A KANTIAN & COMMUNICATIVE APPROACH TO CRIMINAL ADJUDICATION

Jason R. Steffen†

TABLE OF CONTENTS

INTRODUCTION

In Anglo-American legal systems, a suspect in a criminal case becomes a defendant when formally charged by the prosecutor—which may involve a grand jury indictment in some jurisdictions. In theory, the defendant eventually stands trial in front of a jury, whose members deliberate about evidence in the case and come to a unanimous conclusion about whether the government has proven that the defendant is guilty. The defendant has the support of an attorney, who confronts the state's prosecutor. Both lawyers present their side of the case by calling and questioning witnesses, presenting evidence, and making arguments to the jury about the defendant's guilt or innocence. The outcome of the

† JD, Harvard Law School; PhD, University of Minnesota-Twin Cities. Presently Assistant Public Defender, State of Minnesota Board of Public Defense; and Adjunct Professor of Law, Mitchell Hamline School of Law. I am especially grateful to Antony Duff, who provided many insightful comments on a prior version of this paper; I also benefitted from valuable input given by Sarah Holtman, Michelle Mason, and Peter Hanks.

trial determines the defendant's fate; an acquittal means that the defendant can never be retried for the same crime, while a conviction brings the promise of punishment (which can again involve juries but is more frequently the province of a judge).

Although the precise procedures vary, sometimes significantly between jurisdictions, the fundamental point is that our criminal justice system grants defendants a right to a particular kind of adjudicative process: an *adversarial jury trial*. There are two conceptually separate elements here: the characterization of the adjudicative process as adversarial and the use of the jury as a procedural mechanism. The process is adversarial, in that the prosecution and the defense are pitted against each other; prosecutors and defense attorneys are, within ethical limits, bound to represent the perspective of the government or their clients (rather than, say, being neutral with respect to the defendant's culpability). The jury, meanwhile, is the mechanism by which we determine which side in the contest is right; jurors listen to both the prosecution and the defense and, ideally, come to a unanimous decision based on deliberation about the evidence each side presents at trial. While both of these elements merit scrutiny, my focus in this article shall be on the trial as a jury-centered system.

One reason for this focus is that the jury has been a fixture of Anglo-American law for centuries.[1] In various forms its use has been recorded at least as far back as ancient Athens, as portrayed in Plato's *Apology*.[2] In the United States, the jury is often regarded by legal commentators as a "cornerstone of democracy."[3] Defendants in criminal cases have a constitutional right to trial by jury.[4] Even readers who are unschooled in esoterica of the law are likely to be familiar with the form and function of the jury, particularly in criminal cases; "courtroom drama" has become its own subgenre of popular literature and film, and the evening news

1. For a historical perspective on the rise and development of the jury in English law, see ANTONY DUFF ET AL., THE TRIAL ON TRIAL: VOLUME 3: TOWARDS A NORMATIVE THEORY OF THE CRIMINAL TRIAL 17–53 (2007).

2. *See* PLATO, *Apology*, *in* THE TRIAL AND DEATH OF SOCRATES 20–54 (G. M. A. Grube, trans., Hackett, 3rd ed. 2000).

3. ALBERT Dzur, PUNISHMENT, PARTICIPATORY DEMOCRACY, AND THE JURY 6 (2012).

4. *See* U.S. CONST. art. III, § 2, cl. 3; *see also* U.S. CONST. amend. VI. The Sixth Amendment right to trial by jury in criminal cases has been held to apply to the states via the Fourteenth Amendment. *See* Duncan v. State of Lousiana, 391 U.S. 145, 149 (1968). A significant exception is that the right does not apply, unless decided otherwise under state law, in most cases where the defendant faces no more than six months incarceration. *See* Cheff v. Schnackenberg, 384 U.S. 373, 379–80 (1966). In some states, the result is that most misdemeanor defendants do not have a right to a jury trial.

would not be complete without some attention devoted to the latest high-profile murder trial.[5]

Despite such a history and presence in our law and culture, criminal jury trials are increasingly uncommon. Though exact measures vary, it appears that the percentage of cases resolved via jury trial is well below five percent.[6] Not only do jury trials seem to be disappearing, but their loss is unlikely to be mourned by many. Citizens in the United States generally dread the notion of being forced into jury duty,[7] and many legal professionals regard the jury with skepticism.[8] All this has led some scholars to worry that "[t]he criminal trial is under attack."[9] Of course, this sentiment assumes that we have good reason to care about the decline of the jury. But how can we be sure that the waning of the jury system is not a desirable, or at least acceptable, process?[10]

This question is all the more significant because an adversarial jury trial is certainly not the only kind of adjudicative process we could envision. Other countries with modern criminal justice systems do not follow the Anglo-American model. Their adjudicative processes may be less adversarial, and they may not rely on juries, or plea-bargaining, to the same extent that we do. In the German system, for example, the criminal trial is viewed "not [as] a contest between parties, but [as] an objective, judge-led inquiry into the material truth of the facts underlying

---

5. *See* LLOYD WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES ix (1977). This is not a new phenomenon, though arguably its effects have intensified in the popular imagination. Over four decades ago, Lloyd Weinreb referred to the adversarial trial, pejoratively, as "an arena for pyrotechnics, where manipulative ability is prized and tactics and strategy determine professional conduct . . . ." *Id.*

6. *See, e.g.*, THOMAS H. COHEN & TRACEY KYCKELHAHN, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2006 11 (2006). This Bureau of Justice Statistics report is based on data from the 75 largest counties in the United States, where approximately 58,100 defendants were charged with felony offenses during one month and puts the rate of trials at 4%. *Id.* at 1, 11. A similar study a few years later put the felony trial rate at 2% and the misdemeanor trial rate at less than 0.5%. *See* BRIAN A. REAVES, U.S. DEP'T OF JUST., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009, —STATISTICAL TABLES Table 21 (2009). Though one might quibble with the accuracy of such statistics (they include all people *charged* with crimes, even if their cases were dismissed before resolution via plea or trial), other sources concur that the percentage of jury trials is notably small, probably in the single digits. *See, e.g.*, DZUR, *supra* note 3, at 6 (putting the figure at "around 5 percent or lower").

7. See, for example, Dzur's description of a typical juror's experiences in the courtroom. DZUR, *supra* note 3, at 6–8.

8. *See* DZUR, *supra* note 3, at 5–6.

9. DUFF ET AL., *supra* note 1, at 1; *see also* DZUR, *supra* note 3, at 6.

10. For example, Dzur discusses the work of one scholar who argues that the comparatively punitive (by most academic accounts, *overly* punitive) nature of American criminal justice has been avoided in Europe by the professionalization and bureaucratization of criminal justice. *See* DZUR, *supra* note 3, at 151 (citing JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 12 (2003)).

a criminal charge."[11] France utilizes juries in only a few cases and places more authority in judges, who are charged with investigating some types of crimes independently of the police.[12] It would probably be an exaggeration to assert, as one critic has, that "[n]o one who took careful account of the purposes for which we have a system of criminal justice . . . would set up the process we actually have."[13] Still, it is worth asking whether it makes sense to continue to endorse a flagging institution that other apparently well-functioning societies do without.[14]

As a theoretical matter, then, the problem is this: which method of adjudication, if any, is the *right* one? Does it matter whether we use a jury at all, or should we instead rely on professional judges? Even if we could settle the theoretical question, however, we may still have a practical worry: given the apparent demise of the jury trial, what do we do about the "huge gaps between the glowing regard for the jury in mainstream legal theoretical rhetoric . . . and its diminished capacity in practice"?[15] How can we save the jury trial system, assuming there is good reason to save it in the first place?

In this article, I argue that the jury system does serve an important function within Anglo-American criminal law and should, therefore, continue to be utilized—though in somewhat different ways than we currently do. Before doing so, however, I begin, in Section I, by contrasting two salient views of adjudication present in legal-academic literature: the instrumentalist model and the communicative one. I shall argue that the communicative view is more compelling. Then, in Section II, I will suggest that the communicative model shares some key features of Kantian political theory and fills in a gap in Kant's own work. At the same time, Kantian theory provides the communicative model with a stronger normative foundation than it has standing alone. In Section III, I shall explain why the use of juries in Anglo-American criminal trials reflects a commitment to values found in the Kantian-communicative theory. Finally, in Section IV, I will suggest one practical reform that

11. MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 10 (2009).

12. *See* Dan MacGuill, *France ends 'costly' jury trial experiment*, LOCAL (March 19, 2013), http://www.thelocal.fr/20130319/france-ends-jury-trial-experiment. Several years ago, France conducted an "experiment" with increasing its use of juries; critics say the program made criminal cases more expensive, and that lay jurors were ill-equipped to decide criminal cases. *Id*.

13. WEINREB, *supra* note 5, at 144.

14. Anecdotally, I once had a conversation with a lawyer from the Netherlands who stated that she found the very idea of the jury to be "unsettling." I suspect that her reaction might be commonplace among those used to a purely professionalized justice system.

15. DZUR, *supra* note 3, at 12; *see also* WEINREB, *supra* note 5, at 72 ("In view of the infrequency of a trial in this country, our insistence on the superiority of the trial model is somewhat lame").

would move our adjudicative system in a more Kantian, communicative direction: increase the use of juries at the sentencing phase of criminal cases.

I. ADJUDICATION: TWO VIEWS

The purpose of this Section is to present a compelling theoretical explanation of adjudicative procedures in the criminal law. Rather than starting from scratch, however, I shall contrast two extant views or models of criminal adjudication. The first is an instrumentalist or truth-seeking account, and the second a communicative one. I will argue that the latter provides a more compelling way of conceptualizing criminal adjudication than the former. Then, in Section II, I will explain the importance of the communicative model to Kantian theory. In Section III, I will examine the importance of the jury within this Kantian-communicative framework.

A. Instrumentalism & the Truth-Seeking Model

An instrumentalist approach to adjudication sees the sole purpose of the criminal trial to be the search for truth.[16] Thus the jury trial is often referred to as a "fact-finding" mechanism. At the outset, I should note that this terminology is imprecise. There are in reality several types of determinations a jury might be asked to make. For example, a jury might find that the defendant shot the victim in the chest, and that this gunshot wound was the actual cause of the victim's death. However, the jury might also decide that the defendant is not guilty of murder, because he acted in self-defense. I shall discuss these different types of jury determinations in more detail below in Sections III.A and III.D. For the moment, it is sufficient to think of the instrumentalist as being primarily concerned with the various facts that answer the primary question at issue in the adjudicative phase: did the defendant commit the crime(s) charged?

The instrumentalist account seems to be implicit in both consequentialist and retributive accounts of criminal justice. Consequentialists normally view deterrence and incapacitation as primary goals of the justice system, though some rehabilitative models might also be viewed as consequentialist.[17] Naturally, accurate verdicts will normally produce optimal consequences: convicting guilty people will prevent them from committing further offenses and will deter others from doing likewise. Rehabilitating criminals likewise depends on convicting them.

16. *See* DUFF ET AL., *supra* note 1, at 62.

17. *See* ANTONY DUFF ET AL., THE TRIAL ON TRIAL: VOLUME 1: TRUTH AND DUE PROCESS 21 (2004).

Strictly speaking, consequentialists should not care *only* about accurate verdicts: they might need to consider, for example, whether the trial process produces other outcomes, such as rendering the verdict acceptable to the community. It is conceivable that accurate verdicts might, in some instances, lead to undesirable consequences—or that favorable consequences could be attained via inaccurate verdicts. Still, concerns about crime control militate strongly in favor of accurate verdicts in most cases. A system that produced many incorrect verdicts (particularly false acquittals) would fail to control crime successfully or (in the case of false convictions) would fail to gain the widespread support needed to maximize its efficacy. And certainly those favoring a rehabilitative model would need to be sure that those subjected to rehabilitation were, in fact, those who committed the offenses in question.

Meanwhile, for those with more retributivist inclinations, accuracy ensures that wrongdoers are correctly singled out for the harsh penal treatment they deserve.[18] Indeed, the retributivist may be even more concerned with accuracy than the consequentialist, who may be prepared to countenance some proportion of false verdicts in order to maximize efficiency. A properly functioning retributive system requires that all those, and only those, who have committed crimes are convicted and punished. Thus, for the retributivist, adjudicative procedures succeed only insofar as they correctly identify those who deserve to be punished.[19]

On both views, then, the purpose of the trial is to serve other ends: crime control or rehabilitation on the one view and punishing deserving offenders on the other. And "the trial can serve such goals as these only because it presents itself as a search for accuracy or truth: as an attempt to establish whether this defendant committed this crime."[20] On the instrumentalist view, trials may be influenced by other considerations or "side-constraints," but these reflect "external" values that "do not flow from that aim [i.e., truth-seeking], and might indeed hinder its pursuit."[21] Thus, on this view the trial is entirely contingent: fact-finding might reasonably take other forms, if determined to be accurate methods of obtaining correct verdicts.[22] Likewise, the importance of the jury must

18. *See id.* at 59.

19. *See* DUFF ET AL., *supra* note 1, at 61; *see also* WEINREB, *supra* note 5, at 1 (asserting that "[t]he function of the criminal process is to determine criminal guilt with a view toward imposing a penalty").

20. DUFF ET AL., *supra* note 1, at 63.

21. *Id.*

22. Suppose that scientists devised a Verdict Machine which was able to determine with perfect accuracy whether a suspect committed a crime. The utilitarian and the retributivist have no recourse for objecting to a justice system that substituted use of the Verdict Machine for the trial. Indeed, the Verdict Machine need not be 100% accurate in order to satisfy the instrumentalist: it need only be more accurate than the trial system.

reflect the extent to which it succeeds in promoting the fundamental truth-seeking aim of the trial. Instrumentalists see no overridingly important reason to favor a *jury* trial over any other kind—what matters most fundamentally is, simply put, discovering whodunit.

The instrumentalist approach is exemplified by Larry Laudan's work on the epistemic impact of legal rules on criminal verdicts.[23] Laudan argues against many of the procedural and evidentiary rules that operate within American criminal courts, on the theory that they are inimical to the truth-seeking function of the trial. He calls for an increase in juror participation in criminal trials; he thinks that admitting *all* evidence to the jury will result in more epistemically favorable outcomes.[24] Whether or not he is right about this, it is clear that the jury is only important on Laudan's account insofar as it serves an epistemically beneficial function within the criminal justice system. Other theorists take a different approach to the reform of the criminal process, but also assume, like Laudan, that "[t]he function of the criminal process is to determine criminal guilt"[25]—and nothing more.

B. The Communicative Model

An alternative to the instrumental account is the communicative model.[26] Acts are properly criminalized on this view only if they are legitimately viewed as wrongs which are matters of public concern within a democratic political community. Legal procedures, including the criminal trial itself, are conceived as communicative enterprises whose aim is to declare the public norms that the criminal law embodies and to "call to account" actors who violate those norms.[27] Punishment, meanwhile, is conceived as a form of "punitive communication: it censures the offender for her crime and involves intentionally burdensome reparation for that crime."[28]

From the communicative perspective, then, the purpose of the criminal trial itself is to call a defendant to answer for alleged wrongdoing. Of course the trial "aims at truth . . . but that truth is to be

23. *See generally* LARRY LAUDAN, TRUTH, ERROR, AND CRIMINAL LAW: AN ESSAY IN LEGAL EPISTEMOLOGY (2006) (discussing the appropriate rules of evidence and procedure that would apply if the primary goal of courts was to discover the truth).

24. *See, e.g.*, *id.* at 121. Laudan is insufficiently clear about why he thinks jury trials have an epistemic advantage over other non-jury models.

25. WEINREB, *supra* note 5, at 1.

26. *See* R. A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 79 (2001). The communicative view might be seen as a further development of the "expressivism" suggested notably by JOEL FEINBERG, *The Expressive Function of Punishment*, *in* DOING AND DESERVING 95–18 (1970).

27. *See* DUFF ET AL., *supra* note 1, at 218.

28. DUFF, *supra* note 26, at 97 (emphasis omitted).

expressed in a normative judgment that declares the defendant's guilt, and thus condemns her . . . or clears her name."[29] On this view, the problem with the instrumentalist model is not necessarily that it is *wrong*; rather, it is incomplete, for it "fails to capture the intrinsic importance of the attempt to establish and declare the truth that a trial should involve."[30] The communicative aspect of the adjudicative process—in which the norms embodied in the criminal law are expressed, reiterated, and challenged—is absent from the instrumentalist account.

This non-instrumentalist view of truth-seeking is consonant with the way we view the criminal trial in our society. If we were pure instrumentalists about truth, then accurate verdicts would be all we cared about—or at least this would be our primary concern.[31] But accurate verdicts, while important, do not reflect the significance that citizens attach to the judgments of criminal courts. Criminal trials do more than elucidate facts—they communicate collective values.[32] Convictions are more than statements of fact—they are condemnatory judgments.[33] Criminal courts are viewed as having the right or authority to express such condemnation—but such "epistemic warrant" surely cannot derive merely from the fact that a defendant has been found to have committed an offense.[34]

This is not to say, of course, that we as citizens *always* care deeply about the judgments of criminal courts. Indeed, the average citizen is likely to be aware of only a tiny fraction of criminal judgments even within his local jurisdiction. It is also the case, however, that many citizens are aware of, and care about, high-profile criminal cases within their political communities.

To use a contemporary example, many citizens in the United States are aware of recent incidents involving alleged police mistreatment of citizens. Some Americans, particularly those in minority communities,

---

29. DUFF ET AL., *supra* note 1, at 128.

30. *Id*. at 64.

31. *See id.* at 88; *cf.* LAUDAN, *supra* note 23, at 2 (claiming that "a criminal trial is first and foremost an *epistemic* engine, a tool for ferreting out the truth . . . ").

32. *See* DUFF ET AL., *supra* note 1, at 82.

33. *See id.* at 127.

34. *Id*. at 90. The normative view of the trial also explains why we should still consider our system successful when it sometimes does not achieve epistemically ideal results.

> The attempt to establish truth can be of significant value even when it fails. Suppose that a defendant, whom the victim knows to be guilty, is acquitted because the prosecution cannot prove his guilt beyond a reasonable doubt (or even on a "technicality"). In one way, of course, the trial has failed . . . but in another way, as a search for truth that also respects such values as the presumption of innocence, it has been a success . . .

Id. at 83.

have expressed a lack of confidence in the police and, more generally, in the criminal justice system.[35] A lack of prosecutions and convictions of officers in many of these cases may be perceived as evidence that the justice system fails to speak for all citizens. A conviction under these circumstances would, to many people, mean more than a mere decision about facts would suggest. Rather, the response would be relief that a collective condemnation of police misconduct has been expressed by the jury on behalf of all citizens.[36]

On a smaller scale, I once participated in a trial where a woman was accused of murdering her husband. Few people outside of the family were aware of this case—certainly it did not make the national news. Yet upon the jury's conviction of the defendant, the daughter of the decedent cried out in the middle of the courtroom, "You killed my father!" and burst into tears of relief. Her statement was not merely one of fact, of course—she had been convinced for the several years leading up to the trial that her step-mother was responsible, so it is unlikely that the jury verdict was relevant to her as an epistemic matter. What mattered to her was that the jury had *condemned* the defendant, had judged her to be responsible for this grave wrongdoing, and had done so in a way that carried the weight of the community's punitive authority.

We should, too, consider the seriousness with which we take cases of *mistaken* convictions. Advocacy groups such as the Innocence Project have raised public awareness of the fact that a disturbing number of people who are convicted of serious crimes and have spent many years in prison—or even been executed—are in fact innocent. Describing such cases merely as instrumental failures seems intuitively inadequate. The visceral response that many of us have to such cases shows that more is at stake than mere epistemic accuracy. We feel terrible that we, as a community, have judged these people wrongly; we demand that the government compensate them in some way for the many years of suffering that they have unfairly borne. We also support efforts to remedy the epistemic inadequacies of the trial process in order to send the

35. Normative view of the trial also explains why we should still consider our system successful when it sometimes does not achieve epistemically ideal results. "The attempt to establish truth can be of significant value even when it fails. Suppose that a defendant, whom the victim knows to be guilty, is acquitted because the prosecution cannot prove his guilt beyond a reasonable doubt (or even on a 'technicality'). In one way, of course, the trial has failed . . . but in another way, as a search for truth that also respects such values as the presumption of innocence, it has been a success . . ." *Id.* at 83.

36. This is not to say, of course, that it would be justifiable to convict someone merely to send a message to the community. Such a view would license the intentional conviction of the innocent. The point is, rather, that if one of the accused persons in these cases were rightly convicted, then the conviction would have more than mere epistemic value to the community.

message that we, as a polity, care about our failure to make an appropriate normative judgment of innocence in such cases.

The communicative model is therefore quite convincing insofar as it explains many intuitively important features of criminal trials, at least in Anglo-American systems. In the following Section, however, I will suggest that the communicative model would benefit from being reframed from a Kantian perspective.

II. KANTIAN THEORY & THE COMMUNICATIVE MODEL

At this point, the obvious question is why we need, as I suggested in the introduction to this article, to turn to Kant? That is, if the communicative model of criminal justice adequately addresses questions about a jury-centered system of adjudication, then why not endorse communicative theory and move on? The answer has to do with a problem with the communicative approach: its lack of a groundwork in political theory. Now communicative theorists do not view this as a problem. Indeed, they think it advantageous to remain agnostic about the details of specific political theories. Doing so, however, has some disadvantages—notably the inability to make normative judgments about states of affairs in societies that reject communicative norms.

A prominent proponent of the communicative approach, Antony Duff, has argued that the search for a "unitary grand theory" of criminal justice is misguided.[37] Indeed, one of Duff's primarily philosophical targets here is Kant himself, though he also discusses contemporary examples.[38] The main problem that Duff has with the Kantian approach is the way in which it makes "universal, ahistorical" claims about political matters: what constitutes a just society, for example. Thus he avers that "[w]e should not assume (as too many theorists tend to assume) that we can create a rational and properly limited system of criminal law only if we can articulate a single master principle, or set of principles . . . ; the search for such a principle or set of principles is doomed to failure."[39]

37. DUFF, *supra* note 26, at xiv.

38. *See id.* at xvi.

39. R.A. Duff, *Towards a Modest Legal Moralism* 16 (Univ. of Minn. L. Sch. Legal Stud., Research Paper No. 12–28, 2012), http://ssrn.com/abstract=2103317. The context here is a discussion of criminalization, but Duff would surely say the same about an attempt to formulate universal principles of adjudication. *See* DUFF, *supra* note 26, at xvi (using the phrase "doomed to futility."). One motivation for this assertion may be that Duff has a particular perspective about the way philosophy works: "Philosophy must always begin from actual human practice, with the concepts and values embodied in and given meaning only by such practice." *Id.* at xv. This is a broad claim, but I do agree that, at least in the context of practical philosophy, it is hard to see how else to broach whatever subject one has in mind. Developing a theory of political or moral importance seems obviously to require some attention to human practices: we would not worry about the moral permissibility of

It might help to distinguish two different objections at work here. The first could be lodged against what we might term theoretical *Unitarianism*: the search for a "single master principle" to explain something—in this case, what set of institutions and practices should be used in adjudicating criminal cases.[40] The second objection could be directed against theoretical *Universalism*: the claim that such a unitary principle, if discoverable, will be valid under any set of circumstances—in this case, all criminal justice systems in any polity throughout time and space.[41]A theory could, of course, be unitarian without being universalist. For example, one could attempt to show that criminal cases *in the United States* should be adjudicated according to theory X. Providing support for this claim would not necessarily advance a universalist proposition, such as: wherever there exists a criminal justice system, adjudication must proceed according to X.

One could develop a theory that is unitary but non-universalist (or at least non-necessarily universalist). It would be a substantial step forward for Anglo-American criminal law if we could determine which principle (or principles) of adjudication are most compelling *for us*. Even if it turned out that those principles were not transferrable into different kinds of legal systems (such as those found in continental Europe), we would have made progress toward a more coherent model of criminal justice. Philosophers such as Duff, who are opposed to grand theories in general, might be open to such a unitary (but non-universalist) project.

Still, I believe there are reasons why working toward a universalist theory might be desirable. To see why, I shall first need to give a brief summary of Kant's political theory, as I view it.[42]

The Kantian concept of justice can be broken down into two sub-concepts: civic freedom and civic virtue. Civic freedom is attained when citizens of a political community conform their actions to the requirements of ideally just laws.[43] Whether an action is in fact in compliance with justice can be determined by reference to the Universal

---

punishment, for example, if we never actually punished anybody. I am less skeptical, however, about the possibility of discovering "grand principles" even from such a modest starting point. *See* Duff, *supra* note 39, at 16.

40. Duff, *supra* note 39, at 16.

41. *See id.*

42. For a longer treatment, see Jason R. Steffen, *Criminalization: A Kantian View*, 12 WASH. U. JURIS. REV. 27, 32–48 (2019). For a useful overview of the extant competing interpretations of Kant's political theory, see generally SARAH HOLTMAN, KANT ON CIVIL SOCIETY AND WELFARE (2018) (taking into account the competing interpretations of Kant's political theory in developing an alternative model based in civic respect).

43. *See* IMMANUEL KANT, *On the Common Saying: That May Be Correct in Theory, But It Is of No Use in Practice*, *in* IMMANUEL KANT: PRACTICAL PHILOSOPHY 273, 293 (Mary Gregor ed. & trans., 1996).

Principle of Right (UPR): "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law."[44] The UPR ensures a maximal level of individual freedom of choice, to the extent that these choices are compatible with others' freedom.[45] To use an obvious example, murdering a fellow citizen, though it may advance my ends, would be incompatible with her own, and would therefore violate the UPR. Peacefully practicing my religion, on the other hand, is both important to my ends and compatible with others'. Thus, a law guaranteeing freedom of religion is compatible with the UPR, as is a law criminalizing murder.

Civic virtue, meanwhile, refers to the way in which ideal Kantian citizens view themselves and others. Such citizens would be concerned for the freedom, equality, and independence of all citizens.[46] They would do more than simply refrain from violating the UPR—the minimal condition for justice—but would actively work to ensure the protection of other citizens' freedoms. What civic virtue requires of us is more context-dependent than civic freedom. For example, if one lives in a society with a long history of racial injustice (as in the United States), then one might have a greater obligation to pursue activities designed to raise awareness of this problem than if one lives in a society without such a history. I shall have more to say about civic virtue in the context of the adjudication of criminal cases in Section III.E. below.

Kant is not alone, of course, in attempting to describe the philosophical contours of a just society, the most famous contemporary example of which is John Rawls' *Theory of Justice*.[47] But anti-universalists reject these philosophers' "aspir[ations] to a radically transcendent theory, one that will establish some set of universal,

---

44. IMMANUEL KANT, THE METAPHYSICS OF MORALS 24 (Mary Gregor ed. & trans., 1996).

45. *See id.* The idea here is similar to the first of Rawls' Two Principles of Justice: "each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others." JOHN RAWLS, A THEORY OF JUSTICE 53 (rev. ed. 1999).

46. KANT, *supra* note 43, at 91. Kant, of course, gives these terms his own particular meaning. To uphold others' freedom is to be "united in giving law"—that is, sharing a commitment to, and willingness to participate in, the shaping and upholding of just laws that ensure the freedom of all citizens. *Id*. Equality refers to the idea that each citizen has coercive rights against each other and is "subjected to coercive right equally." *See* KANT, *supra* note 44, at 292. In other words, the exercise of my freedom is limited by the ability of other citizens to enforce their own rights against me; moreover, I can trust that my own rights will be enforceable against others, no matter their rank or status in society. Finally, ideal citizens are "colegislator[s]" of the public law. *Id*. at 294. That is, they will support laws conducive to and necessary for the preservation of all citizens' ability to pursue their ends.

47. *See* RAWLS, *supra* note 45, at xviii (attempting to generalize and carry to a higher order or abstraction the theory of social contract as realized by Locke, Rousseau, and Kant).

ahistorical principles . . . from which we can derive an a priori account of how political society should be structured."[48] Rather, they seek a theoretical account based on "a particular, historically contingent, normative understanding of political society."[49] Duff, for example, argues that certain values will play an important part in contemporary Western political communities:

> the political and procedural values of liberal democracy; welfare values concerning the physical, psychological, and material goods that matter to us simply as human beings or as preconditions of the pursuit of any substantive conceptions of the good . . . ; and "other-regarding" values concerning the community's relations to nonmembers, both human and nonhuman.[50]

Duff is convinced you cannot derive these from some primary value, despite the desire of those "tempted by value-monism" to do so.[51] Thus he expresses hesitancy about privileging the liberal state (as thinkers such as Kant and Rawls do) above others: it is impossible to "*prove* that we should favor this liberal-communitarian perspective" because such "'proof' is [not] available in normative political theorizing."[52]

Kant, by contrast, argues that a certain type of state is better than another—that there is such a thing as a living under a "rightful condition"[53] and, by extension, any number of *wrongful* ones. This does not mean that Kant thinks there is only one right way of, say, enacting legislation or arranging the court system. It does mean that he is willing to condemn certain types of political arrangements: those which fail to acknowledge the freedom, equality, and independence of their citizens. Such regimes oppose the very essence of humanity—our status as autonomous moral agents. For example, North Korea is presently a paradigmatically autocratic state. A Kantian has good reason to say of the North Korean regime that it fails to comport with the most basic requirements of justice: its citizens do not enjoy anything approaching civic freedom. An anti-universalist must, it seems, content herself with the observation that North Korea's political values do not conform to Western conceptions of justice.

This latter response strikes me as morally inadequate. As an example that attempts to capture this intuition, consider the problem of the United States' indefinite detention of suspected terrorists in the post-9/11 world. If one were to object that this unabashed denial of due process violates

48. DUFF, *supra* note 26, at xvi.
49. *Id.* at xvi–xvii.
50. *Id*. at 47 (internal citations omitted).
51. *Id*.
52. *Id*. at 55.
53. KANT, *supra* note 43, at 89.

the value of *freedom*, then the government might reply as follows. "We thought freedom was important, but now we see that security is, in fact, more important than freedom. And since there is nothing *fundamentally* important about freedom—since it is merely a socially constituted value, like security—then you have no (philosophical) grounds for objecting to our policy." One might, of course, point out that the state is being hypocritical: it talks about freedom, mentions the value in its constitution, and so on. Americans clearly care about freedom, so the government ought to respect it. But while releasing indefinitely detained prisoners (or at least granting them trials and other requirements of due process) because it is consistent with other American values, or is required by the United States Constitution, might be fine from the perspective of the prisoners or their lawyers, it does not seem to capture the reason why doing so is necessary as a matter of justice. The anti-universalist seems committed to the view that indefinite detention might not be wrong under certain circumstances, under certain regimes, provided that it were otherwise consistent with that regime's values. Indefinite detention may not be unjust in North Korea, on this view, because North Korea as a society has no special commitment to freedom.

The anti-universalist might view this result as an inevitable limitation on political theorizing. Kant, on the other hand, is prepared to offer a different reply. Indefinite detention is categorically unjust, on the Kantian view, because it is incompatible with the "rightful condition" of a just society—it violates the UPR by impermissibly using some citizens as means to an end (security), effectively ensuring one group's freedom at the expense of another's. Both North Korea and the United States are therefore committing an injustice by engaging in indefinite detention. This is not to say, of course, that they are equally culpable in this practice.

My contention is that the Kantian view is preferable insofar as it avoids the situation where the anti-universalist is unable to make definitive statements about intuitively unjust practices occurring outside her own society (or those structured similarly to her own). In this way, the purported superiority of the Kantian view is similar to that of the moral objectivist over the moral subjectivist. The latter is unable to justify his outrage over certain practices he finds immoral, but which are considered permissible by others.

The anti-universalist may simply assert that I am wrong—that the Kantian approach is unreasonable because, one assumes, there will always be disagreement across societies over matters of justice. To such an assertion, I am uncertain as to what other kind of argument could be mustered than the one, I have already given here. If one is fundamentally committed to distancing oneself from universalist theories, then the Kantian approach I have presented here will certainly be unsatisfying.

But I do not see that anti-universalists have any compelling reason for *dis*favoring the Kantian approach, other than the merely aesthetic notion that theories which aspire to universal values do not *seem* like the best kind of theories.

Given that Kantian theory provides a superior explanation for our intuition that some practices are unjust regardless of their social context, it seems to me that the burden is on the anti-universalist to show exactly what is wrong with it. But if one is at least willing to entertain the notion that a universalist approach is superior to the more limited one typically endorsed by communicative theorists, then one might wonder why we should not simply turn to Kant to formulate our model of adjudication. That is, why have I bothered to introduce the communicative model at all?

First, we have the problem of limited Kantian resources. Throughout his writings on moral and political theory, Kant has very little to say about the adjudication of criminal cases.[54] True, we can glean some broad adjudicative principles from Kant's moral theory. A respect for citizens' humanity will rule out some obviously unjust procedures, such as the medieval practice of trial by ordeal. Somewhat more specifically, in Kant's view, free citizens should be considered "beyond reproach," capable of being their "own masters," and "authorized to [act]" in ways compatible with the UPR.[55] This collection of principles seems to argue in favor of a presumption of innocence and, in general, against the practice of pretrial detention; a right to testify and represent oneself; and imposing only a minimal set of restrictions on the defendant at the pretrial stage.[56] Moreover, Kant's concern for equality seems to entail that all accused persons must be accorded whatever basic package of rights is guaranteed by the particular process in question—hence the universal rights to trial, defense counsel, and so on in Anglo-American systems.

Still, these minimalist restrictions, while desirable, do not help us determine exactly what the adjudicative process should look like. By contrast, the communicative model can provide us with the means to evaluate specific adjudicative procedures. It would therefore be

54. Kant does make a few remarks about the role of judges and juries but does not make clear what distinction he draws between them. He says that "[a] people judges itself through those of its fellow citizens whom it designates as representatives," and appears here to be talking about judges: "[f]or a verdict . . . is an individual act of public justice . . . performed by an administrator of the state (a judge or court . . . ." KANT, *supra* note 43, at 94. But in the same paragraph he states that "only the *people* can give a judgment upon one of its members, although only indirectly, by means of representatives (the jury) whom it has delegated." *Id*. Exactly what Kant envisioned the functions of judges and juries being in *any* case, let alone criminal cases specifically, is not clear.

55. *Id.* at 30.

56. *See id.*

convenient if a Kantian universalist could simply adopt the communicative model of adjudication as her own. But why should she do so? After all, while it may be theoretically superior to instrumentalism, there might be other possible models to choose from. I believe, however, that there are compelling reasons for Kantians to endorse the communicative approach.

Returning to the notion of civic freedom, we find that it is a reciprocal concept.[57] My freedom can be guaranteed only insofar as you respect it (by complying with the UPR), and vice-versa. I thus owe you a duty of civic respect—but you are, at the same time, expected to behave with the same respect toward me. A crime breaks the reciprocal bond of civic freedom that binds us together as community members.

The communicative model can be seen as instantiating this notion of reciprocity. For example, it views the criminal trial as a way in which the community calls the defendant to answer charges against him, but also provides him with an opportunity to challenge the evidence against him. The trial is, as noted in the previous Section, not merely a search for facts, but also a medium for communication between the defendant and the community.

More broadly, to be a citizen on the communicative view is not just to be bound by the law, but also to participate in its existence and enforcement. Thus, the law is not just "imposed on us by a sovereign"; rather, it "is our law, that speaks to us in our own collective voice in terms of the values by which we define ourselves as a polity; a law by which we bind ourselves."[58] Thus,

> [w]e are criminally responsible *as* citizens, under laws that are our laws; which implies that we are criminally responsible *to* our fellow citizens collectively. We are held responsible, called to account, by and in criminal courts: but the courts act on behalf of, and in the name of, the polity as a whole . . .[59]

Acts of conviction and punishment are given meaning by the nature of citizenship, and in turn inform the view we take of fellow citizens who have violated our laws.

But this view of citizenship is, to put it simply, a Kantian view. Ideal Kantian citizens take on the perspective of just lawmakers—they promote and support those regulative laws and policies which advance, not just their own interests, but those of all citizens equally.[60] In practice, this seems inevitably to entail a commitment to civic participation and public

57. *See* Steffen, *supra* note 42, at 43.
58. DUFF ET AL., *supra* note 1, at 134.
59. *Id.*
60. *See* HOLTMAN, *supra* note 42, at 46.

deliberation on matters of importance for the community. Kantian citizens would deliberate about the limits of the criminal law, but they would not stop there. Because they are concerned with the freedom, equality, and independence of all citizens, they would take an active interest in the administration of criminal justice which, after all, impacts their fellow-citizens in quite obvious ways. Such active citizens would be unlikely to view the criminal trial, then, as a mere epistemic tool; they would, rather, conceive of it in a participatory and deliberative way. Moreover, the Kantian view of punishment is one in which citizens demonstrate appropriate respect for criminals, even as they rightly condemn the criminal act. This, though, will require a kind of perspective on, and participation in, the criminal justice process that is different—and more demanding—than what is suggested by the instrumental model. Indeed, it will require viewing the punishment process as, in part, a communicative enterprise.[61]

Thus, the Kantian has good reason to endorse the communicative model, for this approach tends to promote the same notions of reciprocity and mutual accountability that Kantians think are necessary in order to promote justice within society. In turn, it allows us to evaluate particular adjudicative procedures on the basis of their conduciveness to values shared by the communicative model and Kantian theory.

To summarize, the problem with elucidating adjudicative principles based on communicative theory alone is that this approach lacks a foundation in political theory; those who object to its conclusions can easily sidestep it by claiming adherence to competing values. Kant's political theory, by contrast, claims to be derived from the very structure of the normative world. As such, it has explanatory and normative value in all areas of the criminal law, as well as in other areas of civic life. At the same time, Kantian theory is compatible with—and is greatly enriched by—the communicative model of criminal justice.

III. THE ROLE OF THE JURY IN A KANTIAN-COMMUNICATIVE THEORY OF ADJUDICATION

So far, I have shown how the communicative model can explain and justify the institution of the criminal trial in a much more convincing way than the traditional instrumentalist approach. I have also argued that Kantian theory and the communicative model can work in theoretical harmony. In this Section, I will attempt an examination of the jury by taking up a Kantian-communicative perspective. Recall that from a

61. For a fuller discussion of the role of Kantian citizens in criminal punishment, see Jason R. Steffen, *Moral Cognition in Criminal Punishment*, 9 BRIT. J. AM. LEGAL STUD. 143, 168–70 (2020).

communicative perspective, the specific method of trial by jury will prove justifiable to the extent that it serves a principally normative function—not (merely) an instrumental or epistemic one—wherein the community attempts to communicate its values by calling the defendant to account for her alleged wrongdoing. This, then, is the primary question before us: to what extent does the jury meet this test?

In order to answer this question, I shall begin by reviewing three traditional explanations for the jury in Anglo-American law: the jury functions "[A] as a fact finder, [B] as a buffer between defendants and government, and [C] as a representative of community values."[62] In this Section, I argue that [A] is an insufficiently good reason to call for the use of juries on their own, but that it is compatible with the Kantian-communicative model. I will further suggest that, while [B] and [C] do provide good reasons for the jury's continued existence, there are two further considerations suggested by the Kantian-communicative model: [D] that juries are the appropriate mechanism for making the type of normative (moral) judgments at issue in criminal cases; and [E] that jury service develops certain Kantian civic virtues, which in turn facilitate the realization of the communicative ideal.

A. Juries as Fact-finders

Juries have traditionally been viewed as epistemically beneficial in a way that other methods of fact-finding have not.[63] The term "fact-finding," is ambiguous however, and lawyers and judges are usually not very careful to distinguish between different types of decisions that jurors may be called upon to make. There are, in fact, three categories of judgment: the first I shall call judgments of pure fact; the second are judgments applying the law to the facts; and the third are normative judgments. When it is alleged that juries make good fact-finders, it is typically the first two types of judgments that are intended. I shall therefore discuss these two categories here; the third shall be reserved for Section III.D below.

The first kind of "fact-finding" typically involves determining whether to accept or reject assertions made by the prosecution or defense. For example, suppose the state's witnesses testify that that the footprints found at the crime scene were from a pair of men's size eleven shoes, and that a search of the defendant's home revealed that he possessed a pair of men's size eleven shoes. The jury must then decide whether or not they believe these witnesses—if they do, they will make the purely factual

62. DZUR, *supra* note 3, at 5.
63. *See, e.g.*, LAUDAN, *supra* note 23, at 215; *see also* DUFF ET AL., *supra* note 1, at 27.

judgment that the defendant's shoes match the size of the footprints found at the crime scene.

Whether jurors are able to make accurate judgments about pure facts depends in large part on their level of knowledge relative to the evidence in question. This does not seem problematic when the evidence consists of shoe sizes. But what about data collected from scientific instruments such as Intoxylizers or Gas-Chromatograph Mass Spectrometers, or statements from expert witnesses regarding DNA evidence, brain scans, or ballistics trajectories? Most laypersons are simply not in a position to know whether a scientist has made an accurate statement about such matters. Granted, many trials do not involve the level of technological sophistication seen on television shows such as "CSI." Some do, however, and the appearance of such evidence in the courtroom will only increase as technology advances. Many important trials have already become "expert battles" in which the prosecution and defense attempt to convince the jury that their particular experts' opinions are the correct ones. We might well be cynical about laypersons' ability to make accurate judgments in these types of cases.[64]

Social science research bears out this skepticism to some extent. On the one hand, while trial lawyers often assume that juries hold unreasonable expectations about forensic evidence based on popular culture, at least one study has found no such "CSI effect."[65] On the other hand, other studies do call into question the extent to which it is reasonable to expect juries to properly evaluate whatever forensic evidence *is* presented in the courtroom. For example, jurors do not properly weigh "weak evidence": they tend to take evidence weakly supportive of the defendant's guilt as evidence in favor of the defendant's innocence.[66] Jurors also tend to overstate the importance of forensic fingerprint evidence.[67] Perhaps most disturbingly, the *way* in which experts present the same evidence can influence jurors' decisions about

64. Even seemingly routine cases may pose more epistemic problems than we might think; scholars and practitioners have become increasing concerned in recent years about jurors' ability to accurately evaluate even common types of evidence, such as eyewitness testimony. *See, e.g.*, Gary L. Wells & Elizabeth A. Olson, *Eyewitness Testimony*, 54 ANN. REV. PSYCH. 277, 284–85 (2003).

65. Janne A. Holmgren & Judith Fordham, *The CSI Effect and the Canadian and the Australian Jury*, 56 J. FORENSIC SCI. 63, 68 (2011).

66. K. A. Martire et al., *The Expression and Interpretation of Uncertain Forensic Science Evidence: Verbal Equivalence, Evidence Strength, and the Weak Evidence Effect*, 37 L. & HUM. BEHAV. 197, 205 (2013).

67. *See* B. Garrett & G. Mitchell, *How Jurors Evaluate Fingerprint Evidence: The Relative Importance of Match Language, Method Information, and Error Acknowledgement*, 10 J. EMPIRICAL LEGAL STUD. 485, 507 (2013).

guilt.[68] At the very least, these types of studies should lead us to be cautious about assuming that juries can and do properly weigh pure factual evidence—particularly scientific forensic evidence—in criminal cases.

The second type of judgment jurors must make involves the issue at the core of the case: whether or not the defendant committed the crime charged. This is a different kind of determination from the first, because it requires piecing together a number of pure facts in order to make a judgment based on legal standards and definitions.

For example, suppose the jury makes the judgment that the defendant committed burglary. Such a determination would be based on some pure facts (such as the defendant's shoe size) and some legal rules (such as the statutory definition of burglary). In some cases, this process will be fairly mechanical: if the jury believes the prosecution's claims (that the defendant entered the victim's home and stole some of her possessions) then they will make a judgment that the defendant committed burglary.[69] In other cases, however, this type of factual judgment will be more complicated. For example, perhaps jurors disagree about the pure facts—some think that the defendant entered the home, while others think he stayed on the back lawn—and must decide together whether the facts fit the charges (burglary) or a lesser offense (trespassing).

More problematic still are cases where the definitions of criminal offenses are difficult to understand. For example, suppose that a Minnesota jury is charged with determining whether Dallas committed the crime of conspiracy. The law stipulates that Dallas commits conspiracy when she "conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy . . . ."[70] So in order to decide whether Dallas is guilty, jurors must determine (1) whether she conspired with at least one other person, (2) whether the object of the conspiracy was a (different) criminal act, and (3) whether one of the conspirators did something "overtly" in order to "further" the conspiracy. But note that each of these elements requires the jury to make further factual determinations: what constitutes conspiring with someone (as opposed

68. *See* Dawn McQuiston-Surrett & Michael J. Saks, *The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear*, 33 L. & HUM. BEHAV. 436, 448–50 (2009) (whether an expert gives an ultimate opinion and whether the limitations of the tests used in forensic analysis were expressed both impact juror's perception of guilt).

69. Note that this is not yet to say that the jury will *convict* him. This requires another kind of judgment that will be taken up in Section III.D below.

70. MINN. STAT. § 609.175 subdiv. 2 (West 2021).

to, say, merely refraining from opposing another's plan, or fantasizing with another about a criminal act); what the subject of the conspiracy actually was (was it really a criminal act, or was the resultant criminal act merely an unintended consequence?); what constitutes an "overt act" (as opposed, one assumes, to a "covert" one?), and whether such an act really "furthered" the conspiracy (as opposed to one that is merely taken in view of the conspiracy but does not in fact further it).

In some cases, some of these elements will seem clear-cut: if the prosecutor can show that Dallas hired Carlos to murder Dallas' husband, then Dallas and Carlos have clearly "conspired" to commit murder. If Carlos shoots at Dallas' husband, then he has obviously committed an act in furtherance of the conspiracy. But if the prosecutor can show merely that Dallas talked with Carlos about murdering her husband, and Carlos approved of the plan, does this constitute "conspiring"? If Dallas purchases a gun but does not give it to Carlos, has she "furthered" the conspiracy? Is Carlos' research of Dallas' husband's daily routine an "overt" act? The answers here are unclear because the definition of conspiracy is itself ambiguous.[71]

One might object here on two grounds. First, I have chosen a contentious crime to make this point, and, second, I have failed to consider the role of courts and judges in refining the definitions of offenses in order to make jurors' jobs easier. It is of course true that conspiracy cases are frequently tortuous, and *some* offense definitions are relatively clear-cut. First-degree murder will generally be defined as premeditated killing, and in *some* cases, premeditation will be easy to prove, as when the prosecution presents evidence that the defendant told someone else that he was going to kill the victim on such-and-such a date. But there will be many cases where the definition of first-degree murder, seemingly uncontroversial, is insufficient to allow jurors simply to apply the law to the facts.

To give a concrete example, consider the murder case referred to in Section I above. The facts (simplified for present purposes) showed that the victim had been shot multiple times in the side and back by a semi-automatic handgun. The prosecutor argued that the existence of multiple gunshots showed that the killing was premeditated—if it had been a heat-of-passion crime, then there would have been only one gunshot wound. As it turns out, the jury convicted the defendant only of second-degree murder.

Discussion with the jury after the fact revealed that they were sure that the defendant had killed the victim (based on the pure facts) but were

71. It is also bizarrely circular: it defines conspiracy in terms of someone "conspiring" with another. This is like defining murder as "murdering" someone.

undecided about the first-degree murder charge (a question of applying the law to these facts), mainly because they were unsure whether premeditation required planning the crime a long time in advance, or if the planning could take place just seconds before the killing. If the former, then they made the right epistemic decision; if the latter, then they did not. Perhaps appellate-court decisions on premeditation might have helped the jurors in this case, but even the most carefully crafted jury instructions will rarely be sufficient to make the law perfectly clear to lay jurors. Indeed, there is good empirical evidence suggesting that jury instructions fail to fulfill their ostensible purpose: to instruct the jury![72] Allowing jurors to ask questions about the law is helpful, too—but most lawyers and judges will have had the experience of jurors asking questions that are obviously irrelevant to the factual and legal issues in the case, which calls into question the extent to which spontaneous

72. For example, one study published in 1988 found that "jurors seriously misunderstand instructions given them by the court." Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 77, 80 (1988). The authors note that then-extant research on jury instructions suggests "juror comprehension of instructions is appallingly low." *Id.* at 78. They therefore conducted an experiment in which they gave some jurors regular, unmodified jury instructions and others a set of instructions that had been rewritten with an eye to improving comprehensibility. *See id.* at 86. On the one hand, the rewriting did substantially improve juror comprehension. *See id.* at 87. However, a shockingly large percentage of jurors still did not understand the instructions. *See id.* For example, "[i]n a murder case the pattern instructions yielded an average of 51% correct answers [to questions about the instructions] per juror, the first rewrite 66% correct answers, and the second rewrite 80% correct answers." Steele & Thornburh, *supra* note 72, at 86. In other words, one in five jurors failed to comprehend the court's instructions even when they were twice rewritten to make them easier to understand! Although Steele & Thornburg's findings suggest that juror confusion can be mitigated to some extent by rewriting jury instructions in more comprehensible ways, they note that "a number of forces within the American legal system and legal profession . . . deter attempts to rewrite jury instructions." *Id.* at 78–79. These forces include lawyers lacking the skill to do so, appellate courts focusing on "pinpoint legal accuracy" of instructions rather than comprehensibility, and the nature of the adversary system, where one side may not want the jury to understand the instructions. *Id.* at 79. Of course, while it is possible that some judges might also misunderstand jury instructions, presumably their legal training and experience would make this less likely.
Subsequent studies have been similarly negative. *See* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J.L. REFORM 401, 429 (1990) (surveying jurors hearing real cases in Michigan courtrooms and concluding that "jury instructions are often lost on jurors, and can sometimes even backfire"); *see also* Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 120–21 (1998) (finding that juror confidence in being able to understand the instructions far outstripped actual comprehension); Judith L. Ritter, *Your Lips Are Moving . . . But the Words Aren't Clear: Dissecting the Presumption that Jurors Understand Instructions*, 69 MO. L. REV. 163, 197–02 (2004) (reviewing empirical studies on juror comprehension of jury instructions).

courtroom education of jurors is sufficient to close the epistemic gap between legal professionals and lay jurors.

In short, the alleged epistemic benefits of having juries determine pure facts are questionable. And even if jurors are competent to accurately determine the pure facts of the case, judges might be in a better position to understand whether these pure facts fit the elements of the criminal statute at issue. A legal professional is better positioned than a juror to know what kinds of acts constitute the furtherance of a conspiracy or the commission of premeditated murder. Thus, there seems to be no overwhelming *epistemic* reason not to have professional fact-finders making such decisions, for "legal training and court experience appear to assist as much as common sense in fact-finding."[73] Moreover, the communicative model provides no particular reason to accept or reject the jury's role as fact-finder in this sense—as far as the optimal method of such fact-finding is concerned, the communicative view so far remains agnostic.

B. Juries as Buffers

Another traditional justification for the jury is that it ostensibly provides a "buffer" between an oppressive government and an individual citizen. One might initially be skeptical about how strong a justification this is, for "judicial elections and scheduled performance reviews are alternative buffers against official misconduct,"[74] and it is doubtful that juries are well-equipped to identify such misconduct in the first place. Moreover, in an adversarial system like ours, the defense attorney is tasked with representing the defendant's interests. This ideally entails identifying and exploiting weaknesses in the State's case, including any wrongdoing at the hands of police or other officials—which an attorney would be better equipped to do than a panel of laypersons.

Still, the communicative model allows us to think about this justification for the jury system in a deeper way. One reason for preferring buffering by means of the jury over buffering by some other means (strengthening the power of defense attorneys, holding judges accountable via elections, etc.) is that the jury is uniquely able to speak on behalf of, and address its findings to, the wider community. A defense

73. DZUR, *supra* note 3, at 5. One might think that the fact that the jury is a group, whereas a judge is an individual, is some reason to prefer the former in this context. This might particularly be true where the jurors disagree about some important pieces of evidence: perhaps it is better to ensure that a group of six or twelve people agree about the defendant's shoe size, rather than assuming that the individual judge would decide correctly. But this problem could be solved by requiring the concurrence of a panel of judges.

74. *Id.*

attorney speaks on behalf of her client. A judge speaks on behalf of the law. Jurors, however, speak on behalf of citizens.

Indeed, the jury-qua-buffer has both a symbolic and a practical role. Symbolically, the jury represents the interests of members of the polity because it is composed of representative citizens. Ideally, jurors look and act like average community members, and they take seriously their role as impartial citizens tasked with judging cases according to community norms. When a matter of alleged government misconduct is brought before the jury, for example, the purpose is to demonstrate that officials in a democracy are called to answer *to the people* they serve, rather than (or, at least, in addition to) to a judicial figure who is himself an employee of the government. As a practical matter, whatever epistemic worries we might have about juries, we might think that they are more likely than legal professionals to hold government officials accountable—and that their judgment will be taken more seriously by the wider community than one rendered by a legal professional.[75]

If there is something compelling about the notion of jurors acting as the buffer between citizens and the government, then we need to address the thorny issue of nullification. If we accept that the function of the criminal trial is partly to provide a means for the community to express its values to the defendant, and to call her to account for her conduct, then it must also be an appropriate forum for the defendant to express, if she wishes, her reasons for disobeying the law. Though perhaps infrequently the case, sometimes defendants appear in court because they engaged in conduct, they believe to be rightful (or, at least, non-criminal). Sometimes this conduct is the result of willful civil disobedience; other times the defendant realizes only after the fact that she is being prosecuted on the basis of an unjust law. In any case, the defendant ought to be permitted to explain to the jury why she acted the way that she did and argue for her acquittal on the basis of injustice.

The question then becomes whether the jury ought to be allowed to accept the defendant's argument. Should they be permitted to engage in "nullification"—that is, acquittal on the basis of principles other than the State's failure to prove its case?[76] Nullification is unlikely to be a viable

75. The jury can also provide another type of symbolic "buffer." For example, indigent criminal defendants in the United States are represented by public defenders or other court-appointed attorneys, who are often salaried or reimbursed by the state or another government entity. As a practicing public defender, I experienced skepticism from some defendants at my role as their advocate, given that I received my paycheck from the same entity that was prosecuting them. Though it is insufficient to fully address this concern, it is noteworthy that the involvement of non-government-employee jurors avoids the "appearance of impropriety" we worry about in other legal contexts.

76. *See* DUFF ET AL., *supra* note 1, at 72.

option on the instrumentalist view: acquitting a defendant the jury believes beyond a reasonable doubt to be guilty is a bad epistemic result. Even those who do not insist on the instrumentalist position might be skeptical that the nullification power would always be wielded in an honest and ethical way by jurors. But the communicative model suggests that we should at least consider whether we should more clearly present jurors with the option of nullification—reminding them of the potential consequences of their task and their responsibilities and capacities as citizens engaged in a communicative enterprise.[77]

One might object that the justness of a particular law should not be argued in a criminal courtroom—this is a matter for the legislature. It seems to me, though, that in cases where the defendant has a serious argument as to the failure of the criminal law to produce a just result, he ought to be allowed to present his case to the jury. While acknowledging that "[t]he role of the jury is not politics by other means," legal scholar Albert Dzur thinks that the jury ought to make its decision with awareness of "the particular case, defendant, law, harm, victim, [and] context."[78] Citizens may deem a law on the books to be perfectly reasonable, until they are faced with its ramifications for real people accused of violating it. They should be permitted to render a judgment that takes into account those facts—not merely the fact that the law exists in the first place.

We should not, however, ignore the potential injustices that could result from permitting nullification. Nullification is a double-edged sword. On the one hand, it empowers jurors to acquit defendants who are being unfairly targeted by the government (as when only people of one racial group are being arrested for petty crimes), or whose unlawful act (civil disobedience in protest of a radically unjust government policy, for example) is one the community deems appropriate under the circumstances. On the other hand, nullification also makes it possible for a collection of citizens to acquit people for morally repugnant reasons (as when a racist jury refuses to convict a white man of raping a black woman, despite believing he did so). In both cases, of course, nullification fails to uphold the epistemic function of the jury. In the first case, however, it appears to be morally laudable act; in the second, the moral failure eclipses the epistemic one. In an ideal Kantian system,

---

77. It is not too much of an exaggeration to say that:

> [t]he biggest and most powerful law enforcement agency in the United States has the absolute, non-negotiable power to ignore laws, judges and prosecutors, to keep people out of prison, to make any jury trial come out the way they want it, and to make our government honest. What is this agency? The Fully Informed Jury.

DZUR, *supra* note 3, at 133 (quoting a poster created by a libertarian activist group, the Fully Informed Jury Association).

78. *Id*. at 104.

perhaps the risk of "bad" nullification would be minimal, because citizens would not endorse the kinds of values that would permit nullification of racially motivated rape. In the real world, I am unsure how to weigh the "good" cases of nullification against the "bad" ones; for present purposes, it will have to suffice to note that nullification has a communicative component that is relevant in assessing whether or not to endorse the practice.[79]

Regardless of what position one takes on nullification, it seems correct to say that the jury-as-buffer argument supports the communicative model. More importantly, this model gives us a different perspective on the way that juries allow defendants to interact with powerful legislators and judges. The jury can be a mechanism whereby the defendant is able to communicate her principled opposition to the law that is the basis for her appearance in the criminal court. The jury in this sense is not so much a "buffer" between the powerless defendant and powerful public officials but rather a mediator who both communicates the will of the community to the defendant, and also, at the same time, listens (and possibly responds) to the defendant's complaints about the way the community is treating her.[80]

C. Juries as Communicators of Community Values

What of the jury as a purveyor of community norms and values? On one level, it seems obvious that juries can adequately fulfill a communicative function: at the least, they communicate a verdict to the defendant. But why do we need a jury in order to perform such communication? Why is it not sufficient for the judge and lawyers to communicate with the defendant? Part of the answer is surely that a jury is, in its ideal form, a representation of the community. It is comprised of citizens, initially chosen at random and then (theoretically) selected by virtue of their lack of bias with respect to the case at hand. An ideal jury is comprised of individuals with diverse viewpoints—different professions and experiences, socioeconomic and cultural backgrounds,

79. More generally, Kant places a great importance on properly devised rules in making up for human beings' failings—be they moral or epistemic. To the extent that one could devise rules that would prevent this kind of misuse of nullification, then Kant would be more likely to approve of the practice. I shall not attempt to formulate such rules here, however.

80. At one point, Dzur says that we should treat the defendant "as a coequal partner in a civic dialogue about the law's demands." DZUR, *supra* note 3, at 160. This does not seem quite correct—it is unrealistic to expect that criminal defendants are "coequal" to the community, and it may even be undesirable. But Dzur's main point here is that we must "treat him [the defendant] with dignity." *Id.* Certainly, this does not require that we take seriously *every* instance of dissent from the law—but it probably means that we allow even those with fringe views about criminality to express their sentiments in court and take the time to explain to them why we are rejecting their conception of justice in favor of a more convincing one.

and so forth—who nevertheless share the common feature of citizenship in a particular political community in which the defendant and victim are, if not also a part, at least present.

But why should we care that the *jury* represent the community in this way, as opposed to other professionals involved in the criminal justice system? Elected legislators, after all, are said to represent their constituents. Judges are sworn to uphold the laws of the communities they serve. And even the prosecuting attorney is supposed to represent the "people" of the relevant jurisdiction.[81]

The most persuasive answer has to do with the nature of the communication at issue. In legislation, the will of individual citizens is far removed from the facts of any particular case. Even if the system is one of direct democracy, the legislation at issue normally remains quite abstract. Indeed, we reasonably forbid bills of attainder precisely because we think it unwise, even unjust, to legislate at the individual level. Thus, legislators expand the scope of the criminal law and increase criminal penalties because they assume that such policies will be popular and (optimistically) because such decisions may seem wise when made in marbled halls miles away (figuratively and often literally) from the nearest prison. It is easy to condemn putative wrongdoing as a theoretical matter when one need not look any particular wrongdoer in the eye.

By contrast, in the criminal courtroom, a particular individual's rights and freedom—perhaps even his life—are at stake. The defendant stands face-to-face with citizen-peers and looks them in the eye. Through his attorney, he pleads his case under circumstances that are both alien and intimate: alien because of the courtroom formalities, but intimate because of the presence of his fellow-citizens. Perhaps the defendant does not deny the conduct imputed to him but has the opportunity to explain himself—to attempt to justify his actions and defend his cause. If citizens vote to convict him under these circumstances, they are making a judgment about *this* case and *this* defendant—not a judgment about conduct in the abstract, but about the particularities relevant to the case at hand. They are aware of the effects of their judgment—the nature of the punishment to which the defendant might be subjected, or the potential implications of releasing him from responsibility—in a way that

81. A different case, and a troublesome one, involves the existence of elected trial-court judges. Aside from the question of whether laypersons are generally competent to know whether judicial candidates are qualified or not, elected judges might feel beholden to their constituents—and yet their loyalty must, as a matter of professional ethics, be to the law, which does not always comport with the will of the majority.

they have not before considered.[82] It is therefore significant that, as Kant puts it, "a verdict . . . is an *individual* act of public justice."[83]

Thus the jury's verdict is, at least in theory, a careful, reflective judgment of unbiased representatives of the community about this particular human being's actions. This type of judgment is quite different from that made at the level of legislation. Citizens who impose criminal liability and punishment easily in the abstract are suddenly confronted with the implications of that decision for an individual's life. Such a judgment also differs from one made by judges: the defendant cannot complain that she is being unjustly persecuted by elitist professionals when her neighbors are the ones who condemn her, even after hearing her side of the story. She is more likely to receive and acknowledge the condemnatory message when conveyed by her peers than when announced by a distant figure in black robes. At the same time, should she choose to address the jury to explain her actions, defend her cause, or plead for mercy, she does so as a relative equal—as one who may share at least some life experiences with some members of the jury. Finally, if the jury convicts the defendant, it does so with full awareness of the ramifications of its condemnatory message—an awareness that is necessarily lacking at the level of legislation in either a representative or direct democracy.[84] It is thus through the use of juries that our society is forced to take responsibility for the "exercise[] of power" inherent in the promulgation and enforcement of coercive criminal laws.[85]

---

82. In reality, the jury may often be ignorant of the sentence to which the defendant might be subjected. I address this issue in Section IV below. Briefly, I argue that our system takes entirely the wrong approach: sentencing is an obvious place where juries *ought* to be used and, failing that, they certainly must be informed of the defendant's potential sentence in order to make a reasonable normative judgment about his actions.

83. KANT, *supra* note 43, at 94 (emphasis added).

84. *See* Sherman J. Clark, *The Juror, the Citizen, and the Human Being: The Presumption of Innocence and the Burden of Judgment* 6 (Univ. of Mich. Pub. L., Rsch. Paper No. 299, 2013), http://ssrn.com/abstract=2201849. As Sherman Clark explains,

> [t]he criminal trial forces jurors to look at what they do—to feel and accept internal responsibility for their decisions, and in particular for convictions, in a number of ways. For example criminal verdicts require unanimity, which prevents any juror from taking solace in the possibility that the defendant would have been convicted even if he or she had not voted to convict. Trials are generally staged such that the jurors can see the defendant, and be seen by him. Directed verdicts against criminal defendants are prohibited, thus [e]nsuring that the jurors know that, if they choose, they can simply acquit, which highlights the choice they make when they convict – and emphasizes their agency in the conviction. These and other aspects of the criminal trial process encourage jurors to recognize that when they convict, they are not simply deciding something; they are doing something. In these ways, jury service contrasts sharply with initiative voting. Jurors are made to realize that they are not merely deciding facts about the defendant, they are determining the fate of the defendant.

Id.

85. *Id.* at 5.

D. Juries & Normative Judgments

I suggested above in Section III.A that there are several different kinds of decisions that juries make in criminal cases. In addition to the two types of judgments described in that Section (those regarding pure facts, and those applying the law to such facts), I now add a third. Jurors are also asked to make *normative* judgments.

What I mean by normative judgments are decisions that go beyond mere factual determinations. Typically, if A makes a normative judgment about B, then A determines that B merits something, or deserves to be treated in a certain way. A's normative judgment might take the form of condemnation or praise, for example. Normative judgments are dependent upon facts, of course, but they are distinct from merely factual determinations. Suppose, for example, that A and B are friends, and A discovers that B has been lying to him. A's judgment that B has been lying is a purely factual determination. If A, however, then determines that B has done something *wrong* by lying, he has now made a normative judgment. A might further make the decision to confront B, or alter their relationship in some way, pursuant to the normative judgment about B's conduct.

In the criminal courtroom, the most obvious normative judgment the jury makes is whether the defendant is guilty of the crime charged; a related normative judgment is what sentence he should receive if convicted. The decision about the defendant's guilt requires more than merely matching the facts of the case to the law on the books, for the fact that the defendant committed a criminal act is a necessary but insufficient condition to warrant a judgment of guilt. The jury might decide, for example, that the defendant committed burglary out of necessity (he was starving and had no recourse other than to break into the home in order to find food) or duress (he was forced at gunpoint to participate in the crime).

In most cases, of course, the facts are not as obvious as the burglary-at-gunpoint example. The jury receives relatively little guidance from the law in such cases. They are left to determine whether they think the defendant acted reasonably—did the defendant have alternatives to burglarizing the home, for example—and if so, should he be responsible for not thinking of them at the time?[86] If the jury decides that the

86. For example, jurors evaluating a duress defense in Arizona courts would be told that:

> [a] defendant is justified in committing the conduct giving rise to the charged offense if a *reasonable person* in the situation would have believed that he was compelled to commit such conduct by the threat of immediate physical force against him that could have resulted in serious physical injury that a *reasonable person* in the situation would not have resisted . . . You must measure the defendant's belief against what a *reasonable person* in the situation would have believed.

defendant's conduct was justifiable or excusable, then they might return a not-guilty verdict, notwithstanding their prior judgment that the pure facts of the case fit the legal definition of the crime. Or they might find that the defendant was insane at the time of the act and, therefore, incapable of possessing the *mens rea* necessary for guilt. Finally, the jury could nullify on the basis of, say, an unjustly enacted law.

To say that the determination of guilt is a normative one entails, in the context of a communicative conception of criminal law, that it expresses a judgment conveyed to the defendant by the jury on behalf of the community. A judgment of guilt is a *moral* judgment. In civil cases, there is not necessarily any moral content to a judgment for or against a defendant: whichever insurance company must pay, nobody is claiming that either company is morally responsible for the car accident.[87] By contrast, a criminal conviction, on the communicative view, is necessarily a moral judgment: the defendant has done something morally wrong, and is being "called to account" for such wrongdoing.[88] A sentence, then, is not merely harsh treatment for the sake of burdening a guilty person; rather, it has "the aim of persuading offenders to face up to and to repent their crimes, to begin to reform themselves, and to make apologetic reparation to those whom they wronged."[89]

Why, though, should we insist that *juries* are the appropriate mechanism for making such normative judgments? There are three reasons which, taken together, favor the jury performing this function.

First, juries are qualified to make normative judgments. Unlike the two types of jury decisions already discussed in Section III.A above, a determination of guilt does not require legal or technical expertise. It relies, rather, on what philosophers call practical reason. This capacity to make moral judgments is something that all qualified jurors share. Whether or not the average juror is qualified to make a judgment about

---

RAJI (CRIMINAL) 3d § 4.12 (3d. ed. 2011) (emphasis added; bracketed language omitted). Jurors would not, however, be told what a "reasonable person" is, nor how to decide what a reasonable person would believe. *See id.*

87. We do say that the tortfeasor is at "fault," and certainly there is a sense in which we hold her responsible by, for example, requiring her to pay damages to the other party for harm she caused. But not all responsibility is *moral* responsibility—thus absent from such a judgment is a moral condemnation of her actions. True, there may be instances of moral judgment in *some* civil cases, such as when the jury imposes punitive damages for conduct they find to be repugnant. Even in the case of dueling insurance companies, it *may* be that one is morally obligated to comply with the terms of a valid contract, though this depends on the dubious notion of holding a non-sentient entity morally responsible. In any case, often there is no alleged moral content: neither insurance company is at fault in anything but a technical, legal sense—and my point is merely that moral culpability is not a *necessary* feature of civil cases, whereas it is of criminal ones.

88. DUFF ET AL., *supra* note 1, at 134; *see also* DUFF, *supra* note 26, at 82.

89. DUFF ET AL., *supra* note 1, at 13.

pure facts, or to apply legal standards to those facts, she is (as a competent adult) qualified to use her practical reason in making the normative judgment that the defendant is (or is not) guilty. Now it is true that judges and other legal professionals also have a capacity for moral reasoning. So this first point alone shows merely that jurors are qualified to make normative judgments, not that they are necessary to the adjudicative system.

A second consideration, however, is the diversity of perspectives that jurors ideally bring to the process of making a normative decision. An individual faced with a difficult case—should the defendant be convicted of burglary even though he says his actions were necessary?—may have an initial thought that would go unchallenged were it not for the perspectives of other jurors. It is not uncommon in ethical matters that we find ourselves changing our minds, or at least modifying or tempering our initial positions, when we come to see situations from others' points of view. In a criminal case, we do not merely want *a* normative response to the case at hand, we want *the* normative response that best expresses the considered judgment of the whole community about the defendant's alleged actions. The jury is, by virtue of its nature as a subset of community members, better equipped than a professional judge to discover and express such a response.

Third, and most importantly, normative judgments are made at two critical points during a criminal case: at the rendering of a verdict and at the imposition of a sentence. But these are also the two occasions where the communicative function of the jury is most salient. At judgment and sentencing, the decision-maker speaks directly to the defendant, states that he has been found guilty (or not), and (if guilty) explains why he has been convicted and received a particular sentence. What more important place for a panel of community members to participate in the criminal justice process than at the event which is supposed to communicate to the defendant the judgment of that community? While the jury should certainly be present throughout the entire trial—for one thing, the defendant should be permitted to address the jury and, for another, it is hard to understand how to make a normative judgment without having witnessed the presentation of evidence—the crucial points where the jury fulfills the communicative function of the trial are the verdict and sentencing phases.

To these reasons, one might object that we run a significant risk when we use laypersons instead of professionals to make such important normative judgments. The risk is that jurors will make judgments based on their personal values or conceptions of the good, when what we really want is for such judgments to be "objective." For example, a jury filled with committed libertarians who believe taxes are unjust might acquit

someone clearly guilty of the crime of tax evasion—whereas what the jurors ought to do is set aside their personal feelings and follow the law. The role of jurors, in other words, is *not* to bring their own opinions and biases to bear in the case at hand, but rather to leave them behind while serving as jurors.

The force of this objection turns on what we mean by an "objective" normative judgment, or by requiring jurors to "leave behind" their personal values. We might mean that we simply want jurors to come up with the answer demanded by the law, regardless of their personal feelings to the contrary. There is something intuitive about this. The judge gives jurors a set of instructions because he wants their decision to be based on the right legal reasons. Still, normative judgments are so called precisely because they respond to questions that are not capable of being answered by appeal to *merely* legal or factual rules. Whether someone is *guilty* of crime depends on a host of factors, but ultimately must involve a judgment about whether or not the defendant should be condemned and punished for her alleged actions. Making such a decision might be easy in many cases, but it is still incorrect to think that it is merely a legal or factual one. So when we say that jurors ought to be "objective," surely we do not mean that they should *merely* follow the judge's instructions.

A better way of thinking about the objectivity of juror judgments is that we want jurors to use their capacity for practical reasoning in a particular way. We want jurors to make decisions using the "first-person plural" perspective rather than the "first-person singular" one.[90] That is, we ask jurors to make normative judgments from the perspective of the polity's shared values, rather than from their own personal conceptions of the good (which may at times conflict with such shared values). On this view, then, jury instructions are intended to explain the content of the law in ways that laypersons can understand, and jurors are then supposed to both apply but also endorse the law as reflective of shared community values.

One might still be skeptical of the role of the jury as a communicator of community values because, as Dzur puts it, "most legal theorists reject the idea of a stable and uncontroversial set of community values that lay jurors are to represent in court."[91] Dzur later revisits this issue in discussing what we might term the problem of value pluralism, that is, "differences in deeply held values that can lead to disagreements about collective goods or ends."[92] On the one hand, the existence of value

90. *See also* DUFF, *supra* note 26, at 71.

91. DZUR, *supra* note 3, at 5.

92. *Id*. at 157 (citing Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118–72 (Oxford UP, 1969)).

pluralism might cause us to be skeptical that jurors can accurately reflect so-called "community values." In at least *some* cases jurors will be asked to make normative judgments in cases where they will be unable, or unwilling, to set aside their "first-person" values in order to make "third-person" judgments. To some extent we control for such cases in the legal system already; for instance, potential jurors called for capital cases are released if they are morally opposed to the death penalty or, at the least, are unwilling to set aside such convictions and vote for execution if legally warranted. In most cases, however, no such requirement exists. The problem is that "[i]f the fact-finders are to retain their moral integrity, they need not achieve a close fit between the personal and the official, but they must be able to avoid radical fissures between the two; there will, therefore, be limits to the extent to which they can honestly and non-hypocritically apply legal values and offence definitions that they regard not merely as somewhat misguided, but as illegitimate or unjust."[93] Since such "fissures" seem inevitable, the instrumentalist might argue that value pluralism will result at times in conflict and that the concomitant failure of the jury to reach a decision will result in a loss of truth.

On the other hand, perhaps the importance of the jury derives in part from the fact that it constitutes a diverse assemblage of citizens who, theoretically, bring their differing experiences and perspectives to the table in deliberating about the case at hand. Thus juries might be said to recognize and even embrace the existence of value pluralism in a way that non-jury systems cannot do as easily. The instrumentalist may be correct that juries will not always be able to decide a case. But perhaps those are cases that should not be decided, if in fact citizens cannot agree on whether the defendant should be held accountable in the situation at hand or not—or, in the case of the death penalty, whether a morally controversial punishment ought to be imposed at all. Therefore, what at first appears to be a weakness in the communicative jury model may in fact be one of its strengths.

Unfortunately, we have weakened the jury's power to make normative judgments precisely where they are most important: at judgment, and at sentencing. Jurors are often tasked simply with checking one of three boxes: "guilty," "not guilty," or "cannot agree." Although the foreperson is sometimes called upon to read the verdict (in other places the judge or clerk may do so), none of the jurors are permitted to make any statements beyond one of these three outcomes. They certainly do not "communicate" with the defendant in any meaningful respect. In many jurisdictions they are allowed to ask questions, but only in writing, and only to the judge. They may not question witnesses and may certainly

93. DUFF ET AL, *supra* note 1, at 87.

not address the defendant. Most juries are not involved in sentencing—the exceptions being capital cases and the occasional jurisdiction, such as Kentucky, which requires jury sentencing in other types of criminal cases.[94] The result, then, is that juries are called upon to make decisions about pure facts and mixed facts—where they are epistemically disadvantaged—while being denied the possibility of meaningfully communicating normative judgments on behalf of the community.

As an example of how this works in practice, consider the following case.[95] After receiving reports of drug activity in the area, the police obtain a search warrant for James' apartment. In his home, the police discover James in the process of pouring acetone over a moderate quantity of methamphetamine. Naturally, James is arrested; he is later charged with multiple drug-related crimes, including both the possession and manufacture of methamphetamine. At trial, James testifies that he is a drug addict, and willingly admits possessing methamphetamine. He denies, however, that he had been manufacturing the substance; he explains that acetone is commonly used by addicts to purify the methamphetamine they buy, which dealers often "cut" with other substances. In their testimony, narcotics officers agree that acetone is commonly used in this manner; they also admit that they found no other chemicals typically used in the manufacture of methamphetamine in James' home. James' argument is that while he is a drug user, he is not a manufacturer, and should therefore not be found guilty of this more serious offense. The prosecutor's argument is that James "manufactured" methamphetamine when he immersed the purchased drugs in acetone in order to make a purer product. The judge instructs the jury that the law requires that they find James guilty of manufacturing methamphetamine if he "produce[d], prepare[d], propagate[d], compound[ed], mix[ed] or process[ed]" the drug.[96] The jury finds James guilty of both possession and manufacture.

The jury later discusses the case with the prosecutor and defense attorney. The jurors state that they do not view James as a drug manufacturer, but merely an addict. They report having voted to convict James of manufacturing *only* because the judge said that they had to follow the law, and the law says that manufacturing includes preparing or processing drugs even for personal use. The jurors are shocked to discover that James will receive a mandatory minimum of five years in

94. An intermediate option is to allow the jury to submit a non-binding sentencing recommendation along with a guilty verdict, as is the case in Texas.

95. The details are adapted from a criminal case I defended some years ago.

96. ARIZ. REV. STAT. ANN. § 13-3401(17) (2021).

prison on the manufacturing charge, which they feel is too much time given the facts of this case.

I am confident, based on my practice experience and discussions with other attorneys, that this type of outcome is common enough that we need not view it as aberrant. How, then, should we view this case?

First, we can dispense with the instrumentalist's contention that the jury instructions ensured epistemically accurate results. The facts of this case were uncommonly clear: the defendant was caught red-handed. There was no conflict between the police officers' account and the defendant's. The story told by both the defense attorney and the prosecutor was essentially the same: that the defendant was a drug addict who had been caught pouring acetone over methamphetamine in order to purify it for his personal use. The only question at trial was whether or not the defendant had "manufactured" methamphetamine. And on this point, the jury instructions required that the jury strictly follow the law—rather than their own common sense—and convict someone who was clearly not a drug "manufacturer" in any reasonable sense of the term. Finally, the jurors were not permitted to learn anything at all about the statutory penalty for a drug-manufacturing conviction—a fact that probably would have changed the result of the case. Whether we view the outcome in this case as epistemically favorable is questionable: yes, the jury correctly applied the law to the facts—but nobody in the courtroom (other than, perhaps, the prosecutor zealously pursuing the charge) could seriously affirm the notion that James was a drug manufacturer in anything but a narrow, legalistic sense, nor that he *deserved* to be put away for five-to-fifteen years for feeding his addiction. The jury thus arrived at one kind of truth by disregarding another kind.

On the communicative model, the jurors supposedly expressed the judgment of the community: that manufacturing methamphetamine is a grave wrong with which the community is properly concerned. But knowing what we do about the jurors' explanation for their verdict, it is not clear that the jurors communicated the "right" judgment. The jurors in this case had to set aside their commitment to values such as fairness and common sense in order to uphold the letter of the law. It is very likely that the jurors' collective shock at James' sentence would be reflective of their community's normative judgment that such a penalty is unfair, even outrageous, under the circumstances of the case.

If I am right, then under an ideal system the jurors would have had the option of deliberating about the wisdom of the manufacturing statute *in light of the particularities of the case at hand*. Perhaps they all would have agreed that James should be acquitted on that count—or perhaps some of them would have been in favor of applying the law as written in this case, and they would have deadlocked. In either case, the normative

judgment expressed by the jury to the defendant—as well as to the court, legislators, and the wider community—would have been that the methamphetamine manufacturing law might need to be reconsidered in light of the results it threatened in this particular case.

Our system narrowly constrains jurors and thereby prevents them from communicating the normative judgments of average community members to the rest of the community. It therefore fails to take advantage of one of the most compelling reasons to involve laypersons in the criminal justice system.

E. Juries & the Development of Civic Virtues

A final reason to favor the jury-centered model of criminal justice has to do with what jury service does for jurors and for communities. This justification for the jury is different from the preceding ones. Whereas they focused on the value of juries in achieving criminal justice, this one suggests that the institution of the jury is valuable in promoting aims that are important outside the criminal process as well.

Recall that, from a Kantian perspective, to be a virtuous citizen is not merely to refrain from violating the UPR (the minimal condition of justice); it is also to actively support and ensure the freedom, equality, and independence of all citizens within the political community. This is, of course, an ideal; Kant does not suppose that human beings always act as ideal citizens ought to. Moreover, precise civic obligations supporting this ideal will depend on the context in which citizens find themselves. But we can enumerate some general attributes of good Kantian citizens in the hopes of understanding how to go about actuating this capacity within our community.

My contention in this Section, then, is that jury service promotes certain attributes that good Kantian citizens should develop. At the same time, these virtues promote good judgment. Thus, insofar as legal professionals and academics are rightly concerned with both the phenomena of decreasing jury service and the generally poor quality of justice in our system, they are identifying two sides of the same coin.

Where, then, can we turn for a clearer picture of what it would mean to be a good Kantian citizen? I propose that we do this by importing some values from Kant's moral theory into his political theory. This may seem, at first glance, philosophically suspect. Kant maintains, as most of us do, a distinction between morality and justice. One can, on this view, be a just person without being a morally worthy one. Specifically, acting morally requires acting for the right reasons, while acting justly merely

requires conformity with the requirements of justice.[97] Nevertheless, while being just does not require moral perfection, a morally good person will necessarily act justly, and for the right reasons. She will also be, among other things, a good citizen who endorses particular virtues of citizenship as being conducive to justice. Thus, while Kant rightly acknowledges that personal morality and the demands of political justice are distinct and conceptually separable, his moral theory nevertheless provides us with the basis for describing how an ideal citizen would act. In other words, a Kantian can maintain that a morally worthy citizen is more likely to contribute to the development of the "rightful condition" of justice, while still maintaining the important distinction between justice and personal morality.

There are, I believe, at least two Kantian virtues that jury service demands of jurors: (1) sympathy, and (2) the recognition of others' condition.

1. The Virtue of Sympathy.

Kant calls sympathy the "duty of humanity."[98] This duty entails that one cultivates "sensible feelings of pleasure or displeasure . . . at another's state of joy or pain."[99] It is not enough merely to *experience* such feelings from time to time—for "[n]ature has already implanted in human beings receptivity to these feelings,"[100] and they "spread[] naturally among human beings living near one another."[101] It would be odd, Kant thinks, to say that we have a duty to feel sympathy for members of our family or others close to us—for we are already naturally disposed to do so. The duty, then, seems to be to cultivate these sympathetic feelings toward other human beings more generally—including, especially, those toward whom we are *not* naturally inclined to experience compassionate feelings. Sympathy in this latter sense is "free" (chosen by the will, rather than experienced instinctively) and is therefore an obligation of practical reason.[102]

One oddity in Kant's discussion is his apparent rejection of sympathetic feelings in cases where one cannot assist the person who is experiencing pain or displeasure:

> It was a sublime way of thinking that the Stoic ascribed to his wise man when he had him say "I wish for a friend, not that he might help *me* in

97. *See, e.g.*, KANT, *supra* note 44, at 14; *see also id.* at 17–18 (distinguishing legality from morality), 24–25 (describing requirements of justice).

98. *Id.* at 204 (emphasis omitted).

99. *Id.*

100. *Id.*

101. *Id.* at 205.

102. *See* KANT, *supra* note 44, at 204–05.

> poverty, sickness, imprisonment, etc., but rather that I might stand by *him* and rescue a human being." But the same wise man, when he could not rescue his friend, said to himself 'what is it to me?' In other words, he rejected compassion.[103]

Now it is unknown whether Kant means to say that the entire Stoic story is "sublime," or merely the first part he quotes. It is therefore initially unclear whether the fact that the wise man "rejected compassion" is, on Kant's view, good or bad. One possibility is that Kant means to contrast the Stoic view with his own: it seems unlikely that Kant would endorse the idea that we should not cultivate sympathy toward those who suffer but whom we have little realistic chance of helping.

Another (compatible) possibility is that Kant intends to warn us against taking an extreme approach to sympathy. Thus he follows the above passage with the assertion that "when another suffers and, although I cannot help him, I let myself be infected by his pain (through my imagination), then two of us suffer, though the trouble really (in nature) affects only *one*."[104] It is possible, Kant seems to be saying, to be *too* invested in understanding and even experiencing the suffering of others, which can blind us to other requirements of morality. We need not starve ourselves (thereby failing to respect our own humanity) in order to understand the problems faced by those experiencing famine; we should not deprive our families of shelter (thereby harming them) in the name of a vacuous solidarity with the homeless. Such exercises, which "increase the ills in the world . . . [demonstrate] an insulting kind of beneficence, since it expresses the kind of benevolence one has toward someone unworthy, called *pity*; and this has no place in people's relations with one another."[105] On the Kantian view, pity involves "shar[ing] the sufferings . . . of others,"[106] and suffering, in and of itself, is (contrary to some popular caricatures) not a desideratum of Kantian ethics.[107]

Granting that we should not fall into the trap of replacing sympathy with this (perhaps ill-named) "pity," what is it that a Kantian sympathy would look like in practice, in the context of jury service? First, Kant says of people who are suffering that we ought to "sympathize *actively* in their

---

103. *Id.* at 205.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* KANT, *supra* note 44, at 205. This is not to say that it would be wrong, on the Kantian view, to fast on occasion, or to sleep on the streets from time to time, in order to increase one's understanding of and sympathy for those who are forced to endure such conditions. Perhaps, depending on our circumstances, it would even be appropriate to engage in such activities frequently. But we should not do so, Kant seems to be saying to the point where we cause ourselves or others needless suffering and, in doing so, rob ourselves of the possibility of alleviating *anyone's* suffering.

fate."[108] The notion of sympathy here is therefore twofold: we have an "indirect duty to cultivate the natural (aesthetic) feeling in us," but also to "make use of" such feelings.[109] It is not enough, then, that we *feel bad for* people. We must allow these feelings to work within us and impel us to action.[110]

Jurors can and should attempt to sympathize with criminal defendants, as well as with victims. They should "make use of" such sympathetic feelings in passing judgment upon the defendant. This view is at odds with the common judicial practice of admonishing jurors *not* to be swayed by sympathy. It would be better to say that jurors should not act *merely* out of sympathy. It would be wrong, of course, to convict a defendant *only* because the jury feels bad for the victim, or to acquit a defendant *only* because she has a sympathetic life story. Nevertheless, the notion that jurors should *lack* sympathy, and should make decisions based on cold logic alone, is flawed. Surely it matters, in making normative judgments about the defendant's culpability, whether the victim was in fact seriously harmed, or whether the defendant does have a seriously disadvantaged background. We make such judgments daily in other areas of life, and it is both strange and unwise to expect jurors to abandon such central aspects of normative judgment-making. Expecting jurors to act merely as logicians, while understandable on the instrumentalist account, is at odds with the normative conception of adjudication.

The practice of Kantian sympathy by jurors will have ramifications that reach beyond the courtroom. Thus one corollary of the duty of sympathy, according to Kant, is that:

> It is therefore a duty not to avoid the places where the poor who lack the most basic necessities are to be found but rather to seek them out, and not to shun the sickrooms or debtors' prisons and so forth in order to avoid sharing painful feelings one may not be able to resist.[111]

One of the features of criminal incarceration in the United States is the tendency to try to keep prisoners in certain areas—often facilities are built in poor, rural areas. Part of the pressures here are economic: the rich are able to fence out such undesirables, while poorer communities may benefit from the jobs created by jails and prisons. There are also, to be

---

108. *Id.* at 205 (emphasis added).

109. *Id.*

110. More broadly, affective responses are important in Kantian thought insofar as they enable us to grasp morally salient features of a situation and, therefore, to responds appropriately. Affective responses that fail to motivate us in this way are taken to be morally deficient. Hence Kant's distinction between the properly motivating experience of sympathy and the morally harmful sense of pity. *See* IMMANUEL KANT, THE METAPHYSIC OF ETHICS 9 (Henry Calderwood ed., J. W. Semple trans., 3d ed., 1871).

111. KANT, *supra* note 44, at 205.

sure, some legitimate security concerns: it may be safer to house at least certain types of violent offenders in more remote areas. Still, these concerns are surely outweighed (at least in most cases) by the knowledge that what we are doing is precisely trying to "avoid the places" occupied by a certain type of human being: those members of our community who have committed crimes. Although America's skyrocketing prisoner population has garnered more media attention in recent years, most citizens do not make a habit of visiting prisons or involving themselves in the criminal justice system in any significant capacity—unless forced to by jury duty or a loved one's involvement. A good Kantian citizen would, at the least, not shrink from the task of jury duty merely because of potential exposure to unsavory characters. And after her service, she would return to the community with a more sympathetic view of the kinds of people she has judged.[112]

2. The Virtue of Recognizing Others' "Condition"

We might worry that that cultivation of sympathy, along with the general Kantian notion of respecting people's worth as human beings, could result in a pathological form of tolerance, in which we simply decline to convict or punish anyone. Surely some people ought to be treated differently than others—criminals, in particular, ought to be treated in a different way than law-abiding citizens. Of course this is correct. But to say that we should cultivate sympathy for everyone, or that we should respect our fellow human beings' essential dignity, is not to imply that we should treat everyone the *same*. It is possible to punish people while still respecting their humanity, and even sympathizing with them. So it would be incorrect to say that Kantian virtue demands exactly the same treatment of every person one encounters.

Indeed, quite the opposite is true. Kant says that "different forms of respect [are] to be shown to others in accordance with differences in their qualities or contingent relations—differences of age, sex, birth, strength,

112. Another symptom of the lack of Kantian sympathy in the criminal justice system is the treatment of ex-offenders. Few businesses seek to hire ex-convicts, particularly when economic conditions are such that plenty of non-offenders are seeking jobs. Discrimination in employment—as well as housing and other areas—based on criminal records is legal and, to an extent, understandable. But there is likely *no* good reason to refuse to offer most kinds of jobs to someone with, say, a conviction for drug possession, driving under the influence, or shoplifting. (I say "most," because there are cases where a prior conviction would be a reasonable basis for bar to employment. The obvious cases involve seriously violent offenders working with weapons, serious sex offenders working with children, or career thieves working with substantial sums of cash). Ironically, if we actually *prioritized* employment (and housing, education, etc.) of ex-offenders, I suspect recidivism would decrease. At the least, it would help us develop the kind of sympathetic understanding of the situation faced by ex-offenders.

or weakness, or even rank and dignity, which depend in part on arbitrary arrangements."[113] Kant does not attempt to explain exactly how one ought to behave toward people who are "in a state of moral purity or depravity," or in "prosperity or poverty," for these are "only so many different ways of *applying*" the duties one owes to other people.[114] He indicates, however, that determining the precise contours of one's duties toward others *is* an important part of one's moral obligation to respect others' humanity.[115]

In the context of the criminal trial, then, good citizen-jurors will reason about the morally appropriate stance to take toward people who commit crimes and will be prepared to modulate such responses depending on relevant factors. A poor person who steals bread in order to survive deserves, intuitively, a much different response from citizens of her community than the rich person who steals because she wishes to live an even more comfortable lifestyle. Determining precisely how to respond to the poor thief versus the rich one will not necessarily be easy. But jurors should try to do so—both because justice demands it in the case at hand, and because doing so promotes good citizenship.

Legal scholar Sherman Clark describes (in non-Kantian terms) a similar idea. He believes that jury service encourages citizens to do at least three things: take responsibility for "exercises of power over others"; "see others as fundamentally like ourselves"; and "see things from the perspective of others."[116] These "capacities," as Clark calls them, are clearly relevant both to jury service and to other demands of citizenship. A political community will intuitively be more likely to work toward ideals of justice if its citizens try to see one another's point of view, focus on their common humanity rather than their differences, and take seriously the notion that even legitimately acquired power must be exercised responsibility.

Clark points to some features of jury service, at least as it exists in the USA, that promote these capacities: jurors see the defendant face-to-face; they must come to a unanimous verdict; and they alone determine the defendant's fate (since directed verdicts against the defendant are not allowed).[117] Perhaps because of these features, Clark does not suggest that we need many changes to the current system in order to make the capacity-building feature of jury service more salient. He suggests only that we make note of it in jury instructions.[118]

---

113. KANT, *supra* note 44, at 213.
114. *Id.* at 214.
115. *Id.* at 213.
116. Clark, *supra* note 84, at 2.
117. *See id.* at 6.
118. *See id.* at 9.

One problem, though, is that jury service is not common—often it is literally a once-in-a-lifetime opportunity (if that). Clark thinks that there is still "symbolic" value in the capacity-building function of the jury, even if the average citizen does not serve frequently.[119] While this may be true, we would certainly be better off, if in fact jury service fulfills this valuable function, using the jury in more than a tiny percentage of cases. An increase in jury service would result in an increased understanding (by jurors and by the wider community) of the Kantian "conditions" motivating criminal activity. This would, in turn, render just judgments in individual criminal cases more likely, and would also encourage the development of civic virtue among the citizenry.

3. An Objection to Virtue

Here we must attend to a provocative objection: that focusing on the development of jurors' civic virtues seems irrelevant, if not perverse, in the context of the criminal courtroom. The average defendant, for one, is not concerned with how virtuous the jurors are—he just wants to be acquitted. Much the reverse sentiment might be expressed by crime victims. While we might think it nice to encourage civic engagement, surely the jurors' job should be to convict or acquit, not to develop their own civic virtues. That, after all, is the job of civics classes and public-service announcements in the windows of the local Post Office.

The best answer, I think, is to recognize that the jury system "allows, indeed presses, ordinary citizens to take ownership of the 'terrible business' of criminal justice."[120] When the jury ceases to be a significant part of a criminal justice system, as is arguably the case in contemporary Anglo-American courtrooms, we are letting ourselves as citizens be "left off the hook of moral and political responsibility for punishment."[121] This collective avoidance of the process makes it easier, perhaps, to justify avoiding convicts themselves, both by erecting prisons in places we are unlikely to venture, and also by separating ourselves from neighborhoods and communities where future- and ex-convicts are likely to reside. It likewise makes it easier to avoid the responsibility of knowing about and critically assessing our community's criminal laws.

It may be true, then, that in a given case what is most important to the defendant or victim will be the judgment of conviction or acquittal, regardless of whether it is handed down by a jury, judge, or other body. But more is at stake for the political community in which the trial takes place: we should also care about the development of civic virtue, which

119. *See id.*
120. DZUR, *supra* note 3, at 40.
121. *Id.*

in turn maximizes our chances of achieving a "rightful condition"—that is, a just society, including just criminal laws and procedures. Jury service promotes the development of civic virtue, and should therefore be encouraged on the Kantian view, at least absent a more compelling account.

F. Conclusion: The Role of the Jury

I have argued that there are four compelling reasons to view the jury as an integral part of a criminal trial based on a Kantian-communicative model. First, juries act as both a symbolic and literal buffer between the government and the citizens (see Section III.B above); they are capable of communicating community values in a way that professionals are not (Section III.C); they are well-placed to make controversial and difficult normative moral judgments on behalf of the community (Section III.D); and they foster the development of civic virtues that, in turn, promote a just social order (Section III.E). In addition, the traditional role of fact-finder (Section III.A) does not give us any reason to reject the use of the jury, though it might call into question the propriety of using jurors to decide certain types of facts.

At this point, I might reasonably be accused of setting up a false dichotomy. One might grant that *some* lay participation in criminal justice is desirable, but maintain that expert guidance is also useful. Why assume that the only options available to us are professional judges or lay juries? We might conceive of some sort of hybrid system. Perhaps juries should consist partly of laypersons and partly of experts. Such experts might be magistrates or lawyers who are in a better position than nonlawyer citizens to explain the relationship between the evidence and the law. They might also be scientists or other professionals who would be better able to interpret evidence within their spheres of expertise.

Certainly, I have raised concerns about the ability of jurors to decide some matters of "pure" fact, particularly in cases where the subjects require particularized scientific or technical knowledge in order to make an accurate judgment about the claims made by witnesses on both sides of the case. However, any participation by legal or other experts in the process should be limited to the first two kinds of decision-making discussed above in Section III.A. The most important *normative* decisions in the case—whether the defendant is guilty or not, and (if guilty) what his punishment ought to be—should be made primarily by laypersons. Discovering facts about what actually happened at the crime scene may be a task better suited for experienced investigators. Determining whether those facts align with legal definitions might be best accomplished by legal professionals. But *interpreting* those facts—passing a judgment on a fellow human being in light of those

judgments—should remain the province of those in the best position to make such normative judgments in the name of the community who has enacted the criminal law.

Ought we to conclude that legal systems which rely very little, or not at all, on juries or other forms of lay participation are unjust? I cannot hope to address every conceivable procedure and judicial configuration, though I recognize the significant limitations of a theory that fails to address common practices outside the Anglo-American legal tradition. I think it safe to say that the view I have presented here might be compatible with some "inquisitorial" systems that rely *more* on professionals, but this would depend on the extent to which such procedural configurations could be said to fulfill the roles outlined in Sections III A through E above. For example, the practice of mixing professional magistrates with laypersons to decide cases might be seen as a reasonable attempt at including lay citizens in the criminal process; still, when judges are clearly "in charge" of the process, we might worry about the potential loss of communicative power that such a system might have.[122] In any case, I hope to have shown that the jury plays an important role, at least in our system, of promoting the Kantian-communicative model of adjudication and, therefore, that we should care very much about its demise in Anglo-American criminal justice systems.

IV. A PROPOSAL: INCREASE THE USE OF SENTENCING JURIES

In Section III, I argued that in the Kantian-communicative view, juries should play an important role in the criminal trial process. In this Section, I focus on one aspect of the criminal trial that has thus far gone largely unmentioned: sentencing. In most jurisdictions in Anglo-American systems, nearly every defendant who is convicted of a crime (after a jury trial, bench trial, or plea agreement) is sentenced by a judge. There are some exceptions, including capital cases in the United States, and the occasional jurisdiction that requires sentencing juries. Still, the majority of criminal defendants in our system who are convicted will be sentenced to prison or probation by a professional judge. From the Kantian-communicative perspective, this practice is unfortunate. Jury sentencing would be better for four reasons, which reflect the adjudicative model outlined in the previous Section.

122. *See, e.g.*, BOHLANDER, *supra* note 11, at 10 (discussing German trial process as "judge-led"); *see also* WEINREB, *supra* note 5, at 138–41 (proposing institution of criminal "court" composed of seven laypersons, two attorneys, and one judge; the three professionals' votes would be taken more seriously than the laypersons').

First, punishment is most reasonably viewed as part of the communicative process.[123] It functions similarly to imposed penance in some religions: as inviting and encouraging the defendant to acknowledge his wrongdoing and "repent," with the goal of reintegrating himself into the community.[124] Although the sentencing judge might claim to represent the community—perhaps she is even elected—she is still speaking to the defendant from a position of power. Most defendants are not of the same class as judges; they frequently lack education, and certainly legal education. They do not speak the language of the law. They might be dressed in jail garb already, while the judge sits above them clad in formal robes. A chasm exists between the roles of judge and defendant.[125]

By contrast, sentencing juries are comprised of lay citizens who often have much more in common with the average defendant than does the judge. Ideally some jurors are of a similar social or economic class; some of the same race; some of a similar level of education or sophistication. Most jurors do not speak in the language of the law, and many of the courtroom machinations that take place between the judge and lawyers may escape them as much as the defendant. What the jury is able to do, however, is to look the defendant in the eye and convey the judgment of the community—condemnation (conviction) or non-condemnation (innocence or acquittal)—and call the defendant to answer via the imposition of sentence. The necessary legal formalities involved in conviction and sentencing are softened to some extent by the presence of the jury—the defendant is more likely to feel that he is being condemned by fellow-citizens, by human beings who have considered his plight, rather than by an arbitrary and powerful professional who speaks in the stilted language of "mitigating factors," "mandatory minimums," and so on.[126]

---

123. *See, e.g.*, DUFF, *supra* note 26, at 97.

124. Thus Duff describes punishment as "a species of secular penance." DUFF, *supra* note 26, at 106. *See also* R. A. Duff, *Expression, Penance, and Reform*, *in* PUNISHMENT AND REHABILITATION 169 (Jeffrie G. Murphy ed., 3d ed. 1995).

125. *See* DUFF, *supra* note 26, at 75–77 (describing four ways in which defendants are "excluded" from the criminal justice process: politically, materially, normatively, and linguistically); *see also* DUFF ET AL., *supra* note 1, at 152 (suggesting it is problematic to expect a defendant to participate in trial given unfamiliarity and overly formal nature and "style" of trial); DZUR, *supra* note 3, at 161 (arguing that "[t]he laypeople of the jury ensure that the language of the law, the back-and-forth banter of the court professionals, the way the case is articulated, the way the defendant and affected parties are treated discursively all comport with what a defendant's peers find respectable and comprehensible. They ensure, if they are really his peers, that the dialogue of the trial is not alien and remote").

126. Minnesota is particularly egregious in this respect. If a judge does not sentence a defendant to prison, she may order that he receive a "stay of execution," a "stay of imposition," or a "stay of adjudication," all of which have different meanings and legal

A second reason to prefer sentencing juries is that the imposition of a criminal sentence is, in part, a normative judgment. Currently, our tendency is to see sentencing primarily as a matter of numerical calculations: the judge compares the crime the defendant has been convicted of to a sentencing chart; she then determines where the defendant falls within a given sentencing range, perhaps taking into account mitigating and aggravating factors. The sentence imposed is the correct fit for the case at hand based upon these statutory guidelines. What is missing from such a practice is the recognition that the imposition of punishment is more than a matter of adhering to *lex talionis* or any other principle of proportionality. To impose a punishment is to attempt to communicate with the criminal: to call her to accept the jury's judgment that she has acted wrongly, and to impress upon her the seriousness of her crime and, in some cases, the harm she has caused the victim. To determine what punishment is appropriate is, in large part, to make a normative judgment about what kind of treatment will best serve that communicative function of the criminal law under the circumstances. And while a judge can make a decision with the same content, a jury is the preferable body for communicating it to the defendant.

Third, even if juries are not used elsewhere in the criminal trial process, sentencing juries could act as a "buffer" in at least one significant way. In cases where the government charges and prosecutes someone in a way that the public considers unfair or overzealous, a sentencing jury could decline to sentence the convicted defendant or could impose a nominal sentence. Nominal damages are sometimes assessed in civil cases where it is judged that the plaintiff prevails, but the harm is so trivial that the defendant should not be required to do anything (or very much) in order to make the plaintiff whole. While a criminal conviction is still a more significant outcome than a civil judgment, a nominal sentence could send the message that the community is not pleased with the government's handling of the case and, perhaps, could motivate prosecutors to reassess their approach.[127]

Finally, using juries for sentencing would promote the civic virtues that the Kantian-communicative theory identifies as important in the

consequences, and none of which are the slightest bit intelligible to an inexperienced defendant without an attorney to interpret this "legalese" for him. *See* MINN. STAT. ANN. §§ 152.18(c), 609.135(a)(1)–(2) (West 2021).

127. For example, consider the "James" case, *see supra* Section III.D. A more just result (and perhaps a better alternative to nullification) would have obtained if the jury could have convicted James of manufacturing methamphetamine but imposed a nominal punishment (perhaps a one-dollar fine or a jail sentence of one day), in order to send the message that the manufacturing statute was defective, or that the State was unreasonable in pursuing that charge under the circumstances.

context of criminal justice. Ideally, sentencing involves passing a very specific type of judgment on the defendant. Rather than the more or less binary judgment that the defendant did or did not commit the offense (or, more accurately, that the government did or did not provide sufficient evidence to warrant this conclusion), sentencing involves a weighing or balancing of multiple factors including, for example, the defendant's criminal and life history, the circumstances surrounding the crime, and the extent of harm to the victim. Having juries consider and weigh these factors would require them to develop the Kantian virtues of sympathy and recognition of others' conditions.

Thus, even in a world where plea bargaining ensures that most criminal defendants will never go to trial, requiring juries to sentence defendants would be a substantial step toward the fulfillment of the Kantian-communicative adjudicative model.

To this proposal, one might object that the trajectory of Anglo-American criminal justice is away from the jury, and perhaps there are good reasons of efficiency that militate against using juries even for sentencing alone. Of course it is true that mandatory jury sentencing would be costlier than judicial sentencing. This, though, must be balanced against the clear failure of the criminal justice system to utilize an important moral resource. Moreover, as Dzur puts it, achieving such a modest reform—increasing the percentage of defendants who are sentenced by juries instead of judges—certainly seems more practical and attainable than many other reforms that are often posited by academics looking to fix the system.[128]

A more plausible objection is that judges are in a better position than the jury to know what the "typical" sentence is for a given crime, and perhaps in a better position to decide where the case at hand falls along a spectrum of cases (e.g., this is a "really bad burglary" or a "run-of-the-mill assault"). I admit that this is a significant concern; we would not want to end up with a system in which defendants received radically disparate sentences based solely on the whims of jurors. Certainly, the judge should tell the jury what the legal sentencing ranges are; likely he should have further involvement in assisting them. But judges also come to sentencing with their own prejudices and opinions about human nature, mental illness, the efficacy of deterrence, the viability of retributive sentiments, and so forth. Surely a collection of people would be better equipped to reach a reasonable consensus about sentencing issues than a lone judge. As Dzur puts it, "[p]rocedures like the traditional jury are . . . collaborative devices. They bring citizens together . . . in the procedural hope that under conditions of normative and sociological pluralism,

128. DZUR, *supra* note 3, at 97.

nonprofessionals can speak coherently about and do justice."[129] To the extent that judges could be involved in the sentencing process, perhaps by making recommendations based on comparisons with similar past cases, such involvement should not come at the expense of encouraging the jury to make an independent judgment about the case at hand.

One might nonetheless worry that laypersons are more likely to make mistakes or be injudicious when it comes to such decisions. In particular, we might be concerned about jurors being overly retributive when it comes to sentencing. Judges are, theoretically, trained to ignore their own prejudices and make decisions rationally, based solely on legal factors. A practical response to such a concern is that we need not do away with appellate review of criminal sentences. We might, in fact, consider empowering appellate courts to review sentences more carefully, particularly with an eye to determining whether a given sentence is seriously disproportionate with respect to sentences handed down to similarly situated defendants.

We should also consider, however, that sentencing juries who have at their disposal all the facts of the defendant's life circumstances, in addition to the facts of the offense, are unlikely to treat the defendant too harshly—even if they were predisposed to support draconian penalties before entering the courtroom. Martha Nussbaum has argued that attention to the "particulars" of an individual's life story normally inclines us toward mercy rather than vengeance,[130] and there is some evidence that this is accurate: death-qualified juries usually vote not to execute defendants, despite having been selected by virtue of their non-opposition to the death penalty.[131]

Finally, we might worry that jurors are not in as good a position as judges to know which *type* of punishment would be most appropriate or efficacious in the particular case at hand. In a system where the usual sentences are either prison or probation, this might not be too significant a concern. But we might think that there ought to be other options available. Some progress has been made to this end with the rise of drug-court programs and other alternatives to incarceration. In any case, to the extent that other modes of punishment are available, it certainly makes

129. *Id*. at 159.

130. *See* Martha Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFFS. 83, 85 (1993).

131. DZUR, *supra* note 3, at 140. I give this example tentatively, because Dzur does not cite a source for this claim, and because figures are difficult to come by. One Department of Justice report does indicate that, from roughly 1988–2000, the DOJ sought 62 capital convictions. U.S. DEP'T OF JUSTICE, THE FEDERAL DEATH PENALTY SYSTEM: SUPPLEMENTARY DATA, ANALYSIS AND REVISED PROTOCOLS FOR CAPITAL CASE REVIEW (2001). Juries returned a guilty verdict in 57 of those cases (a 92% conviction rate), but only imposed the death penalty in 25 (i.e., 44% of eligible cases). *Id.*

sense for the judge to provide the jury with information relevant to making a wise decision about using them. Perhaps the judge, or an expert sentencing advisor, could make a recommendation to the jury based on their experience and knowledge. We should not be overly concerned with the precise way in which this knowledge is transmitted to the jury, so long as we do not allow the jury to become a mere "rubber stamp" for the judgment of experts.

In the end, I believe these objections are not sufficiently compelling to overcome the clearly beneficial impact that jury sentencing could have on our criminal justice system in terms of the promotion of communicative norms and Kantian values.

CONCLUSION

I began this article by presenting two models of adjudication: instrumentalist truth-seeking on the one hand, and normative communication on the other. I argued that the communicative model was theoretically superior. I then showed that Kant's theory of justice shares the core commitments of the communicative model—and that it provides that model with a desirable theoretical foundation. I provided several reasons for thinking that the jury serves an important purpose within a Kantian-communicative system of adjudication. Finally, I suggested one feasible reform that would move Anglo-American adjudicative systems in a more Kantian and communicative direction: increasing the use of juries at the sentencing phase of criminal cases.