Harris's bench trial, the judge found Harris guilty of violating a federal law that prohibits carrying a firearm in furtherance of a drug-trafficking crime, which was punishable by a five-year minimum sentence. *Harris*, 536 U.S. at 551. At Harris's sentencing hearing, the judge found that Harris had brandished a weapon, which, under the statute, increased the minimum sentence to seven years. *Id.*
29. Ring v. Arizona, 536 U.S. 584, 589 (2002); *see also* Smith, *supra* note 5, at 146. In Ring's jury trial, "[t]he jury deadlocked on premeditated murder, with 6 of 12 jurors voting to acquit, but convicted Ring of felony murder occurring in the course of armed robbery." *Ring*, 536 U.S. at 591. Following Arizona law, the judge proceeded to conduct a sentencing hearing, where the judge determined that aggravating circumstances existed and sentenced the defendant to death. *Id.* at 592–95.
30. *Ring*, 536 U.S. at 589.
31. *See id.* at 588–89.

plied it to state sentencing guidelines.[32] The Court found Washington's sentencing guidelines, under which a judge's finding of "deliberate cruelty" could increase a defendant's sentence above the guideline range, to be unconstitutional.[33] Most recently, in *United States v. Booker*, the Court again validated its holding in *Apprendi* and extended it to the Federal Sentencing Guidelines.[34] The Court held that a jury must find beyond a reasonable doubt those facts that increase a defendant's sentence beyond the maximum sentence in the Federal Sentencing Guidelines range.[35]

These cases, beginning with *Apprendi*, firmly established that state legislatures and Congress cannot define a crime so as to circumvent the jury; the jury must find those facts that increase a defendant's sentence beyond the statutory maximum.[36] The *Apprendi* line of cases has left many wondering how exactly a legislature should distinguish between sentencing factors and elements of a crime, as far as what a judge may find and what a jury must find.[37] What is certain, though, is that these

32. Blakely v. Washington, 542 U.S. 296, 303–04 (2004); *see also* Smith, *supra* note 5, at 146. Blakely pled guilty to second degree kidnapping with a firearm, a Class B felony in Washington State, which is punishable by a maximum of ten years. *Blakely*, 542 U.S. at 298–99. Under Washington's Sentencing Reform Act, the range for second-degree kidnapping with a firearm was forty-nine to fifty-three months. *Id.* at 299. Under the Act, however, a judge was allowed to impose a sentence for longer than fifty-three months in the case of aggravating circumstances. *Id.* The judge found that Blakely had committed the crime "with 'deliberate cruelty'" and sentenced him to ninety months. *Id.* at 300. In response to Blakely's argument on appeal, that this judicial finding deprived him of his Sixth Amendment right to a jury trial, Washington argued that the statutory maximum should be interpreted as ten years (for Class B felonies), rather than fifty-three months for the specific crime of kidnapping. *Id.* at 303. The Court, in overturning Blakely's conviction as unconstitutional, rejected Washington's argument, stating that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id.* at 303–04.

33. *Id.* at 299, 303–04.

34. United States v. Booker, 543 U.S. 220, 243–44 (2005); *see also* Smith, *supra* note 5, at 146. *Booker* consolidated the cases of *Booker* and *Fanfan*. Both defendants had received sentences under the Federal Sentencing Guidelines (Guidelines) for drug convictions. *Booker*, 543 U.S. at 227–29. In Booker's case, the jury convicted him of a particular possession crime, which carried a sentencing range between 210 and 262 months under the Guidelines. *Id.* at 227. The judge, however, found additional facts (that Booker had obstructed justice and possessed more drugs than the jury had found) and imposed a longer sentence, as required by the Guidelines. *Id.* Booker appealed. *See id.* In *Fanfan*, under a similar set of facts, the judge refused to impose the longer sentence because he believed it was unconstitutional under *Apprendi*. *Id.* at 228–29. The Government appealed. *Id.* at 229.

35. *Id.* at 243–44; *see also* Smith, *supra* note 5, at 146.

36. *See* Harris v. United States, 536 U.S. 545, 557 (2002) (Kennedy, J., concurring) ("Congress may not manipulate the definition of a crime in a way that relieves the Government of its constitutional obligations to charge each element in the indictment, submit each element to the jury, and prove each element beyond a reasonable doubt.").

37. *See* Hoffman, *supra* note 6, at 982 ("If there is one lesson to learn from the speed and inconsistency of these cases, it is that predictions in this area are almost worthless. . . . The Court seems balanced on an impossibly difficult saddlepoint: if the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to a jury trial by the simple artifice of labeling elements as 'sentencing factors'; yet there seems to be no principled basis upon which to truly distinguish elements from sentencing factors.").

cases have sparked a wave of interest in the proper roles of judge and jury in decisions that affect sentencing.[38]

B. An Expanded Role for the Jury After Apprendi*?*

Apprendi and the cases that followed it have provoked a call for jury sentencing.[39] *Apprendi* highlights and protects the jury's role in determining factors at trial that affect a defendant's sentence.[40] Supporters of jury sentencing argue that, by recognizing and reinforcing this jury function, the Court has paved the way for a greater role for juries in sentencing.[41] These theorists argue that juries should decide both a defendant's guilt and sentence.[42] Commentators praise jury sentencing because it solves the difficulty of distinguishing between factors for jury and judicial determination after *Apprendi*.[43] Advocates of jury sentencing even assert that the Sixth Amendment right to a jury trial includes jury sentencing after the *Apprendi* line of cases.[44] Finally, supporters argue that juries produce more legitimate sentences than judges, as they represent the community conscience and are free from judicial and legislative political pressures.[45]

1. Jury Sentencing Solves Problems Presented by Apprendi

Commentators present jury sentencing as a natural solution to the post-*Apprendi* difficulties of distinguishing between factors that juries must determine and those that judges can decide.[46] One trial judge describes the differentiation between elements of a crime and sentencing

38. Iontcheva, *supra* note 6, at 313.

39. *See id.* at 314–15; King & Noble, *supra* note 1, at 886–87; Smith, *supra* note 5, at 146; *see also, e.g.*, Ball, *supra* note 6, at 896. *But see* Douglas A. Berman, *Should Juries Be the Guide for Adventures Through* Apprendi*-Land?*, 109 COLUM. L. REV. SIDEBAR 65, 69 (2009).

40. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

41. Iontcheva, *supra* note 6, at 313 ("Having enhanced the jury's authority to find facts related to sentencing, the Court may have opened the door to even greater juror participation in the sentencing process."); Ross, *supra* note 6, at 725–26.

42. Iontcheva, *supra* note 6, at 314; Ross, *supra* note 6, at 725–26; *see also* Hoffman, *supra* note 6, at 1000; Lanni, *supra* note 6, at 1777.

43. Hoffman, *supra* note 6, at 1000; Iontcheva, *supra* note 6, at 313–14.

44. Ross, *supra* note 6, at 725–26.

45. *See* Ball, *supra* note 6, at 924–25; Iontcheva, *supra* note 6, at 313, 343; Lanni, *supra* note 6, at 1776.

46. Hoffman, *supra* note 6, at 1000; Iontcheva, *supra* note 6, at 313–14. Both Hoffman and Iontcheva perceive other inconsistencies in the traditional division of labor between judges and juries. "[T]he current orthodox system—in which jurors typically decide liability and damages in civil cases . . . is hopelessly irrational." Hoffman, *supra* note 6, at 993. Iontcheva wonders why most jurisdictions allow juries to decide life or death in capital cases while judges are the ones who choose between statutory minima and life imprisonment. Iontcheva, *supra* note 6, at 314. She also highlights that juries can decide facts that affect sentences, but, in the jurisdictions where judges sentence, juries are forbidden from knowing the possible sentences that might issue from their determinations of guilt. *Id.*; *see also* Shannon v. United States, 512 U.S. 573, 579 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" (citations omitted)).

factors as "impossible" and "arbitrary."[47] Jury sentencing resolves this issue because "once judges are removed from sentencing, it doesn't matter which facts are 'elements' and which facts are 'sentencing factors'; all the facts will be decided by the jury."[48]

2. The Sixth Amendment Protects a Right to Jury Sentencing

Supporters of jury sentencing have ventured as far as to argue that based on the *Apprendi* line of cases, a meaningful Sixth Amendment right to a jury trial includes jury sentencing.[49] One commentator, taking *Booker* as an example, asserts that because the Court held that a jury must find beyond a reasonable doubt any fact that increases the defendant's sentence beyond the guideline maximum, the Court's decision supports an expansive reading of the Sixth Amendment.[50] According to this argument for a "substantive Sixth Amendment," the Court's reasoning presupposes that the Sixth Amendment jury trial right includes a determination of both guilt and sentence; therefore, the jury's involvement is equally important in each.[51]

3. Jury Sentencing Brings Legitimacy to the Criminal Justice System

a. The Jury As a Moral Compass

Jury sentencing advocates also contend that juries produce more legitimate sentences because their decisions reflect the community's conscience.[52] When a jury announces a sentence, "an offender's community and his peers have pronounced his blameworthiness,"[53] as opposed to a judge, who represents an arm of the state. Supporters assert that juries are well suited to criminal sentencing because it is not a specialized or opaque area of the law.[54] Rather, advocates argue, sentencing involves weighing the various goals of punishment—retribution, rehabilitation, and deterrence—and arriving at a decision that reflects a balance of each.[55] In this line of reasoning, jurors, representing a variety of perspec-

47. Hoffman, *supra* note 6, at 1000. Hoffman adds:

> As long as the system maintains the judge/jury division of labor in criminal cases, it will always be forced to maintain some arbitrary distinctions between elements and sentencing factors, otherwise legislatures could gut the Sixth Amendment by redefining any element as a sentencing factor.

Id.

48. *Id.*

49. Ross, *supra* note 6, at 725–26.

50. *Id.*; *see also* United States v. Booker, 543 U.S. 220, 243–44 (2005).

51. Ross, *supra* note 6, at 726 ("[T]rial does not simply mean guilt determination. Trial also encompasses sentencing. As a result, a jury's role in sentencing is just as important as a jury role in determining guilt to protect the individual against the oppressive power of the state.").

52. Ball, *supra* note 6, at 924–25; Iontcheva, *supra* note 6, at 343.

53. Ball, *supra* note 6, at 925 (internal quotation marks omitted).

54. Iontcheva, *supra* note 6, at 343.

55. *Id.* at 344 ("Deliberation not only produces legitimate sentencing decisions, but is also well-suited to a process of fine-tuned and informed sentencing decisionmaking. Sentencing requires careful consideration of a host of factors."); *see also* Lanni, *supra* note 6, at 1776; Hoffman, *supra* note 6, at

tives, are particularly adept at arriving at a consensus among these competing goals.[56] Jury sentencing advocates have also suggested that twelve people are simply better than one at determining the appropriate punishment defendants should serve for their crimes, asserting that one person should not carry the weighty moral burden of deciding the severity of another's punishment.[57]

b. Jury: Free from Political Influence

Similarly, commentators have argued that jury sentencing produces a more legitimate result because it is free from judicial and legislative political agendas.[58] According to this argument, legislators' attempts to pander to constituents' fears with "tough on crime" sentencing guidelines for judges are in fact stricter than what citizens actually want in sentencing.[59] Supporters present the jury as "a more direct and less distorted expression of public sentiment than the current system of legislatively and administratively enacted penalties."[60] Critics of the rigidity of legislatively enacted sentencing guidelines for judges find a solution in jurors, who can act free from the restraint of such guidelines.[61]

4. Conclusion on Support for Jury Sentencing

The commentary discussed above demonstrates that jury sentencing is in vogue as a proposed panacea to sentencing problems. Commentators have seized upon *Apprendi* and its progeny to suggest that the Supreme Court supports a broader role for juries in sentencing. Jury sentencing advocates laud the jury as a microcosm of unbiased public opinion, a moral compass, and a solution to definitional problems arising out of *Apprendi*. Whether these benefits bear out in practice is another question, however.

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951 n.† ("[Lanni's n]ote in the *Yale Law Journal* in 1999 was the first article in eighty-one years to call for a return to jury sentencing.").

56. Iontcheva, *supra* note 6, at 341. Iontcheva details how juries balance various goals of punishment:

> [S]ome jurors will emphasize the defendant's chances of rehabilitation, while others will be more concerned about the message that the sentence sends to the community at large. These jurors . . . perhaps reach solutions that would not have occurred to them individually.

Id. She adds, "the value of jury sentencing lies in mediating, through a conversation across rival discourses, among different aims and models of punishment." *Id.* at 344.

57. Hoffman, *supra* note 6, at 994–95 ("There is nothing I do as a trial court judge that makes me more uncomfortable than when I impose criminal sentences. . . . It is . . . a nagging feeling that this is a moral act and not a legal one, and that one person should no more have the power to select an arbitrary sentence within a wide legislatively prescribed range than to declare certain acts to be crimes in the first instance.").

58. *See* Iontcheva, *supra* note 6, at 330–31; Lanni, *supra* note 6, at 1776.

59. Lanni, *supra* note 6, at 1776.

60. *Id.*

61. *See* Iontcheva, *supra* note 6, at 330–31.

C. Jury Sentencing: Theory Versus Practice

1. Jury Sentencing Systems in Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia

a. Similarities Among the States' Sentencing Structures

Six states—Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia—currently use jury sentencing for noncapital felonies.[62] The systems in these six states share important similarities.

For the most part, they require a bifurcated trial. Better known as the norm in death penalty cases, bifurcated jury trials contain two separate proceedings in which a jury assesses guilt and then punishment.[63] Arkansas, Kentucky, Texas, and Virginia laws provide for bifurcated trials.[64] Missouri requires a bifurcated jury trial for first-time offenders[65] and does not allow juries to sentence defendants with prior offenses.[66] Under Oklahoma law, however, the jury decides guilt and innocence in a single proceeding.[67] An additional important similarity among most of the six states is that in all cases in which a defendant pleads guilty or chooses a bench trial, the judge decides the sentence.[68] Arkansas is the exception, where a defendant can request jury sentencing after a guilty plea with the consent of the prosecutor and the court.[69]

b. The Critical Difference Among the States

For the purposes of this analysis, the most significant distinction among the states is whether jury sentencing is mandatory or elective when a defendant exercises the right to a jury trial on guilt. Missouri and Texas use an elective system, Arkansas and Oklahoma use a pseudo-mandatory system, and Kentucky and Virginia use a mandatory system.

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62. ARK. CODE ANN. § 5-4-103 (2010); KY. REV. STAT. ANN. § 532.055 (West 2010); MO. ANN. STAT. § 557.036 (West 2010); OKLA. STAT. tit. 22, § 926.1 (2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009); VA. CODE ANN. § 19.2-295 (2011).

63. William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 WASH. & LEE L. REV. 931, 932–33 (2006). All states that authorize the death penalty use bifurcated trials. *Id.*

64. ARK. CODE ANN. § 16-97-101 (2010); KY. REV. STAT. ANN. § 532.055 (West 2010); TEX. CODE CRIM. PROC. ANN. arts. 36.01, 37.07 (West 2009); VA. CODE ANN. § 19.2-295 (2011).

65. MO. ANN. STAT. § 557.036 (West 2010).

66. *Id.*

67. OKLA. STAT. tit. 22, § 926.1 (2010).

68. KY. REV. STAT. ANN. § 532.055 (West 2010); MO. ANN. STAT. § 557.036.1 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009); VA. CODE ANN. §§ 19.2-295–295.1 (2011); Cooper v. State, 415 P.2d 1009, 1013 (Okla. Crim. App. 1966) ("There being no role for the jury to perform, because of defendant's plea of guilty, leaves the sentence to be imposed by the court."); *see also* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621, 647 n.112 (2004).

69. In Arkansas, a jury may impose the sentence after a defendant's guilty plea with consent from both the prosecutor and court. ARK. CODE ANN. § 16-97-101-6 (2010).

i. Elective Jury Sentencing

In Missouri and Texas, the defendant chooses judge or jury sentencing at voir dire, and jury sentencing is completely elective.[70] In Missouri, a defendant can opt out of jury sentencing prior to voir dire.[71] In Texas, the judge sentences as a rule, unless the defendant requests jury sentencing before voir dire.[72] Therefore, in Missouri and Texas, jury trials on guilt and sentencing are separate, and the defendant's choice to pursue a jury trial on guilt does not require jury sentencing.

ii. Pseudomandatory Jury Sentencing

In the middle of the spectrum between mandatory and elective, Arkansas and Oklahoma use variations of a consent model. In Arkansas, a defendant, with the permission of the prosecutor and the court, may waive jury sentencing after the jury returns a guilty verdict.[73] In Oklahoma, where the jury decides guilt and punishment in the same proceeding, a defendant may also waive his right to jury sentencing if the prosecutor and judge consent.[74]

Prosecutors and judges can and certainly do refuse defendants' requests to waive jury sentencing, as shown by defendants' failed appeals in Arkansas and Oklahoma after prosecutors and courts refused consent.[75] At the same time, both prosecutors and judges have an interest in judicial efficiency, which may mean that they would be likely to consent to the defendants' waivers, choosing more streamlined judicial sentencing hearings over time-consuming interactions with the jury in a jury sentencing hearing.[76] Despite the potential incentives for judges and prosecutors to accept waivers, defendants have no guarantee they will be able to waive jury sentencing successfully in Arkansas and Oklahoma.

iii. Mandatory Jury Sentencing

On the far end of the spectrum, Virginia and Kentucky employ a mandatory jury sentencing scheme.[77] In Virginia and Kentucky, a jury

70. MO. ANN. STAT. § 557.036 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009).

71. MO. ANN. STAT. § 557.036 (West 2010).

72. TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009).

73. ARK. CODE ANN. § 16-97-101 (2010).

74. Case v. State, 555 P.2d 619, 625 (Okla. Crim. App. 1976) ("The refusal of either [prosecutor or court] to consent to assessment of punishment by the trial court will result in a jury verdict assessing punishment, provided the jury can reach such a verdict."). Under Oklahoma law, if the jury is unable to agree on punishment after finding the defendant guilty, the judge imposes the sentence. OKLA. STAT. tit. 22, § 927.1 (2010).

75. *See, e.g.*, Buckley v. State, 76 S.W.3d 825, 831 (Ark. 2002) (prosecutor refusal); *Case*, 555 P.2d at 625 (court refusal).

76. *See* King, *supra* note 1, at 198 ("Prosecutors, judges, and legislators . . . [want to] dispose of cases quickly and cheaply.").

77. KY. REV. STAT. ANN. § 532.055 (West 2010); VA. CODE ANN. § 19.2-295 (2011).

must decide the defendant's sentence if the defendant exercises his or her right to a jury trial on guilt.[78]

iv. Problems in Mandatory and Pseudomandatory States

The mandatory and pseudomandatory sentencing models at work in Virginia, Kentucky, Arkansas, and Oklahoma bind defendants. If defendants want to avoid a jury sentence or the risk of a jury sentence, they must choose a bench trial or plead guilty.[79] As discussed in Section 2 below, defendants are likely to plead guilty or take a bench trial for two reasons: (1) Arkansas, Kentucky, Oklahoma, and Virginia only permit their juries to sentence within the statutory range, rather than allowing them alternate sentencing options that judges have at their disposal; and (2) jury sentences are highly unpredictable.[80]

2. The Problems of Jury Sentencing in Practice

The theoretical benefits of jury sentencing[81] have failed to materialize in practice because defendants fear and therefore avoid jury sentencing.[82] Juries in Arkansas, Kentucky, Oklahoma, and Virginia—the four states with mandatory or pseudomandatory jury sentencing—must sentence within a set statutory range.[83] Once within this range, though, juries can sentence however they want, with inconsistent and unpredictable results.[84] If defendants in states with mandatory jury sentencing want a jury determination on guilt, they must also face the unpredictability of jury sentencing.[85] If defendants in states with pseudomandatory schemes want a jury determination on guilt, they encounter the possibility that the prosecutor and judge will not approve their request for judicial sentence, leaving them with the risk of an arbitrary jury sentence.[86] As one might expect, many defendants in these states decide to avoid this risk of jury sentencing and plead guilty or choose a bench trial,[87] forgoing their right to a jury determination of guilt.

78. *Supra* note 77.

79. *See* King, *supra* note 1, at 198. Defendants in states with mandatory systems certainly will face jury sentencing at trial, and defendants in states with pseudomandatory systems encounter the risk of jury sentencing. *See supra* notes 73–78 and accompanying text.

80. For a complete discussion, see *infra* Part II.C.2.

81. For a review of academic arguments in support of jury sentencing, see *supra* Part II.B.

82. King, *supra* note 1, at 198. King's article is based on her research of felony jury sentencing with Rosevelt L. Noble. *See* King & Noble, *supra* note 1, at 885. This Note tables the issue of whether the suggested benefits of jury sentencing, discussed in Part II.B, would exist if defendants actually did seek jury sentences. *See supra* Part II.B.

83. ARK. CODE ANN. § 16-97-101(3) (2010); KY. REV. STAT. ANN. § 532.055(2) (West 2010); OKLA. STAT. tit. 22, § 926.1 (2010); VA. CODE ANN. § 19.2-295 (2011).

84. King, *supra* note 1, at 197.

85. For an explanation of Kentucky and Virginia's mandatory models, see *supra* notes 77–78 and accompanying text.

86. For an explanation of Arkansas and Oklahoma's pseudomandatory models, see *supra* notes 73–76 and accompanying text.

87. *See* King, *supra* note 1, at 198.

a. Requirement to Sentence Within the Statutory Range

Juries in Arkansas, Kentucky, Oklahoma, and Virginia must sentence within the statutory minimum and maximum.[88] This means that juries in these states have fewer sentencing options than judges, who can sentence defendants to probation or suspend their sentences and thereby sentence below statutory minimums.[89] In Kentucky, for example, appeals courts have overturned jury sentences below the statutory minimum as "unauthorized and unlawful."[90]

b. Unguided Sentencing

Even more troubling is that jury sentencing in noncapital felony cases features few safeguards to prevent arbitrary sentences, as opposed to jury sentencing for capital crimes.[91] In both Arkansas and Virginia, reports show that juries' sentences vary more widely than those of judges.[92] Jury sentences are wildly unpredictable because jurors are asked to choose a sentence anywhere within the statutory range.[93] This procedure can result in radically different sentences for the same crime, as shown in the case of Virginia, where juries in rape cases may sentence between five years and life imprisonment.[94]

Still, it is worth noting that most state judges also enjoy sweeping sentencing discretion. Twenty-one states currently employ sentencing guidelines for their judges.[95] The remaining states retain an indeterminate sentencing model, in which judges can sentence freely between statutory minima and maxima.[96] Unguided judicial discretion, just like unguided jury discretion, can lead to unpredictable and disparate results for similarly situated defendants.[97] Even advocates of judicial discretion,

88. ARK. CODE ANN. § 16-97-101(3) (2010); KY. REV. STAT. ANN. § 532.055(2) (West 2010); OKLA. STAT. tit. 22, § 926.1 (2010); VA. CODE ANN. § 19.2-295 (2011).

89. King, *supra* note 1, at 201.

90. *See, e.g.*, Neace v. Commonwealth, 978 S.W.2d 319, 321 (Ky. 1998).

91. King, *supra* note 1, at 200. The Eighth Amendment's limitation on arbitrary punishment offers no protection to these defendants, as "[j]ury sentences short of death lack the finality that triggers the Eighth Amendment's requirements for guiding jury discretion." *Id*; *see also* U.S. CONST. amend. VIII.

92. King, *supra* note 1, at 197.

93. *Id.*

94. *Id.*

95. NAT'L CTR. FOR STATE COURTS, STATE SENTENCING GUIDELINES: PROFILES AND CONTINUUM 4 (2008), http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/criminal&CISOPTR=130 [hereinafter STATE SENTENCING GUIDELINES].

96. DAN MARKEL ET AL., PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 15 (2009). Note that these authors report that eighteen states use some sort of sentencing guidelines. *Id.* The source for their information comes from a 2005 article, therefore this Note relies on the more recent National Center for State Courts' (NCSC) report from 2008, stating that twenty-one states use the Guidelines. *See* STATE SENTENCING GUIDELINES, *supra* note 95, at 4. The NCSC itself notes, however, that information on state sentencing guidelines is frequently changing, sometimes difficult to obtain, and therefore a constant subject of debate. *Id.*

97. Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124, 1159–60 (2005).

who criticize the rigidity of sentencing schemes like the Federal Sentencing Guidelines, agree that judicial sentencing would benefit from increased appellate review and "authoritative criteria" to assist judges in their decisions.[98] Despite reasons for concern about judicial discretion, in a judicial sentencing jurisdiction, a judge, predictable or not, will sentence the defendant whether a defendant chooses a jury trial or a guilty plea. In contrast, in jury sentencing jurisdictions such as Arkansas, Kentucky, Oklahoma, and Virginia, broad jury sentencing discretion affects the defendant's determination of whether to seek a jury trial on guilt, producing unsettling Sixth Amendment implications.

c. Fear and Avoidance of Jury Sentencing

This uncertainty and the likelihood of higher punishment lead defendants to plea bargain and choose bench trials, giving up their right to a jury verdict on guilt.[99] Prosecutors and judges in these states have admitted that "the risk of an unusually high jury sentence after jury trial . . . [was] a key reason that defendants chose to waive the expensive jury trial process."[100]

The current lack of guidance for jurors is unlikely to change.[101] There is little incentive for reform, as prosecutors and judges prefer the system in jury sentencing states as it stands now because "the wild-card aspect of jury sentencing helps to funnel defendants to guilty pleas and bench trials."[102] Prosecutors and judges have no incentive to change the system, as it helps to avoid time-consuming jury trials: "[f]or criminal justice insiders, the unpredictability of jury sentencing is a blessing, not a curse; the more freakish, the better."[103]

As a result of the mandatory and pseudomandatory jury sentencing schemes in Arkansas, Kentucky, Oklahoma, and Virginia, defendants' right to have a jury decide their guilt is tied to their acceptance of a jury sentence (or to a prosecutor and judge's approval of a request for a judicial sentence).[104] Defendants therefore face the risk of unpredictable jury sentencing if they want a jury trial on their guilt.[105] This leads defendants to give up their right to a jury trial on guilt in order to avoid jury sentencing.[106]

98. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 82 (1998) (discussing federal, not state, sentencing).

99. King, *supra* note 1, at 198.

100. *Id.* King interviewed prosecutors and judges for their insights on jury sentencing in practice. *See id.*

101. *See id.*

102. *See id.*

103. *See id.*

104. *See supra* Part II.C.1.

105. *See* King, *supra* note 1, at 197.

106. *See id.* at 198, 203; *see also* King & Noble, *supra* note 1, at 946.

D. Part II Summary

Part II illustrated the disconnect between jury sentencing theory and practice. Supporters have argued that *Apprendi* and its progeny opened the door to jury sentencing.[107] While they praise jury sentencing as the fulfillment of a Sixth Amendment jury right and the solution to sentencing ills,[108] the four states that tie the jury's guilt and punishment determinations cause defendants to surrender a jury verdict on guilt because of unpredictable jury sentencing practices.[109]

III. ANALYSIS

State jury sentencing in practice in Arkansas, Kentucky, Oklahoma, and Virginia clashes with the Sixth Amendment. The Sixth Amendment maintains: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[110] In *Apprendi* and other cases examining the Sixth Amendment, the Court has sought to determine what the right to a jury trial meant in 1791 when the Framers amended the Constitution; the Court has then used this historical meaning as a touchstone for applying the Sixth Amendment in current cases.[111]

Section A argues that *Apprendi*, rather than providing support for jury sentencing, instead suggests that the jury's role in sentencing was limited in the Framers' time.[112] Therefore, the Sixth Amendment, as conceived by the Framers, protects defendants' right to have a jury decide their guilt or innocence.[113] Using this understanding of *Apprendi* and the Sixth Amendment, Section B analyzes mandatory and pseudomandatory jury sentencing models in Arkansas, Kentucky, Oklahoma, and Virginia. Section B concludes that these models conflict with the Sixth Amendment because defendants give up their right to a jury trial on guilt due to the arbitrariness of jury sentencing.[114] Section C addresses arguments against this conclusion.

107. *See supra* Part II.B.

108. *See supra* Part II.B.

109. *See supra* Part II.C.2.

110. U.S. CONST. amend. VI. The Supreme Court applied the Sixth Amendment to the states through the Fourteenth Amendment's due process clause in *Duncan v. Louisiana*. 391 U.S. 145, 148 (1968); *see also* Nancy Jean King, *The American Criminal Jury*, 62 L. & CONTEMP. PROBS., Spring 1999, at 41, 43.

111. Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1471 (2001) ("The *Apprendi* Court relied upon history for guidance, as it has so often when construing the Bill of Rights in criminal cases, particularly the provisions of the Sixth Amendment.").

112. *See infra* Part III.A.

113. *See infra* Part III.A.

114. *See infra* Part III.B.

A. Sixth Amendment Analysis in Apprendi *and Jury Sentencing*

An analysis of *Apprendi* shows that it does not support a broader role for the jury in sentencing and instead demonstrates that criminal indictments at common law circumscribed the jury's sentencing function.[115] Therefore, *Apprendi* suggests that the Sixth Amendment right to a jury trial actually protects the defendant's right to a jury determination of guilt.[116]

1. McMillan*,* Apprendi*, and the Right to a Jury Trial*

Before addressing *Apprendi*, it is important to note that prior to its decision in *Apprendi*, the Supreme Court declared in *McMillan v. Pennsylvania*, "that there is no Sixth Amendment right to jury sentencing."[117] *McMillan*, which predated *Apprendi* by fourteen years, involved a Pennsylvania law that required a sentencing judge to impose a minimum five-year sentence for specific felonies, if the judge found that the defendant visibly possessed a firearm when committing the felony.[118] The Court held that the law was constitutional under both the Fourteenth Amendment's due process clause and the Sixth Amendment's jury trial provision.[119] The Court's prior decision in *McMillan* lends support to the interpretation that *Apprendi* does not open the door to jury sentencing.[120] The *McMillan* Court, however, did not provide the same extensive historical analysis found in *Apprendi* for its assertion that the Sixth Amendment does not protect jury sentencing,[121] so *Apprendi* can serve to explain and inform this principle.[122]

2. Historical Analysis in Apprendi

Historical analysis of the Sixth Amendment was central to the Court's decision in *Apprendi*.[123] The Court looked to the common law to determine that the jury must find those facts that increase a defendant's sentence beyond the statutory maximum.[124] The Court explained that the

115. *See infra* Part III.A.

116. *See infra* Part III.A.

117. McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986); *see also* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.2(b), at 1237–39 (5th ed. 2009).

118. *McMillan*, 477 U.S. at 81.

119. *Id.* at 91, 93. *McMillan* appears to speak to an issue similar to that decided in *Apprendi*. The Court explicitly stated in *Apprendi* that *McMillan* was still good law, though slightly limited: "We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict—a limitation identified in the *McMillan* opinion itself." Apprendi v. New Jersey, 530 U.S. 466, 487 n.13 (2000).

120. *McMillan*, 477 U.S. at 93; *see also* LAFAVE ET AL., *supra* note 117, § 26.2(b), at 1237–39.

121. *See McMillan*, 447 U.S. at 93. For support, the *McMillan* Court cited to *Spaziano v. Florida*, *id.*, in which the Court ruled that the Sixth Amendment did not require jury sentencing in capital cases. *See Spaziano*, 468 U.S. 447, 462–63 (1984).

122. *See infra* Part III.A.2.

123. *See Apprendi*, 530 U.S. at 476–85; King & Klein, *supra* note 111, at 1471.

124. *See Apprendi*, 530 U.S. at 476–85.

dispute in *Apprendi* between elements of a crime and sentencing factors did not exist in the Framers' time: "Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding."[125] Instead, in the Framers' era,

> criminal proceedings were submitted to a jury after being initiated by an indictment containing all the facts and circumstances which constitute the offence, . . . stated with such certainty and precision, . . . *that there may be no doubt as to the judgment which should be given*, if the defendant be convicted.[126]

The Court added, "[t]he defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime."[127]

The Court utilized this historical analysis to reason that "with respect to the criminal law of felonious conduct, 'the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense.'"[128] Given that at common law a certain guilty verdict dictated a certain punishment, combined with a judge's limited discretion at common law to sentence outside of the limits of the law, the Court concluded that the Sixth Amendment requires that any fact increasing a defendant's sentence beyond the statutory maximum be found by the jury beyond a reasonable doubt.[129]

3. Applying Apprendi*: The Jury's Sentencing Role*

From its historical analysis, the Court determined that at common law the strict connection between verdict and punishment curbed a judge's discretion in sentencing.[130] The necessary corollary to this conclusion is that the jury's role and discretion in sentencing were also very limited. As the Court explained, indictments in the Framers' time were explicit enough to leave the defendant with no doubt as to what the judgment would be if the jury issued a guilty verdict.[131] Thus, by extension,

125. *Id.* at 478–79 & n.4 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *368 (1769) ("'[A]fter trial and conviction are past,' the defendant is submitted to 'judgment' by the court[.]")).

126. *Apprendi*, 530 U.S. at 478–79 (internal quotation marks omitted) (citing another source).

127. *Id.* at 478.

128. *Id.* at 479 (citing John H. Langbein, *The English Criminal Trial Jury on the Eve of the French Revolution*, *in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700–1900, at 13, 36–37 (Antonio Padoa Schioppa ed., 1987)).

129. *See Apprendi*, 530 U.S. at 478–79, 482–83, 490 ("The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.").

130. *Id.* at 478–79.

131. *Id.*

the jury's role was to determine guilt or innocence, not to issue a sentence. The sentence, of course, flowed from the jury's verdict, but the indictment predetermined what that sentence would be.[132]

The *Apprendi* Court noted that, despite the determinative force of indictments, jurors at common law could affect a defendant's sentence through jury nullification[133] and partial verdicts, or "pious perjury," as Blackstone called them.[134] Partial verdicts were similar to the "verdicts of guilty to lesser included offenses" that exist today.[135] Partial verdicts in felonies most often reduced punishment from death to transportation.[136] One commentator has suggested that these partial verdicts were effectively sentencing decisions, as a jury could decrease a sentence from death to transportation by declaring a partial, rather than a full, verdict.[137] The Court in *Apprendi*, however, referred to both jury nullification and partial verdicts as "extralegal ways" in which the jury at common law "avoid[ed] a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant."[138] Thus, rather than making a sentencing decision, the jury, by entering a partial verdict or acquittal, was making a decision on guilt that affected sentencing.

Additionally, even if the jury's ability to choose felony verdicts of guilty, partial verdicts, or acquittals—resulting in death, transportation, or no punishment, respectively—could be painted as sentencing decisions,[139] these practices do not represent an exercise of broad jury discretion in sentencing. The three discrete options available to juries in the Framers' time[140] are a far cry from the unbridled jury discretion practiced

132. *See id.*

133. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 36 (2003) ("Criminal juries have the power to issue a general verdict of 'guilty' or 'not guilty' under the law, based on whatever facts they find. And when the verdict is 'not guilty,' the jury's decision is *unreviewable*. This power translates into the power to nullify the law. If the criminal jury believes that a law should not apply in a particular case because its application would be unjust, the jury has the power to ignore that law, regardless of the law's language.").

134. Apprendi v. New Jersey, 530 U.S. 466, 479 n.5 (citing Jones v. United States, 526 U.S. 227, 245 (1999)). The importance and potency of jury nullification is not to be underestimated, though. An anecdote about William Penn's trial provides a colorful example. *See* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 295 (1996) ("Penn had good reason to value jury trial so highly. He was a defendant in the proceedings . . . in which jurors who had defied both the evidence and the law to acquit Penn and a codefendant were jailed and starved for their conduct but then sued successfully for their freedom . . . .").

135. *Apprendi*, 530 U.S. at 479 n.5 (internal quotation marks omitted) (citing another source).

136. John H. Langbein, *Albion's Fatal Flaws*, PAST & PRESENT, Feb. 1983, at 96, 106; *see also* Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1124 n.204 (2001). "Transportation" refers to the practice in England of shipping criminals to the colonies. Langbein, *supra*, at 110.

137. Langbein, *supra* note 136, at 106.

138. *Apprendi*, 530 U.S. at 479 n.5.

139. *See* Langbein, *supra* note 136, at 106, 110.

140. *See id.*

in jury sentencing states now.[141] Imprisonment replaced transportation as the common penalty for felonies in the early nineteenth century,[142] and punishment transformed into a length of time in prison that was directly related to the severity of the crime.[143] One historian explains that "death and transportation[] had lent themselves to jury manipulation, because they came as 'either-or' choices."[144] The jury was less useful for deciding length of imprisonment due to the multitude of possibilities: "Because the new sanction of imprisonment for a term of years was all but infinitely divisible, it invited the concept of the sentencing range, which transferred to the judge the power to tailor the sentence to the particular offender."[145] Therefore, the ability of juries in Arkansas, Kentucky, Oklahoma, and Virginia to sentence a defendant to imprisonment for any length of time within a wide statutory range[146] would not have been within the contemplation of the Framers when the Sixth Amendment was ratified. Even if partial verdicts could be considered sentencing decisions in effect,[147] they do not support a broad jury sentencing function.

4. Conclusion on Apprendi *and Jury Sentencing*

Apprendi demonstrates that common law indictment practices effectively circumscribed *both* the judge and jury's role in sentencing.[148] Thus, when the *Apprendi* Court stated that a jury must find beyond a reasonable doubt any fact that increases a defendant's sentence, it was protecting the right to a jury determination of guilt, which then has the effect of determining a defendant's sentence.[149] In stark contrast to scholarly arguments that *Apprendi* supports jury sentencing,[150] *Apprendi* instead provides a historical basis for the principle that the Sixth Amendment right to a jury trial actually protects defendants' right to a jury verdict of innocence or guilt, rather than a right to jury sentencing.[151]

141. For a discussion of jury discretion and arbitrariness, see *supra* Part II.C.2.

142. JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 59–60 (2003).

143. *Id.* at 60 ("The movement to revise the substantive criminal law by consolidating and rationalizing the categories of offenses invited the grading of sentences according to severity. This development was deeply connected to the appearance of imprisonment as the routine punishment for cases of serious crime.").

144. *Id.*

145. *Id.*

146. For an explanation of jury discretion to sentence within statutory ranges, see *supra* notes 88–94 and accompanying text.

147. *See* Langbein, *supra* note 136, at 106, 110.

148. *See* Apprendi v. New Jersey, 530 U.S. 466, 478–79 (2000).

149. *See id.* at 490.

150. For a review of commentators' arguments that *Apprendi* supports jury sentencing, see *supra* Part II.B.

151. *See Apprendi*, 530 U.S. at 490.

B. Arkansas, Kentucky, Oklahoma, and Virginia's Sentencing Models Clash with the Sixth Amendment

Apprendi and *McMillan* reveal that the Sixth Amendment protects a defendant's right to a jury determination on guilt and that the jury's role in sentencing was limited at the time of the Framers.[152] The jury sentencing models in Arkansas, Kentucky, Oklahoma, and Virginia therefore clash with the Sixth Amendment in two ways.

1. Jury Sentencing Prevents the Exercise of the Right to a Jury Determination on Guilt

First, because the Court stressed in *Apprendi* and *McMillan* that the Sixth Amendment protects a right to a jury trial on guilt, not jury sentencing,[153] the models in Arkansas, Kentucky, Oklahoma, and Virginia conflict with the Sixth Amendment. The bizarre result of jury sentencing in these states is that defendants give up their right to a jury determination on guilt in order to avoid an arbitrary jury sentence or a higher sentence than what a judge might impose.[154] Because the Framers did not conceive of sentencing as a part of the Sixth Amendment right to a jury trial,[155] jury sentencing should never operate to discourage or prevent defendants from exercising their right to a jury verdict, which is the right actually protected under the Sixth Amendment.

2. Unchecked Jury Sentencing Discretion Conflicts with the Sixth Amendment

Second, the models at work in Arkansas, Kentucky, Oklahoma, and Virginia give juries unchecked discretion to sentence defendants within a wide range,[156] which is at odds with the Sixth Amendment as interpreted by *Apprendi*.[157] *Apprendi* demonstrates that indictments limited the jury's role in sentencing: "The defendant's ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime."[158] In the systems applied in Arkansas, Kentucky, Oklahoma, and Virginia, defendants are left with an empty jury trial right because their sentence is completely unguided

152. *See supra* Part III.A.

153. *See supra* Part III.A.

154. For a discussion of the practical problems with jury sentencing, see *supra* Part II.C.2.

155. *See supra* Part III.A.

156. For an explanation of jury discretion to sentence within statutory ranges, see *supra* notes 88–94 and accompanying text.

157. *See supra* Part III.A.

158. Apprendi v. New Jersey, 530 U.S. 466, 479 (2000) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *369–70 (1769)); *see also* Bibas, *supra* note 136, at 1139 ("In *Apprendi*, the Court suggested that indictments must allege enhancements so that defendants have adequate notice of them. The Court praised the common law's determinate sentences because they allowed defendants to predict their sentences from the faces of the indictments.").

within the statutory range, leading to unpredictable results.[159] Additionally, unbridled jury sentencing discretion runs contrary to jury practice at the time of the Framers, when the jury's ability to affect sentencing was very limited.[160]

3. Conclusion on the Application of the Sixth Amendment to Arkansas, Kentucky, Oklahoma, and Virginia

The jury sentencing systems in place in Arkansas, Kentucky, Oklahoma, and Virginia conflict with the Sixth Amendment.[161] Jury sentencing has forced defendants to give up their right to a jury determination on guilt, and the jury trial that does exist is an empty one because the jury is unguided.[162]

C. Counterarguments from Brady *and* Blakely

The Court's decisions in *Brady v. United States*[163] and *Blakely v. Washington*[164] appear at first blush to repudiate this Note's argument that the practical effects of these four states' jury sentencing systems clash with the right to a jury trial. Upon closer examination, however, *Brady* and *Blakely*'s interpretations of guilty pleas and plea bargaining do not dispense with the problematic Sixth Amendment implications presented by these sentencing systems.

1. Guilty Pleas and Brady

The *Brady* Court specifically referred to jury sentencing in its analysis of guilty pleas.[165] Brady asserted that his plea was coerced and unconstitutional because he had pled guilty in order to avoid a more severe sentence.[166] In rejecting the defendant's argument, the Court likened Brady to "the defendant, in a jurisdiction where the judge and jury have the same range of sentencing power, who pleads guilty because his lawyer advises him that the judge will very probably be more lenient than the jury."[167] The Court concluded:

> We decline to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penal-

159. *See supra* Part II.C.2.a–b.
160. *Apprendi*, 530 U.S. at 479–80; *see also supra* Part III.A.
161. *See supra* Part III.B.1.
162. *See supra* Part III.B.2.
163. 397 U.S. 742 (1970).
164. 542 U.S. 296 (2004).
165. *Brady*, 397 U.S. at 751.
166. *Id.* at 744. If Brady had chosen a jury trial, he could have received the death penalty as a sentence; in contrast, the most severe sentence facing him after a guilty plea was life imprisonment. *Id.* at 749.
167. *Id.* at 751.

> ty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.[168]

The important distinction here is that Brady did not base his appeal on the Sixth Amendment; rather, he argued that his guilty plea was coerced and therefore invalid under the Fifth Amendment because he had effectively testified against himself involuntarily by pleading guilty.[169] Thus, although the Court compared Brady's choice to forgo a jury trial in favor of a more lenient sentence with a defendant's choice to avoid a jury trial in a jury sentencing jurisdiction, the Court's determination that neither situation violates the Fifth Amendment does not extinguish the possibility that jury sentencing schemes may conflict with the Sixth Amendment.

2. Plea Bargaining and Blakely

The strongest argument against this Note's analysis comes by analogy from *Blakely v. Washington*. In *Blakely*, Justice Scalia, writing for the majority, rejected Justice Breyer's argument[170] in dissent that *Apprendi* harms defendants by giving them more incentive to plea bargain.[171] Justice Breyer contended, "[p]rosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest."[172]

The Court, in repudiating Justice Breyer's argument, doubted whether *Apprendi* really did increase the likelihood of plea bargaining.[173] Ultimately, however, the Court reasoned that even if *Apprendi* did increase the likelihood that defendants plea bargain, the Sixth Amendment's protections did not extend to that concern:

> [T]he Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.[174]

168. *Id.*

169. *See id.* at 748.

170. Blakely v. Washington, 542 U.S. 296, 312 (2004).

171. *Id.* at 331 (Breyer, J., dissenting). Justice Breyer based his reasoning on an article by Stephanos Bibas. *Id.*; *see* Bibas, *supra* note 136, at 1100–01.

172. *Blakely*, 542 U.S. at 331 (Breyer, J., dissenting).

173. *Id.* at 312–13 (majority opinion). The majority responded with its own article that criticizes Bibas's argument on *Apprendi*. *Id.* at 311–12; *see also* Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295, 296 (2001) ("[Bibas's] argument is indeed startling; it is also dead wrong.").

174. *Blakely*, 542 U.S. at 312.

The Court's assertion—that the Sixth Amendment does not protect those who forgo its protection—appears damning to this Note's proposition that jury sentencing clashes with the Sixth Amendment by leading defendants to plead guilty and forgo their right to a jury trial. Plea bargaining is, of course, an accepted practice that is necessary for an overworked criminal justice system to work.[175] It is likely that guilty pleas would continue even if plea bargaining itself were prohibited, as some defendants simply choose not to go to trial, even without a deal from the prosecution.[176]

The guilty plea calculus is different, however, for felony defendants in Arkansas, Kentucky, Oklahoma, and Virginia, than for other defendants. In these four states, the "*availability*" of the right to a jury trial is "disserved," as Justice Scalia phrases it.[177] A jury trial cannot be considered available when defendants are faced with the choice between a guilty plea or bench trial and the risk of an arbitrary, unguided jury sentence.

The jury sentencing schemes in these states present a situation that is distinct from Justice Scalia's example of a defendant who forgoes a jury verdict because "government at the moment is not particularly oppressive."[178] With the exception of capital defendants, no defendant outside of these four states pleads guilty or takes a bench trial because of the risk of an arbitrary jury sentence.[179] This is true because outside of these four states, for all noncapital felonies, either a judge always sentences, or a defendant can choose a judicial sentence, as in Missouri or Texas.[180] Importantly, and in contrast with juries in Arkansas, Kentucky, Oklahoma, and Virginia, juries in capital cases benefit from guidelines for aggravating and mitigating circumstances to assist in their decisions.[181]

Therefore, defendants in these four states encounter a uniquely unfair situation in which they must balance the risk of a sentence by a completely unguided jury with their desire for a jury determination on guilt.[182] This jury sentencing model seriously "disserve[s]" the "*availability*" of the right to trial, thereby threatening the Sixth Amendment's protections.[183]

175. RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 1161 (2d ed. 2005).

176. *Id.*

177. *See Blakely*, 542 U.S. at 312.

178. *Id.*

179. *See* King, *supra* note 1, at 196 ("In states with non-capital sentencing by jury, courts and legislatures have been remarkably unconcerned with the arbitrary exercise of discretion in non-capital jury sentencing. The total absence of guidance provided to jurors who sentence in felony cases is striking . . . because it is so inconsistent with decades of effort to control arbitrary behavior by jurors in capital cases . . . ." (footnote omitted)).

180. *See* MO. ANN. STAT. § 557.036 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009); LANGBEIN ET AL., *supra* note 5, at 627 (explaining that most jurisdictions use judicial sentencing).

181. ALLEN ET AL., *supra* note 175, at 1423.

182. For a complete discussion, see *supra* Part II.C.

183. *See Blakely*, 542 U.S. at 312.

D. Part III Summary

This analysis establishes that, according to the Court's interpretation in *McMillan* and *Apprendi*, the Sixth Amendment protects the right to a jury determination on guilt.[184] *Apprendi* also demonstrates that the jury's sentencing role was limited at common law.[185] The jury sentencing schemes in Arkansas, Kentucky, Oklahoma, and Virginia conflict with the Sixth Amendment because they require a defendant to gamble on an arbitrary sentence in order to seek a jury trial on guilt.[186] These four states' sentencing models are also at odds with the Sixth Amendment because they leave defendants with an empty trial right, based on an unguided jury.[187] These arguments survive challenges from *Brady* and *Blakely* because, under these sentencing systems, the Sixth Amendment right to a jury trial is not truly available to defendants.[188] Because they jeopardize the defendant's right to a jury verdict on guilt or innocence, these statutory sentencing schemes must change.

IV. RECOMMENDATION

The good news is that a realistic, if not completely satisfactory, resolution to this problem already exists and functions in both Missouri and Texas. Section A.1 recommends first and foremost that Arkansas, Kentucky, Oklahoma, and Virginia adopt the Texas and Missouri models to solve the pressing problem of defendants forgoing their right to a trial. Section A.2 then suggests that these four states also develop guidelines to assist jurors at sentencing, though this recommendation, perhaps, is unlikely to be implemented. Section B.1 suggests that the statutory models of the four states serve as cautionary tales to legal scholars and legislators who support jury sentencing theories. Section B.2 discusses the applicability of this Note to both jury trials and plea bargaining.

A. Proposed Recommendations for Arkansas, Kentucky, Oklahoma, and Virginia

1. Adopt Missouri and Texas's Models

Missouri and Texas already utilize sentencing models that avoid the problem of conditioning a defendant's right to a jury verdict on his or her acceptance of a jury punishment (or the risk of one).[189] Missouri and Texas allow defendants to choose judicial sentencing before voir dire.[190]

184. *See* Apprendi v. New Jersey, 530 U.S. 466, 488–90 (2000).
185. *See id.* at 478–79.
186. For a complete discussion, see *supra* Part III.B.
187. *See supra* Part III.B.2.
188. For a complete discussion, see *supra* Part III.C.
189. *See* MO. ANN. STAT. § 557.036 (West 2010); TEX. CODE CRIM. PROC. ANN. art. 37.07 (West 2009).
190. *See supra* note 189.

Under this system, defendants in the four other states could likewise inde-pendently choose either jury or judicial sentencing, rather than face the risk of jury sentencing.

This solution is likely to appeal to defendants and should also be palatable to prosecutors and judges. Defendants, first and foremost, have the opportunity to exercise fully their right to a jury verdict on their innocence or guilt, unhindered by considerations of a jury sentence. This solution would appeal to defendants because it would allow them to choose the option that is in their best interests, depending on the facts of their particular cases. Judicial sentencing hearings would also be more efficient than jury sentencing hearings, which would be attractive to prosecutors and judges, whose caseloads and dockets are constantly overflowing.[191] The lingering difficulty with this recommendation is that it does not resolve the original problem—that juries are unguided.

2. Impose Sentencing Guidelines for Juries

In an ideal world, states would also adopt guidelines to assist juries in sentencing, so as to stop the unpredictable and arbitrary decision making that causes defendants to plead guilty or take a bench trial in the first place.[192] These guidelines might provide examples of sentences given in other cases[193] or provide a variation on the aggravating and mitigating circumstances used in death penalty trials.[194]

3. Which Is More Likely to Be Implemented?

Prosecutors and judges have little motivation to advocate for greater consistency across jury sentences, as unpredictability maintains guilty plea rates and thus keeps judicial and prosecutorial efficiency high.[195] The same could be said for adopting Missouri and Texas's models: the interest of prosecutors and judges in plea bargaining also reduces the likelihood that Arkansas, Kentucky, Oklahoma, and Virginia would adopt models allowing defendants to choose judicial sentencing.[196] In defense of adopting Missouri and Texas's models, though, allowing defendants to choose judicial sentencing at least confers some efficiency benefit on the prosecutor and the judge,[197] making it more likely to be implemented. Issuing guidelines for sentencing, however, would only burden prosecutors and judges. Therefore, this Note recommends that

191. King, *supra* note 1, at 198.

192. *See* Iontcheva, *supra* note 6, at 359 (calling for jury sentencing guidelines, as a supporter of jury sentencing); King, *supra* note 1, at 197; *see also* Robinson & Spellman, *supra* note 97, at 1147 (arguing that "articulated sentencing rules" would fix differences in consistency between judges and juries).

193. *See* Robinson & Spellman, *supra* note 97, at 1147.

194. *See, e.g.*, ALLEN ET AL., *supra* note 175, at 1423; *see also* King, *supra* note 1, at 197.

195. King, *supra* note 1, at 197–98.

196. *Id.* at 195–98.

197. *Id.* at 198.

the four states adopt Missouri and Texas's model as the most realistic method to remedy the current situation, in which defendants give up their Sixth Amendment right. This Note also recommends jury guidelines, with the caveat that it is doubtful that these guidelines will be implemented.

B. Broader Implications for Jury Sentencing Policy

This Note recommends that legal scholars and legislators who consider jury sentencing take note of the serious problems facing defendants in these four states. Current jury sentencing practices provide an important practical check on jury sentencing theories.

1. Purported Benefits of Jury Sentencing Cannot Exist When Defendants Avoid Jury Sentencing

This Note does not attempt to determine whether the purported benefits of jury sentencing could exist if state legislatures remedied the practical problems plaguing it. It is clear, however, that under the current systems in Arkansas, Kentucky, Oklahoma, and Virginia, the proposed benefits have no chance to be realized. Insofar as defendants must give up their right to a jury verdict on guilt in order to avoid an arbitrary jury sentence,[198] the arguments in favor of jury sentencing are meaningless.

Scholars can be certain that jury sentencing schemes have little chance to remedy sentencing ills, mainly because few defendants actually choose jury trials out of a fear of jury sentencing.[199] If jury sentencing supporters actually want jury sentencing to be realized, adopting the model of Missouri and Texas would not be sufficient, as that solution is meant to address the more pressing problem that defendants currently forgo their Sixth Amendment right.[200] Under the Missouri and Texas solution, defendants would likely continue to avoid jury sentencing, choosing judicial sentencing if jury sentencing appeared arbitrary to them. Therefore, scholars wishing to bring about the proposed benefits of jury sentencing must call for guidelines to be issued to jurors to aid them in crafting consistent and predictable sentences across cases.[201]

2. Application of This Note: Jury Trials and Plea Bargaining

Admittedly, this Note assumes that defendants would want to exercise their right to a jury verdict on guilt, absent the risk of an arbitrary jury sentence. Critics have suggested that analysis of the jury trial in the

198. *See supra* Part III.B.1.
199. *See supra* Part II.C.2.c.
200. *See supra* Part III.B.
201. Jenia Iontcheva, a supporter of jury sentencing, calls for sentencing guidelines for juries. *See* Iontcheva, *supra* note 6, at 359.

criminal justice system shifts the focus away from reality: over ninety-four percent of defendants plead guilty, so jury trials are a rarity that occupy more than their share of debate on the criminal justice system.[202] Examination of the jury trial, however, is important for discussions of plea bargaining because trials set the "price" of plea bargaining.[203] Without the risk of an arbitrary jury sentence, defendants may be less inclined to waive their right to a jury trial, thereby altering the bargaining positions in plea negotiations.[204] Thus, analysis of jury sentencing is important not only for defendants seeking a jury trial but also for those considering a guilty plea.

V. CONCLUSION

As a general rule, jury sentencing in noncapital felony cases received little attention in comparison to jury sentencing in death penalty cases.[205] This has changed since the Supreme Court's decision in *Apprendi v. New Jersey*, which some scholars have interpreted to mean that jurors should have a broader role in, and maybe even total control of, sentencing.[206] This Note argues that these commentators have interpreted *Apprendi* incorrectly.[207] Instead, *Apprendi* bolsters and clarifies the Court's previous jurisprudence that the Sixth Amendment protects a defendant's right to a jury verdict on guilt or innocence, not jury sentencing.[208] In fact, *Apprendi* shows that the jury's role in sentencing was limited in the Framers' time.[209] Applying this interpretation to the six states that currently use jury sentencing, this Note asserts that the jury sentencing systems in Arkansas, Kentucky, Oklahoma, and Virginia conflict with the Sixth Amendment, producing the odd result that defendants take a bench trial or plea bargain in order to avoid an unpredictable or higher jury sentence.[210] These jury sentencing schemes render the defendant's Sixth Amendment right to a jury verdict on guilt effectively unavailable.

Thus, this Note recommends that these states: (1) allow defendants to choose whether a judge or jury sentences them; and (2) implement jury guidelines for sentencing. Legal scholars and legislators in favor of jury sentencing should pay close attention to the risk that jury sentencing, rather than fulfilling a defendant's Sixth Amendment right, in practice serves to obliterate it.

202. *See, e.g.*, Bibas, *supra* note 136, at 1100.
203. King, *supra* note 1, at 200, 213–14.
204. *See id.* at 198.
205. *See supra* note 17 and accompanying text.
206. *See supra* Part II.B.
207. *See supra* Part III.A.
208. *See supra* Part III.A.
209. *See supra* Part III.A.
210. *See supra* Part III.B.