

Rough draft—comments welcome.

## Pragmatic encroachment and legal proof

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This paper uses some modest claims about knowledge to identify a significant problem for contemporary American trial procedure. First, suppose that legal proof requires knowledge. In particular, suppose that the defendant in a jury trial is proven guilty only if the jury knows that the defendant is guilty. Second, suppose that knowledge is subject to pragmatic encroachment. In particular, whether the jury knows the defendant is guilty depends on what's at stake in their decision to convict, including the consequences that the defendant may face if convicted. Then in order to know whether a defendant has been proven guilty, jurors may need to know something about the potential consequences of conviction. But in nearly every American criminal trial, this information is withheld from jurors.

In §1, I lay out the philosophical premises of my argument. In §2, I say more about why these premises present a problem for American trial procedure, and I identify social and political structures that exacerbate the problem. I describe the reasoning that has led courts to withhold sentencing information from jurors, and I diagnose the flaw in this reasoning. In §3, I expand my initial argument, strengthening its conclusions and offering alternative sets of premises that still entail them. I argue that the legal ramifications of pragmatic encroachment depend on highly controversial questions in epistemology, questions about the precise nature of practical stakes. In §4, I propose strategies for legal reform.

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## 1 A brief introduction to pragmatic encroachment on legal proof

In a criminal trial, jurors should vote to convict if and only if the defendant has been proven guilty beyond a reasonable doubt. But what does it take to prove a fact by this standard? For insight into this question, we may turn to a classic example from NESSON 1979:

*Prison Yard*: 25 prisoners are exercising in a prison yard, when 24 of them suddenly join together in a planned attack on the prison guards. The remaining prisoner tries to stop the attack. There is no available evidence distinguishing the innocent prisoner from the rest. Local prosecutors randomly select one of the prisoners and bring him to trial for participating in the attack.

If you are on the jury in *Prison Yard*, you may be justified in having .96 credence that the defendant is guilty. Nevertheless, you don't have enough evidence to convict. What is missing? A natural answer is that although you're justified in being confident that the defendant is guilty, you don't *know* that he's guilty. Your belief that the defendant is guilty is like the belief that your lottery ticket is not going to win. It is very likely on your evidence, but it doesn't amount to knowledge. As I have argued elsewhere, legal proof requires knowledge.<sup>2</sup> A defendant is proven guilty only if the factfinder knows that the defendant is guilty, where this knowledge is grounded in the evidence admitted at trial.

Suppose that's right.<sup>3</sup> Here is a second claim about knowledge: whether you know something can depend on the stakes. If you have a belief that is supported by plenty of evidence, but it would be disastrous for you to act on your belief if your belief turned out to be false, then it may be hard for your belief to be knowledge, even if it is actually true. As some would put it, knowledge is subject to *pragmatic encroachment*. Here's an illustration:<sup>4</sup>

*Chocolate*: Ishani and Brian are eating some holiday snacks from their friend Chandra, including some carob brownies.

Ishani: These chocolate brownies are fantastic.

Brian: Actually, Chandra has been really into making everything with carob lately, so these brownies don't have chocolate in them.

Ishani: Oh, so we could serve them at the party tonight, without getting the kids all hyped up on caffeine.

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2. See chapter 10 of Moss 2018 and Moss 2020.

3. If you reject this assumption, please bear with me. In §3.2, I develop my argument using other accounts of legal proof.

4. This example is loosely based on the nut-free salad example in WEATHERSON 2016.

Brian: Hang on, I better check about the carob. One of the kids coming over has a life-threatening chocolate allergy, so we should be sure not to serve any chocolate.

Say that Brian knows that Chandra strongly prefers to bake with carob rather than chocolate. In many situations, this evidence could be sufficient for Brian to count as knowing that the brownies don't contain chocolate. But in *Chocolate*, Brian is making a high-stakes decision—namely, whether to serve the brownies at the party. In this situation, it would be disastrous if his belief turned out to be false and the brownies caused a life-threatening allergic reaction. According to advocates of pragmatic encroachment, Brian needs more evidence to know that the brownies don't contain chocolate, in virtue of his practical interests.

Back to our criminal trial setting. Suppose you are on a jury, deliberating about whether to convict a defendant. We have introduced two claims that together bear on your deliberation. Whether the defendant has been proven guilty depends on whether you know that the defendant is guilty, and whether you know this proposition can depend on what's at stake. In particular, it can depend on the severity of the harms that the defendant might suffer if convicted. Suppose you have a fair amount of evidence that the defendant is guilty, and you believe that they are guilty. But if the defendant is convicted, they will serve a mandatory sentence of life imprisonment without parole. Then the cost of a false conviction is extremely high—namely, an innocent person being imprisoned for life. This high cost of error can make it harder for your belief to constitute knowledge. Additional evidence might be required for you to know that the defendant is guilty. Accordingly, additional evidence might be required to license a guilty verdict.

We started with theoretical claims about knowledge and legal proof, and we have derived the claim that legal proof is subject to pragmatic encroachment. This claim about proof has a procedural consequence—namely, that there is a significant reason to inform the jury of the potential consequences of conviction. Will the defendant serve one year in prison if convicted, or life without parole? When the jury is more informed about this sort of question, they can form more accurate beliefs about what proper conviction requires. Conversely, when the jury is ignorant of sentencing information, they may misidentify the conditions under which they ought to convict or acquit.

## **2 The problem for criminal trial procedure**

Given the importance of sentencing information, one might expect that criminal trial juries would routinely learn about the sentences that defendants may face if con-

victed. Unfortunately, contemporary American trial procedure is just the opposite. In nearly every jurisdiction, there is a general rule against informing jurors of the potential consequences of conviction. Attorneys cannot discuss potential sentences faced by the defendant. Witnesses cannot share sentencing information as part of their testimony. Judges are often prevented from instructing jurors about sentences or from taking judicial notice of the content of relevant sentencing statutes. This general rule against informing jurors holds even in cases where the punishment for a crime is entirely determined as a matter of state statute. In *Shannon v. United States*, the Supreme Court held that a defendant is not entitled to jury instruction as to the consequences of a verdict, and that “such an instruction is not to be given as a matter of general practice.”<sup>5</sup> The specific verdict at issue in *Shannon* was the verdict of not guilty by reason of insanity. But as DUANE 1998 notes, the *Shannon* ruling quickly gained a broad influence, and it is now “widely cited as the primary basis for rejecting any defense request to advise a jury about mandatory minimum sentences faced by the accused upon conviction” (473). In the decades after *Shannon*, several district courts attempted to challenge the ruling, arguing that defendants have a constitutional right to inform juries of the potential consequences of conviction. Higher courts have consistently rejected this argument.<sup>6</sup> The same goes for state appellate courts. As CASSAK & HEUMANN 2007 observe, both federal and state courts have demonstrated a “practically universal and unwavering commitment” to withholding sentencing information from jurors (421).

There are only a couple of exceptions to this general rule, special conditions under which jurors end up learning sentencing information. If one party improperly raises the issue and misstates the punishment that a defendant would receive, then this misinformation may be corrected.<sup>7</sup> Also, jurors in death penalty cases are often aware that a defendant may face capital punishment if convicted. However, this is not the result of any effort to clarify the relevant epistemic standard governing juror deliberation in death penalty cases. Rather, states that retain the death penalty generally define capital murder separately from other homicides, so capital murders are introduced under that description in the course of jury instruction. Also, during jury selection in a capital case, jurors are questioned to verify that they are not strictly opposed to capital punishment. In short, death penalty cases are the exception that proves the rule. For example, Florida’s procedural rules regarding jury instruction have exactly one substantive provision about the content of instructions: “Except in

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5. *Shannon v. United States*, 512 U.S. 573, 575 (1994)

6. For instance, see *United States v. Polouizzi*, 564 F.3d 142 (2d Cir. 2009), *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996), and *United States v. Pabon-Cruz*, 391 F.3d 86 (2d Cir. 2004).

7. *Shannon v. United States*, 512 U.S. 573, 587 (1994)

capital cases, the judge shall not instruct the jury on the sentence that may be imposed for the offense for which the accused is on trial.”<sup>8</sup>

Why do courts withhold sentencing information from jurors? For several decades, state and federal courts have given a clear and consistent answer—namely, that the jury’s job is to find the facts, and sentencing information is irrelevant to this job. Here are five representative instances of this argument:

Generally speaking, jurors decide the facts. . . To inform the jury that the court may impose minimum or maximum sentence. . . tend[s] to draw the attention of the jury away from their chief function as sole judges of the facts.<sup>9</sup>

The jury’s function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. . . Information regarding the consequences of a verdict is therefore irrelevant to the jury’s task.<sup>10</sup>

The role of the jury is to make findings of fact and to determine the guilt or innocence of the accused without regard to probable punishment. To inform jurors of the sentencing consequences of their verdict is to invite result-oriented verdicts and possible deviation from the basic issues of a defendant’s guilt or innocence.<sup>11</sup>

[T]he traditional role of the jury has been to decide questions of guilt or innocence, and not to determine the proper punishment a defendant should receive. Consequently, sentencing procedures or details regarding a defendant’s possible punishment are irrelevant to the issues that a federal jury must decide.<sup>12</sup>

Because affixing the punishment for conviction is solely within the province of the judge, it is of no concern to the jury and therefore should not be disclosed.<sup>13</sup>

As these courts emphasize, there is a fundamental division of labor between the judge and jury in American jury trials. The jury assesses the guilt or innocence of the defendant. If they find the defendant guilty, then the judge determines what sentence to impose. There are dedicated rules of evidence governing the initial guilt phase of trial. Evidence is admissible to the jury only if it is relevant to some fact that must be proved. This notion of relevance is understood in terms of probabilistic confirmation. Evidence is relevant to a fact when it makes the fact “more or less probable than

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8. Florida Rules of Criminal Procedure, Rule 3.390(a). In addition to death penalty cases, there are idiosyncratic exceptions to the general rule in a few jurisdictions. North Carolina juries may be informed of penalties that involve the loss of a driver’s license; see NC G.S. §15-176.9. In Louisiana, a defendant can request jury instruction on a sentence over which the judge has no discretion, though if the judge is merely constrained by a mandatory *minimum* sentence, this fact cannot be disclosed to the jury; see *State v. English*, 243 So.3d 1145, 1153 (La. App. 2017).

9. *Pope v. United States*, 298 F.2d 507, 508 (5th Cir. 1962)

10. *Shannon v. United States*, 512 U.S. 573, 579 (1994) (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975))

11. *Commonwealth v. A Juvenile (No. 1)*, 396 Mass. 108, 112 (1985)

12. *United States v. Thomas*, 895 F.2d 1198, 1200 (8th Cir. 1990) (citing *United States v. Goodface*, 835 F.2d 1233, 1237 (8th Cir. 1987))

13. *State v. Guidry*, 221 So.3d 815, 831 (La. 2017)

it would be without the evidence.”<sup>14</sup> Irrelevant evidence is inadmissible, and even relevant evidence may be inadmissible if its probative value is outweighed by a danger of unfair prejudice—for example, if admitting the evidence would encourage jurors to decide their verdict on an improper basis, “commonly, though not necessarily, an emotional one.”<sup>15</sup>

Against this background, courts have reasoned as follows: By contrast with evidence that is normally admitted at trial, facts about sentencing do not substantially confirm or disconfirm the claim that the defendant is guilty. The meager probative value of sentencing information is easily outweighed by a danger of unfair prejudice—specifically, the danger that mentioning the consequences of conviction will encourage jurors to decide their verdict on an improper basis, such as undue sympathy for the defendant. Hence, we should withhold sentencing information from jurors. As the courts put it, sentencing information is *irrelevant* to the jury’s job, and therefore of *no concern* to the jury, and would merely distract them from their chief function of *judging the facts*. In fact, trial judges routinely instruct jurors not to consider the consequences of their decision to convict a defendant. A representative instruction states, “You should not be concerned with punishment in any way. It should not enter your consideration or discussion.”<sup>16</sup> Similar guidance is included in the model jury instructions for nearly every U.S. Circuit Court.

Having connected pragmatic encroachment on knowledge with pragmatic encroachment on legal proof, we can recognize the error in this judicial reasoning. As a helpful guide, consider the following variant of our original *Chocolate* case:

*High Stakes: Ishani and Brian are sitting in a park, eating some holiday snacks from their friend Chandra, including some carob brownies.*

Ishani: These brownies are fantastic. Are they made with chocolate?

Brian: Actually, Chandra has been really into making everything with carob lately, so these brownies don’t have chocolate in them.

*A few minutes later, Ishani sees a neighborhood kid who has a life-threatening chocolate allergy. She gives him one of the brownies.*

Brian: Wait a minute! This kid has a serious chocolate allergy. If it turns out that these brownies were made with chocolate, he could literally die from eating it!

Ishani: Oh yeah, I know all about his allergy. But you said that these brownies don’t have chocolate in them.

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14. FED. R. EVID. 401

15. FED. R. EVID. 403

16. Pattern Jury Instructions, Criminal Cases, U.S. Fifth Circuit, District Judges Association (2019), §1.22

Something has gone wrong here. Ishani has acted recklessly, and Brian is correct to protest. Given the high stakes, Ishani is not justified in acting on Brian's earlier assertion that the brownies did not contain chocolate. Brian wouldn't have made that assertion in a context where the stakes were known to be high. Furthermore, Ishani cannot justify her action by saying,

"Look, I just asked you a question about the *brownies*. Whether this kid has an allergy has no bearing on whether the brownies contain chocolate. Your job was simple—find the facts. How I act on your assessment of the brownies is strictly within my purview. It is *irrelevant* to your job, and therefore of *no concern* to you, and would merely distract you from your chief function of *judging the facts*—that is, judging whether the brownies contain chocolate."

It is not hard to diagnose this bad reasoning. Grant that the life-threatening allergy is evidentially irrelevant to whether the brownies contain chocolate. The allergy may nevertheless be relevant to the role that Brian takes on when Ishani asks him whether the brownies contain chocolate—namely, the responsibility of determining and asserting whether the brownies contain chocolate. Hence there is a significant reason for Brian to know what's at stake when he's making an assertion that Ishani will rely on.

Similarly, sentencing information may not have much probative value, when it comes to the question of whether the defendant is guilty. That is, information about potential sentences may neither confirm nor disconfirm the proposition that the defendant is guilty.<sup>17</sup> But even if that's the case, sentencing information is relevant to the role assigned to the jury—namely, the responsibility of finding the defendant guilty or not guilty. Hence there is a significant reason for the jury to know what's at stake when they are rendering a verdict that the justice system will rely on. Unsurprisingly, there is evidence that some jurors apply different standards of proof at trial, depending on their estimates of the severity of punishment.<sup>18</sup> When judges instruct jurors to deliberate about a verdict without considering its consequences, they are asking jurors to do the impossible. By withholding sentencing information from jurors, courts withhold valuable guidance about the standard governing their deliberation. This error is similar in spirit to a failure to instruct jurors on the appropriate standard of proof, which courts have long recognized as reversible error.<sup>19</sup>

At this point, one might naturally wonder—in practice, how serious is this failure to inform jurors about sentencing? After all, if jurors were able to accurately estimate

17. Actually, sentencing information may be indirectly relevant to whether the defendant had sufficient motive to refrain from committing the crime. See BELLIN 2010 for extensive discussion. For sake of argument, I shall grant to my opponents that this probative value is normally insufficient to tip the balance in favor of admitting sentencing information as evidence.

18. See SIMON & MAHAN 1971 for an early empirical study of this effect, and see JONES et al. 2015 for discussion of recent literature.

19. See *People v. Williams*, 120 Ill.App.3d 900 (1983); *People v. Elguera*, 8 Cal.App.4th 1214 (1992).

the punishment for various offenses, then it might not matter that they don't get this information in court. Unfortunately, in contemporary American criminal trials, the situation is often the opposite. Jurors frequently have false beliefs about the consequences of conviction, underestimating potential punishments. This is not generally due to misinformation spread by individuals, but due to structural features of the criminal justice system.

For example, federal and state legislatures have enacted mandatory minimum sentencing laws for a variety of felonies.<sup>20</sup> By their nature, mandatory minimum sentences are indiscriminately applied to any instance of a crime, including instances for which they are shockingly harsh penalties. The impact of these guidelines is compounded by another structural feature—namely, that nearly all states have felony-murder rules that broaden the crime of murder to include homicides unintentionally caused in the course of committing a felony.<sup>21</sup> As a result of these laws, jurors may severely underestimate sentences imposed upon conviction. For instance, after a jury convicted a thirteen-year-old boy of felony murder in *Tate v. State*, one member of the jury told reporters, “We were basically told all during jury selection and during the trial, that the sentencing was not really any of our business. You know, we’re there to just decide guilt or innocence. Sentencing will be up to the judge.”<sup>22</sup> In fact, the judge had no discretion over the sentence in this case, which was life without the possibility of parole.<sup>23</sup> The juror later remarked, “As I was driving home, I heard on the radio that he would be spending the rest of his life in prison. I didn’t know that was mandatory.”<sup>24</sup> Of course, it is impossible to know whether an instruction on sentencing information would have made a difference to the verdict in *Tate*, and if so, whether it would have made a difference by clarifying the standard of proof or by prompting jury nullification.<sup>25</sup> Still, reflecting on *Tate* can help us understand one way in which structural features of the criminal justice system could lead jurors to form false beliefs about the consequences of conviction, thereby underestimating what legal proof requires and convicting without sufficient evidence of guilt.

To give another example, a number of states have “three strikes” statutes that impose mandatory minimum sentences for defendants with prior felony convictions, resulting in sentences that are significantly more harsh than jurors might reasonably expect. In *State v. English*, the defendant Randel English was convicted of a third of-

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20. See TONRY 2013 for a recent history of American sentencing policy, including detailed discussion of state mandatory minimum sentencing and repeat offender statutes.

21. For a fifty-state review of felony-murder statutes, see chapter 6 of ROBINSON & WILLIAMS 2018.

22. “In Their Own Words: Juror Stephen Danker Discusses the Guilty Verdict and Life Sentence of 14-Year-Old Lionel Tate.” *NBC Nightly News*. NBC, Fort Lauderdale, 10 March 2001.

23. *Tate v. State*, 864 So.2d 44 (Fla. 4th Dist. Ct. App. 2003)

24. CANEDY 2003, p. L23

25. See §4.1 for discussion of jury nullification and its relevance for my argument.



fense of driving while intoxicated and sentenced to five years at hard labor. The primary evidence presented by the government was police testimony. English appealed his conviction on the grounds that “had the jury known of the harsh penalties... it may have returned a different verdict because there was no ‘scientific evidence’ of his intoxication.”<sup>26</sup> The appellate court upheld the trial court on this point, finding that the court did not abuse its discretion in refusing to inform the jury of the mandatory minimum sentence for the offense. This case is not unusual. Twenty-eight states have statutes that significantly enhance sentences for defendants with prior felony convictions. Jurors are often ignorant of these statutes or unaware that they apply in a given case. As a result, jurors in three-strikes cases systematically underestimate the strength of evidence required for conviction.

To sum up, we have reason to provide jurors with sentencing information, and this reason is even more significant than it might have appeared at first. Jurors are not merely *ignorant* of the potential consequences of their verdicts; jurors systematically *underestimate* the severity of these consequences. By withholding sentencing information from jurors, courts not only fail to clarify what it takes for jurors to do their job, but also contribute to a range of structural injustices.

### **3 A general theory of pragmatic encroachment on legal proof**

So far in this paper, I have made four assumptions in order to present a vivid and straightforward version of my argument. I have focused on what legal proof requires at criminal trials, setting aside civil trials. I have set up my argument using simple premises—namely, that legal proof requires knowledge, and that knowledge is subject to pragmatic encroachment. Finally, I have made an assumption about stakes—namely, that it is generally harder for a belief to be knowledge when it would be disastrous for agents to act on the belief if it is false. Against the background of these assumptions, I have argued that there is a significant reason for juries to know sentencing information. In this section, I discuss how to roll back these assumptions. The central arguments of this paper are consistent with a variety of claims about what sort of trial is at issue, what legal proof requires, whether knowledge is subject to pragmatic encroachment, and what determines the stakes of a verdict.

#### **3.1 Pragmatic encroachment on the civil standard of proof**

How does changing our focus to civil trials affect my argument about stakes and legal proof? The short answer is that much remains the same. A civil jury should find

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26. *State v. English*, 243 So.3d 1145, 1153 (La. App. 2017)

the defendant liable if and only if they know that it is more likely than not that the defendant is liable. Whether the jury knows this content can depend on the stakes, such as the costs that would be unfairly assigned to the defendant if that belief turned out to be false. As a result, there is a significant reason to inform civil juries of these potential costs.

A more detailed discussion of civil trials requires some background. One major difference between criminal and civil trials is that in the latter, the standard of proof is lower—namely, proof by a preponderance of the evidence, rather than proof beyond a reasonable doubt. In order to properly find a defendant liable, the jury does not have to know that the defendant is liable, but only that *it is more likely than not* that the defendant is liable. In order to return a verdict of liability, the jury must have more than .5 credence that the defendant is liable, and this probabilistic belief must have a certain epistemic credential. What credential is sufficient for legal proof? It is not sufficient that the jurors are merely *justified* in having a high credence that the defendant is liable, since merely statistical evidence can justify that high credence without justifying a verdict of liability. For example, consider the following case from COHEN 1977:

*Gatecrasher*: [I]t is common ground that 499 people paid for admission to a rodeo, and that 1,000 are counted on the seats, of whom *A* is one. Suppose no tickets were issued and there can be no testimony as to whether *A* paid for admission or climbed over the fence. So by any plausible criterion of mathematical probability there is a .501 probability, on the admitted facts, that he did not pay. (74)

*Gatecrasher* is a civil analog of the *Prison Yard* case discussed at the start of this paper. The jury in *Gatecrasher* is justified in believing that it is more than .5 likely that the defendant is liable for trespassing, but the evidence is not sufficient to license a verdict of liability. Why not? The missing epistemic credential is the same as in *Prison Yard*—namely, the opinion of the jury fails to constitute knowledge.<sup>27</sup> In short, proof by a preponderance of the evidence requires probabilistic knowledge. If knowledge is subject to pragmatic encroachment, then whether a probabilistic belief constitutes knowledge may depend on what's at stake if that belief turns out to be false. Hence whether a verdict of liability is licensed may depend on what's at stake if it turns out that it's *not* more than .5 likely that the defendant is liable.

Historically, many U.S. jurisdictions prevented civil juries from learning about the legal impact of certain decisions.<sup>28</sup> For instance, in the context of a contributory negligence defense, the jury is asked to determine the extent of the damages suffered

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27. See MOSS 2018 for an extended defense of the view that probabilistic beliefs can constitute knowledge.

For arguments in favor of the knowledge account of the civil standard of proof, see MOSS 2020.

28. See KINNEY & THOMADSEN 2003 for a history of blindfold rules and their gradual repudiation.

by the plaintiff, as well as the extent to which the plaintiff was at fault for their own injury. Their assignment of comparative fault affects the compensation that a plaintiff will receive, and sometimes whether they receive any compensation at all. Until the 1970s, most states adopted “blindfold rules” forbidding the court from instructing the jury on the ultimate outcome of their decisions. For instance, the jury might never find out that assigning 50% fault to the plaintiff would entirely bar compensation, whereas assigning 49% fault would merely result in its reduction. Similarly, courts could not mention any statutory damage caps that would reduce the damages awarded on various claims.<sup>29</sup> In fact, just as in criminal trials, jurors in civil trials were explicitly instructed not to consider the consequences of their verdicts. As one trial judge put it, “don’t try to figure out how much the plaintiff is going to get. You figure out the percentages on the negligence and figure the total amount of damages and let me do the mathematics after that.”<sup>30</sup> Courts argued that considering the consequences of special verdicts could only distract juries from their designated function of finding the facts. In the words of the Seventh Circuit, special verdicts are designed to “concentrate the jury’s attention exclusively upon the fact questions put to them. Comment on the legal effects of the answers could in an appropriate case have a prejudicial effect of clouding this purpose.”<sup>31</sup>

However, over the past five decades, many states have traded blindfold rules for “sunshine rules” that provide civil juries with more information. In comparative negligence cases, the overwhelming majority of jurisdictions either permit or require the court to inform civil juries of the ultimate outcome of special verdicts.<sup>32</sup> A number of courts and state legislatures have reasoned that jurors will inevitably reflect on the ultimate outcome of a trial, and that given that fact, it is better for jurors to be informed about that outcome. As the Iowa Supreme Court explained in one frequently cited opinion, “In those instances where the legal effect of their answers is not so obvious, the jurors will nonetheless speculate, often incorrectly, and thus subvert the whole judicial process.”<sup>33</sup> To sum up, the central argument of this paper extends to civil trials.<sup>34</sup> Fortunately, civil jury instruction has already undergone sensible reform. Therefore, I will continue to simplify my discussion by focusing mainly on criminal

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29. For an in-depth discussion of jury instruction as to statutory damage caps, see KANG 1999.

30. *Steinhaus v. Adamson*, 304 Minn. 14, 18, 228 N.W.2d 865, 868–9 (1975)

31. *Gullet v. St. Paul Fire and Marine Ins. Co.*, 446 F.2d 1100, 1105 (7th Cir. 1971)

32. 1 *Comparative Negligence Manual* §13:2 (3d. ed) (2021 update); 57*B Am. Jur. 2D Negligence* §1086 (2021 update)

33. *Seppi v. Betty*, 99 Idaho 186, 193 (1978)

34. This distinguishes my argument from related work by BARTELS 1981, STOFFELMAYR & DIAMOND 2000, and LAUDAN & SAUNDERS 2009. These authors focus on the criminal standard of proof, and they claim that decision theory entails that this standard varies in strength across different trials. By contrast, I have argued that pragmatic encroachment affects all standards of proof, and my argument explains this encroachment in terms of facts about the nature of legal proof and knowledge.

trials, where juror ignorance currently has more serious effects.

### 3.2 Alternative accounts of what legal proof requires

So far in this paper, I have assumed that a defendant is proven guilty beyond a reasonable doubt only if the jury knows the defendant is guilty. There are a number of alternative accounts of what legal proof requires. According to some theorists, proof of guilt does not require knowledge, but only justified belief. For instance, Ho 2008 rejects knowledge-based accounts as “clearly too simplistic” (90), and proposes the following alternative:<sup>35</sup>

The fact-finder must find that p only if (i) one would be justified in believing sufficiently strongly that p. . . and (ii) if one found that p, one would find that p at least in part because one would be justified in believing that p under (i). (93)

Just like the knowledge account of legal proof, Ho’s account naturally lends itself to the thesis that legal proof is subject to pragmatic encroachment. For starters, stakes affect what counts as believing a fact “sufficiently strongly” to satisfy condition (i). According to Ho, “[t]he strength of belief necessary to justify a positive finding of fact. . . must be commensurate with the seriousness of what the finding says about a party and the consequences for her of that finding” (188). Furthermore, according to many advocates of pragmatic encroachment, stakes affect what subjects are *justified* in believing. For instance, FANTL & McGRATH 2002 argue that “S is justified in believing that p only if S is rational to act as if p” (78). Suppose that in a certain high stakes case, it is rationally impermissible for jurors to act as if a defendant is guilty—in other words, to convict. According to Fantl and McGrath, it follows that jurors are not justified in believing that the defendant is guilty. According to Ho, it follows that conviction is not only rationally impermissible, but also legally impermissible. Hence even on justified belief accounts of legal proof, the stakes of conviction may affect whether the jury has enough evidence to convict.

Alternatively, some legal theorists reject any attempt to understand legal proof in probabilistic terms, instead analyzing it in terms of the relative plausibility of the theories presented by each party at trial. For instance, PARDO & ALLEN 2019 argue that a jury should convict only if “the prosecution’s explanation (which includes all of the legal elements) is plausible, given the evidence, and there is *no* plausible defense explanation” (16). What does it take for an explanation to be plausible? According to Pardo and Allen, plausible explanations are those that meet an “explanatory

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35. Ho models his account of legal proof on the norm of assertion defended by LACKEY 2007. Ho includes several additional conditions in his account, which we may set aside for present purposes.

threshold” constructed from a number of criteria, such as consistency, coherence, fit with background knowledge, simplicity, absence of gaps, and the number of unlikely assumptions that need to be made. Like the accounts considered above, plausibility-based accounts of legal proof are compatible with the claim that legal proof is subject to pragmatic encroachment. It may be that the stakes of a guilty verdict affect the explanatory threshold for plausibility, so that when the stakes are high, an explanation must be stronger in order to count as plausible. Here again, the end result is that there is a significant reason for jurors to be informed of the potential consequences of guilty verdicts.

### 3.3 A contextualist reframing of encroachment

As initially presented, the main argument of this paper relied on the following premise:

- (1) Whether the jury knows the defendant is guilty depends on what is at stake.

It is natural to derive this premise from a general view about knowledge and knowledge ascriptions—namely, *interest-relative invariantism*—according to which ‘knows’ denotes the same epistemic relation in all contexts, and whether a subject bears that relation to a content can depend on their practical interests. Interest-relative invariantism is often contrasted with *epistemic contextualism*, according to which speakers in different contexts can use ‘knows’ to denote different epistemic relations of varying strengths. At first glance, it may seem as if my argument essentially requires the former view. But in fact, contextualists can accept a version of my argument, including a version of premise (1).<sup>36</sup>

To see this, it is helpful to note that there are actually two kinds of dependence claims that (1) could be used to express. Interest-relative invariantists interpret (1) as expressing a deep dependence claim. They maintain that ‘knows’ in (1) denotes a single relation, and that stakes can affect whether jurors bear this relation to the proposition that a defendant is guilty. By contrast, contextualists can interpret (1) as expressing a cheap dependence claim. On this interpretation, ‘knows’ is used to talk about many different epistemic relations in (1), each corresponding to a jury in a different context. Contextualists maintain that speakers use ‘knows’ with different epistemic standards in different contexts, just as speakers use ‘tall’ to talk about different standards of height in different contexts. Accordingly, contextualists may compare (1) with sentences like (2):

- (2) Whether a six-foot-tall athlete is tall depends on what sport they play.

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<sup>36</sup> For simplicity, I assume the knowledge account of legal proof in this section, but my arguments extend to alternative accounts of legal proof discussed in §3.2.

Contextualists about ‘tall’ ascriptions interpret (2) as saying that whether a six-foot-tall athlete is tall *by the standards of their sport* depends on what sport they play. Similarly, contextualists about ‘knows’ ascriptions can interpret (1) as saying that whether a jury knows the defendant is guilty *by the standards relevant for their verdict* depends on what is at stake in their verdict. In short, contextualists can accept a true reading of (1), without accepting that the knowledge relation itself is subject to pragmatic encroachment.

Contextualists may also accept a complementary reading of the second premise of my central argument. That is, contextualists may accept the following statement about when jurors should convict:

- (3) Whether you should convict depends on whether you know—*by the standards relevant for your verdict*—that the defendant is guilty.

Semantically speaking, this statement is similar to the following:

- (4) Whether you should stand in the back row in a yearbook photo of your sports team depends on whether you are tall, *by the standards of that sport*.

Just as (4) imposes different standards for standing in the back row of different yearbook photos, (3) imposes different standards for convicting defendants in different trials. As philosophers of language and linguists would put it, contextualists can endorse bound readings of (1) and (3). From these claims, contextualists may infer that whether a defendant has been proven guilty depends on what is at stake. Without committing themselves to pragmatic encroachment, epistemic contextualists can accept that the consequences of conviction can make a difference to whether a defendant has been proven guilty, and that this constitutes a significant reason to inform the jury of the potential consequences of conviction.

It is worth briefly mentioning an alternative contextualist strategy—namely, replacing (1) and (3) with metalinguistic norms such as the following:

- (5) Whether a jury should convict depends on whether they can truly say ‘We know the defendant is guilty’.
- (6) Whether the jury can truly say ‘We know the defendant is guilty’ depends on what’s at stake in their verdict.

For the purposes of my argument, it does not matter whether the contextualist endorses (1) and (3), or instead endorses (5) and (6). Both pairs of claims entail the conclusion that whether a jury should convict depends on what’s at stake in their

verdict.<sup>37</sup>

To put the point another way, we can compare claims about proper conviction with claims about proper assertion. Suppose that you should assert something only if you know it. Whether you are an interest relativist or a contextualist about knowledge ascriptions, you can think that stakes affect whether a speaker ought to assert something—for instance, whether Brian has enough evidence to assert ‘Those brownies don’t contain chocolate’ in a given context. According to the interest relativist, stakes matter because they affect whether Brian stands in the knowledge relation to the proposition he’s asserting. According to the contextualist, there are many different relations that ‘knows’ can be used to talk about, and stakes matter because they affect which of these relations Brian must bear to the content of his assertions in a given context. According to some but not all contextualists, that’s because stakes affect the truth conditions of ‘I know that those brownies don’t contain chocolate’ as uttered by Brian. All of these routes lead to the same conclusion about assertion—namely, that whether you ought to assert something can depend on the stakes. Similarly, both interest relativists and contextualists can embrace my conclusion about conviction—namely, that whether a jury can properly convict a defendant depends on the stakes.

#### **3.4 Accounts of how to determine what’s at stake in a verdict**

How exactly do we calculate what’s at stake when a jury is deciding whether to convict a defendant? So far, we have assumed that the cases we are discussing have a certain structure—namely, that the cost of an innocent person serving a harsh sentence is extremely high compared with the costs of other possible outcomes, such as a false acquittal. As long as we’re focusing on cases of this sort—which may include many actual cases—we do not need to settle on any particular account of how stakes are calculated. Just about any account of stakes will say that when a false belief would be extremely costly and other costs are negligible, it can be harder for a belief to be knowledge.

However, in some cases, it is not obvious how to determine what’s at stake when a jury is deciding whether to convict. It is controversial how to calculate these stakes when there are multiple countervailing costs involved. There could be costs that arise if and only if the defendant is acquitted, for instance, such as costs that the family of a victim might suffer if they believed that the outcome of the trial was unjust. There could also be costs that arise if and only if the defendant is falsely acquitted, such as the risk that acquitting a guilty defendant might enable certain further crimes. So

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<sup>37</sup> For a defense of the former contextualist strategy, see Moss 2021. For a survey of metalinguistic knowledge norms, see §2–3 of WORSNIP 2017.

far, we have focused on whether jurors should be informed of the potential costs of conviction, but we may also ask parallel questions about whether jurors should be informed of the potential costs of acquittal. There are four open questions, to be exact. Should the government be able to inform jurors of various potential costs of an acquittal? What about the potential costs of a false acquittal? Should the defendant be able to inform jurors of the *absence* of various potential costs of an acquittal? What about the absence of potential costs of a false acquittal?

As a matter of fact, courts have already been grappling with these questions. The third question in particular has been decided differently by federal and state courts. In *Shannon v. United States*, the defendant Terry Lee Shannon sought a verdict of not guilty by reason of insanity. An insanity acquittal often results in involuntary commitment to a mental health facility. Shannon asked the trial judge to inform the jury of the consequences of this verdict, thereby informing them of the absence of a potential cost of his acquittal—namely, the risk of his being immediately released from custody and consequently causing serious harm to others. The trial judge refused to give the requested instruction, and the Supreme Court affirmed this decision. By contrast, many state courts have diverged from federal courts on this issue, ruling that judges are permitted or even required to instruct jurors about the consequences of an insanity defense.<sup>38</sup> For example, in Massachusetts, a judge is required to inform the jury about the consequences of a verdict of not guilty by reason of insanity whenever the defendant asks for this instruction.<sup>39</sup>

According to the central argument of this paper, there is a significant reason to inform juries of the potential consequences of conviction. Is there a parallel reason to inform juries of the potential consequences of acquittal? To be clear, I am not asking whether courts who currently inform juries of these consequences are in fact motivated by epistemological concerns. In many actual cases, courts are not informing jurors about insanity defenses in order to clarify what legal proof requires, but simply in order to forestall jury nullification.<sup>40</sup> As BARTELS 1981 puts it, “These courts have concluded that the possibility that the jury will find the defendant guilty even though they have reasonable doubt as to his sanity in order to ensure his continued segregation from society outweighs the possibility that injecting considerations of disposition will encourage result-oriented deliberations and compromise the jury’s duty to render a true verdict” (915–16). In this paper, my focus is the following theoretical question: is there a stakes-related reason to inform juries of the costs of failing to form

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38. LIU 1993, p. 1224

39. *Commonwealth v. Biancardi*, 421 Mass. 251, 253 (1995). By contrast, in Massachusetts it is always improper for a judge to inform the jury about the consequences of a conviction; see *Commonwealth v. Gunter*, 427 Mass. 259, 270 (1998) (quoting *Commonwealth v. Ferreira*, 373 Mass. 116, 124 (1977)).

40. See §4.1 for discussion of jury nullification and its relevance for my argument.



and act on the belief that the defendant is guilty?

The short answer is: it depends. In particular, the answer depends on the correct theory of stakes, which has been a subject of recent controversy among epistemologists. Advocates of pragmatic encroachment generally agree that high costs associated with falsely believing that  $p$  can make it harder for your belief that  $p$  to be knowledge. But it is controversial whether high costs associated with failing to believe that  $p$  can make it easier for your belief that  $p$  to be knowledge. If they can make it easier, then the central argument of this paper extends to additional sorts of jury instructions. For instance, there would be a significant reason for a judge to intervene and prevent jurors from falsely believing that it would be costly to acquit a defendant. By explaining what's at stake in such cases, the judge would be informing the jury that it may be harder to prove the defendant guilty than they would have otherwise thought.

SCHROEDER 2012 defends an account of stakes that supports this line of argument. According to Schroeder, the epistemic status of your belief that  $p$  depends not only on the costs of falsely believing that  $p$  but also on the costs of failing to truly believe it. Schroeder observes that "what the stakes do directly, in the original bank cases, is to affect the cost of type-1 error. But it is also possible to construct cases in which raising the stakes raises the cost of type-2 error along with the cost of type-1 error. Our picture predicts that these cases will not affect knowledge, or at least, certainly not in as clear-cut a way" (278). According to Schroeder, that is because "knowledge is affected by reasons to withhold, and reasons to withhold derive from the preponderance of the costs of type-1 error over the costs of type-2 error" (278–9).<sup>41</sup> In a similar spirit, WEATHERSON 2011 argues that "high-stakes situations are typically long-odds situations, not because they are high-stakes situations because they are long-odds situations, not because they are high-stakes situations" (592). For Weatherston, convicting a defendant is relevantly similar to accepting a bet on the proposition that the defendant is guilty. As it becomes more costly to acquit, the jury may start to rationally prefer this bet at shorter odds than before, in which case it could be easier for the jury to know that the defendant is guilty. LILLQUIST 2002 endorses this conclusion in his discussion of reasonable doubt, saying that "in a case involving someone accused of terrorism and known to be an outspoken advocate of such actions, the standard of proof will probably be lower than in other cases, because the risk of harm from an erroneous acquittal is higher than in other cases" (91).

On the other hand, it is not clear that the foregoing accounts of stakes are correct or that they should guide our reasoning about the stakes of legal verdicts. For starters,

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41. RUSSELL 2019 spells out an account of stakes along these lines, defining the stakes of acting on a belief as a function of the cost of acting or not acting on your belief, given that your belief is correct or incorrect.

these accounts presuppose that the costs of various outcomes are commensurable, whereas the cost of acquitting a guilty person may be incommensurable with the cost of a false conviction. Even assuming that all relevant costs are commensurable, it is not clear that the costs of type-1 and type-2 error contribute equally to determining the stakes of a decision. It is easy to construct minimal pairs such that increasing the cost of a false belief transforms a case of knowledge into a case of ignorance. By contrast, varying the cost of type-2 error has a less predictable epistemic effect. As noted by ANDERSON & HAWTHORNE 2019, increasing the cost of inaction does not generally transform a case of ignorance back into a case of knowledge.<sup>42</sup> For example, consider the following case:

*Allergy:* Alice has a severe chocolate allergy. If she eats chocolate, she will become violently ill for several months. Alice sees Ishani and Brian eating some brownies, and she overhears Brian tell Ishani, “Chandra has been really into making everything with carob lately, so these brownies don’t have chocolate in them.”

Intuitively, Alice does not have enough evidence to know that the brownies don’t contain chocolate. Suppose we change the case by adding one further fact:

*Starving:* Alice is starving. The brownies are the only food available. If Alice doesn’t eat one of the brownies, she will die.

Even in the case of *Starving*, it still does not seem intuitive to say that Alice knows that the brownies don’t contain chocolate. Her allergy is not practically relevant, but it is epistemically relevant. Alice should eat the brownies. She can easily figure out that avoiding starvation is worth the risk of getting sick. But even if Alice should act as if the brownies don’t contain chocolate, that does not seem to make it any easier for her to know that the brownies don’t contain chocolate.

This example suggests an opposing line of argument about whether to inform juries of the consequences of acquittal. The case of *Starving* may be relevantly similar to a legal case in which the costs of acquittal are high. Suppose that voting to acquit is extremely costly—in fact, costly enough that it is obvious that pragmatically speaking, the jury ought to convict. That still may not make it any easier for the jury to know that the defendant is guilty. In this sort of case, the jury may be faced with conflicting pragmatic and legal norms. Even if, pragmatically speaking, the jury ought to convict, it may still be the case that they don’t know the defendant is guilty, and so legally speaking, they ought to acquit.

To sum up, the central argument of this paper does not depend on any particular account of stakes. But the scope of my argument does depend on whether the epis-

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42. See §4.2 of ANDERSON & HAWTHORNE 2019 for a detailed exposition of this idea.

temic status of a belief can vary in accord with the cost of failing to act on that belief. Among epistemologists, the jury is out. I have surveyed arguments on both sides, but I will not attempt to adjudicate between them. This section has demonstrated an intermediate conclusion, interesting in its own right—namely, that seemingly abstract questions about the correct account of stakes may have concrete legal consequences, such as whether there is a significant epistemological reason to instruct juries about what will and will not happen when a defendant is found not guilty by reason of insanity.

#### **4 Suggestions for legal reform**

I have argued that there is a significant reason to inform jurors of the consequences of their verdicts. This conclusion raises two practical questions. Should American trial procedure be reformed? And if so, how should we reform it? I will end this paper by discussing each of these questions in turn.

##### **4.1 Weighing the consequences of informing jurors about sentencing**

In broad strokes, whether American trial procedure should be reformed depends on the overall balance of reasons for and against providing jurors with sentencing information. So far, I have discussed one reason to provide jurors with this information. There are additional reasons to provide the information and countervailing reasons to withhold it. As we have seen, courts shouldn't withhold sentencing information from jurors merely on the grounds that this information may influence their verdicts. If information influences jurors in virtue of clearing up their misconceptions about what legal proof requires, then this influence is perfectly appropriate. But there is a significant worry in the vicinity—namely, that providing jurors with sentencing information might cause them to deliver the incorrect verdict, when otherwise they would have delivered the correct one.

Suppose that a jury receives sentencing information that causes them to acquit, when otherwise they would have voted to convict. There are two cases to consider. The first case has been the focus of our discussion so far: given the high stakes, the jury doesn't know that the defendant is guilty, and clarifying the stakes helps them avoid an improper conviction. In the second case, the jury does know that the defendant is guilty, and informing the jury causes them to acquit when they ought to have convicted. In the words of one trial judge, jurors sometimes find out sentencing information and "consider delivering a not guilty verdict in order to go below the minimum range. In a rape case, for instance, where the range is ten to forty years in

Arkansas, if the case impresses the jury as one where they'd hate to see a minimum of ten years, and at this point they are not told anything about parole—this occasionally happens" (948). In short, sentencing information may cause jurors to nullify.

On the other side, suppose that a jury receives sentencing information that causes them to convict when they would otherwise acquit a defendant. Again, there are two cases to consider. In the first case, the jury does know that the defendant is guilty, and informing the jury of the stakes enables them to avoid an improper acquittal. For example, one Colorado trial judge recounted a case where a jury had acquitted a juvenile defendant of reckless driving, despite evidence that clearly supported his conviction. When asked to explain their verdict, the jurors said that they had engaged in nullification because they believed that the defendant would be sent to the state prison if convicted—though as it happens, this belief was false.<sup>43</sup> Finally, it could in principle happen that a jury doesn't know that a defendant is guilty, and giving them sentencing information causes an improper conviction.

Ultimately, then, whether we should pursue legal reform depends on a combination of comparative judgments. If we inform jurors of potential sentences, we are risking some improper convictions and avoiding others, and we are risking some improper acquittals and avoiding others.<sup>44</sup> In principle, it could turn out that informing jurors would prevent more improper convictions than it caused and also prevent more improper acquittals than it caused, in which case reform would obviously be warranted. However, it is generally considered more likely that informing jurors will lead to more acquittals across the board—that is, that informed juries will return fewer improper convictions and a greater number of improper acquittals. If that's right, then whether we should adopt legal reforms will ultimately depend on the relative severity of the harm of an improper conviction and the harm of an improper acquittal, as well as the relative frequency of these sorts of error under the current system and under various alternatives.

At this point, there is only so much that one can say from the armchair. For instance, our assessments of the frequency of various errors should be informed by empirical studies. These assessments are controversial. Courts have consistently expressed concern that informing jurors about sentences might encourage widespread jury nullification, for instance, while a number of judges and scholars argue that any increase in nullification would be minimal.<sup>45</sup> It is beyond the scope of this paper to settle this debate. However, without digging into the empirical details, we can make

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43. BARTELS 1981, p. 918

44. A note on terminology: I say that the jury *improperly convicts* just in case they convict when the defendant has not been proven guilty, and that they *improperly acquit* just in case they acquit when the defendant has been proven guilty.

45. For the latter argument, see WEINSTEIN 1993, p. 245; CAHILL 2005, p. 119; and KEMMITT 2006, p. 97.

several useful observations about the severity of the harms that we are balancing. For starters, improper convictions may be less acceptable than improper acquittals, in which case a substantial increase in the latter could be offset by a more modest decrease in the former. Furthermore, improper acquittals that result from informing jurors about sentencing are not just any improper acquittals. The costs of these acquittals are themselves counterbalanced by three benefits.

First, jury nullification in response to sentencing information may provide a valuable democratic safeguard against overcharging by prosecutors or excessively harsh statutes adopted by legislatures. As Judge Wiseman explained in *Datcher*, “if community oversight of a criminal prosecution is the primary purpose of a jury trial, then to deny a jury information necessary to such oversight is to deny a defendant full protection to be afforded by a jury trial.”<sup>46</sup> A number of scholars have agreed, arguing that juries should have access to sentencing information precisely because it will enable them to nullify when they feel that the penalty is too harsh given the offense.<sup>47</sup>

Second, jury nullification in response to overly harsh sentences has long been an important instrument of criminal justice reform. Frequent jury nullification prompted the Pennsylvania state legislature to restrict the mandatory death penalty to first-degree murder in 1794, with many other states following suit.<sup>48</sup> Even after this restriction, American juries still regularly refused to convict defendants of first-degree murder, and “[i]n order to meet the problem of jury nullification, legislatures . . . adopted the method of forthrightly granting juries the discretion which they had been exercising in fact,” giving juries sentencing discretion in capital cases.<sup>49</sup> Jury nullification has prompted more modest reforms as well. After the Indiana state legislature established extremely harsh mandatory penalties for drunk driving, juries in the 1950s consistently returned nullification verdicts, eventually causing the legislature to relax the penalty for first offenses.<sup>50</sup>

Finally, our current practice of restricting juror information diminishes public respect for the criminal trial process. After one defendant in California was sentenced to life in prison for taking a five-dollar cut in a cocaine deal, a member of the jury told the press,

I felt deceived by the court. They should have let us know this was a ‘three strikes’ case. I’m a firm believer in ‘Don’t do the crime if you can’t do the time, but this

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46. *United States v. Datcher*, 830 F. Supp. 411, 415 (M.D. Tenn. 1993), *abrogated by United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996)

47. For instance, see SAUER 1995, BARKOW 2003, CAHILL 2005, and KEMMITT 2006.

48. For a concise history of mandatory death penalty statutes in the United States, see *Woodson v. North Carolina*, 428 U.S. 280, 288–304 (1976).

49. *McGautha v. California*, 402 U.S. 183, 199 (1971)

50. KALVEN & ZEISEL 1966, p. 310

was just ridiculous.<sup>51</sup>

In an influential report on jury reform, the Arizona Supreme Court Committee on the More Effective Use of Juries observed,

Jurors who are surprised or even shocked upon learning of the punishment after the verdict has been announced often say they felt like pawns in a justice system that has betrayed them. The reaction is anger toward a system which keeps the decision-makers in the dark.<sup>52</sup>

As we measure the cost of an improper acquittal, the relevant alternative is not an easy conviction, but a conviction that essentially depends on withholding information from jurors, even if their uninformed beliefs are very likely to be false. This is exactly the sort of conviction that causes resentment among jurors, resentment that does not seem unwarranted.

Compared to the cost of encouraging jury nullification, the second potential cost of legal reform is more significant—namely, that informing juries about the consequences of verdicts might cause them to find a defendant guilty, even if guilt has not been proved beyond a reasonable doubt. For example, in *State v. Short*, the defendant John Short was indicted for murder, and the trial court also instructed the jury on the lesser included offense of manslaughter. The court then informed the jury that the statute of limitations had run on the latter offense, so that Short would go free if convicted only of manslaughter. Short was convicted of murder. The Supreme Court of New Jersey reversed the conviction on the grounds that the jury should not have been told about the consequences of a manslaughter conviction. The court reasoned:

Jurors who believe that a defendant has killed his wife are hardly likely to return a verdict of manslaughter knowing that defendant will go free if they do... The trial court's task is to let the jurors know what they need to know in order to make a fair decision on criminal liability in accordance with applicable law, not to give them whatever information they might want in order to assure the imposition of criminal punishment.<sup>53</sup>

This case highlights a legitimate concern. If a jury learns that a defendant will receive a lighter sentence than they had expected for a given offense, they might convict the defendant of a greater offense, even if that verdict is not licensed by their evidence.

Any additional conviction of this sort would certainly be a high cost of informing jurors about potential sentences. Fortunately, the frequency of these costs is largely under our control. So far, I have been discussing the abstract possibility of informing

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51. LYNCH & CEKOLA 1995, p. A1, A16

52. The Arizona Supreme Court Committee On More Effective Use of Juries, *Jurors: The Power of 12, Part Two*, at 13 (1998) (on file with Federal Judicial Center)

53. *State v. Short*, 131 N.J. 47, 58–62 (1993)

jurors about the consequences of conviction. In fact, there are many concrete ways of implementing this reform. Sentencing information could be delivered to jurors through jury instruction, judicial stipulation, testimony, or statements of counsel. Jurors could receive this information in every case, or only in a specified range of cases, or at the discretion of the judge, or only at the request of defense counsel. As we select particular strategies for reform, we can aim to reduce the possibility that informing juries about sentencing will cause them to convict on insufficient evidence.

#### 4.2 Three strategies for legal and social reform

Appellate courts have repeatedly reversed convictions after jurors received sentencing information that may have led to an improper verdict. SAUER 1995 observes that these cases fall into a pattern: “Many of these cases involve the judge, prosecutor, or other court officer mentioning, either spontaneously or in response to juror requests, the possibility of parole or a lenient sentence” (1242). This suggests a natural strategy for modest reform—namely, instructing the jury about sentencing only at the request of the defendant. It is reasonable to expect that instructions requested by a defendant would be unlikely to cause jurors to convict them on insufficient evidence. Several legal scholars have advocated for reforms of this sort, proposing sample jury instructions such as the following:

If you, jurors, find the defendant guilty, this court will be required to sentence her to no less than a mandatory term of x years. The defendant has requested that you receive this information so that you can come to an informed determination of the defendant’s guilt or innocence with full knowledge of the risk to defendant’s freedom at stake. You, jurors, have a duty to apply the law as given by this court to the facts as you find them, and to reach a verdict without bias or prejudice.<sup>54</sup>

Jury instruction on sentencing could be further limited to instruction on mandatory minimum sentences, thereby excluding information about statutes of limitations for various crimes. In 2013, Oregon State Senator Chip Shields sponsored a state Senate bill requiring courts to inform juries of mandatory minimum sentences for certain offenses.<sup>55</sup> Although the bill was not adopted, its introduction suggests that state legislators may be motivated to pursue this first strategy for legal reform.

A second strategy for reform is much more radical: State and federal rules of evidence could be revised to incorporate a broader notion of evidential relevance. According to the current Federal Rules, evidence is relevant if and only if: “(a) it has any tendency to make a fact more or less probable than it would be without the

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54. SAUER 1995, p. 1270. For additional sample instructions, see BARTELS 1981, p. 930; CLARK 1999, p. 2446; and CASSAK & HEUMANN 2007, p. 488–9.

55. S.B. 464, 77th Oregon Legislative Assembly, 2013 Reg. Sess. (Oreg. 2013)

evidence; and (b) the fact is of consequence in determining the action.”<sup>56</sup> In other words, evidence is relevant just in case it confirms or disconfirms some fact at issue. However, there is another broader understanding of what it means for evidence to be relevant to the jury as they form their beliefs—namely, evidence can be relevant not only in virtue of determining the strength of the case against the defendant, but also in virtue of determining the standard by which this strength must be measured.

Suppose you see someone selling brownies, and you ask them whether the brownies contain chocolate. Is it relevant that you are fatally allergic to chocolate? There is more than one sense of relevance to be examined here. Narrowly speaking, the fact that you have a fatal allergy is not at all relevant to whether the brownies contain chocolate—that is, the former fact does not substantially confirm or disconfirm the latter. But broadly speaking, the fact that you have a fatal allergy is highly relevant when you ask whether the brownies contain chocolate. If your decision to buy and eat the brownies depends on what answer you get, then you should clarify what’s at stake when you ask your question. Your allergy is not evidentially relevant, but it is functionally relevant—in particular, relevant to the norms governing what your interlocutor should assert. Put another way, following the Gricean maxim of relevance typically involves making assertions that are relevant in a narrow sense—namely, evidentially relevant for the question under discussion. But in some cases, assertions are relevant in a broader sense—namely, relevant to the norms governing our conversation. We should adopt a similarly broad understanding of what it takes for evidence to be relevant in the context of a trial. Although evidence is typically relevant in virtue of bearing on some fact at issue, it can also be relevant in virtue of bearing on the norms governing juror deliberation.

There is some precedent for understanding this broader notion of relevance as consistent with the Federal Rules of Evidence. In *Old Chief v. United States*, the Supreme Court considered the question of whether a defendant could simply admit to a fact in order to ensure that evidence offered to prove it would not have probative value, thereby rendering that evidence inadmissible. The Court held that on the contrary, the prosecution is generally entitled to prove its case in the matter it sees fit. In particular, even though further evidence cannot raise the probability of a fact to which the defendant has already admitted, that evidence may still have *narrative* relevance.<sup>57</sup> The Court explained:

Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support con-

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56. FED. R. EVID. 401

57. The term ‘narrative relevance’ is due to LEMPERT 2002.



clusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.<sup>58</sup>

Hence in *Old Chief*, the Court recognized that relevance cannot be entirely understood in terms of probabilistic confirmation, and that evidence may also be relevant in virtue of helping the jury fulfill their legal obligations. Sentencing information is relevant in just this sense. The jury is obligated to convict the defendant if and only if guilt has been proved beyond a reasonable doubt. In order to satisfy this obligation, jurors must be able to tell whether this condition obtains, and so evidence can be relevant in virtue of clarifying the epistemic standard that should govern their deliberation.

As with the first strategy, this second strategy of reform need not significantly increase the risk of improper conviction. If a judge determines that sentencing information would likely lead a jury to convict without sufficient evidence, then she may rule that the information is unfairly prejudicial and hence inadmissible despite its relevance. Similarly, a judge could in principle decide to exclude relevant evidence on the grounds that it would likely lead a jury to nullify. Again, in this paper, I am not addressing empirical questions—such as, for instance, whether judges should often worry that juries will unjustly convict or nullify. The upshot of my argument is that by its very nature, sentencing information is relevant in a broad sense, which is the sense that should matter for admissibility. Therefore sentencing information should be subject to the same rules as any other relevant evidence. Absent independently grounded statutes governing the admissibility of sentencing information, its admissibility should be left to individual judges to decide.

A third strategy for reform is to directly address the problem of juror ignorance through public education campaigns. Admittedly, some sentencing information is specific to each trial. The stakes of conviction may be especially high in virtue of an individual defendant's prior convictions or immigration status, for instance. However, some information is both relevant to jurors and widely available, such as information about mandatory sentencing laws. A large majority of the public have misconceptions about sentencing that could be addressed through public education.<sup>59</sup> Perhaps more importantly, the central argument of this paper supports informing potential jurors of the full range of costs that arise from a conviction. Consider the risk that a convicted person will be a victim of sexual assault or other violent crime in prison.<sup>60</sup> Consider

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58. *Old Chief v. United States*, 519 U.S. 172 (1997)

59. For discussion of public misconceptions and communication strategies that could address them, see PICKETT et al. 2015.

60. WOLFF et al. 2006, BOXER et al. 2009, BUCHANAN 2012

the collateral consequences of a felony conviction, including barriers to housing, employment, and education.<sup>61</sup> Consider the social costs of incarceration, including its consequences for families, communities, public health, and racial justice.<sup>62</sup> When jurors fail to consider these costs, they may fail to understand what's at stake in their verdict. Without education or legal reform, such jurors will fail to know what is required to prove a defendant is guilty, and consequently, they may fail to play their proper role in the administration of justice.

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61. PINARD 2010, LUNDGREN et al. 2010, MIDDLEMASS 2017

62. FINZEN 2005, WAKEFIELD & WILDEMAN 2013, PRATT 2019

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