

JURIES AND THE CRIMINAL CONSTITUTION

Meghan J. Ryan^{*}

ABSTRACT

Judges are regularly deciding criminal constitutional issues based on changing societal values. For example, they are determining whether police officer conduct has violated society's "reasonable expectations of privacy" under the Fourth Amendment and whether a criminal punishment fails to comport with the "evolving standards of decency that mark the progress of a maturing society" under the Eighth Amendment. Yet judges are not trained to assess societal values, nor do they, in assessing them, ordinarily consult data to determine what those values are. Instead, judges turn inward, to their own intuitions, morals, and values, to determine these matters. But judges' internal assessments of societal standards are likely not representative of society's morals and values—because judges, themselves, are ordinarily not representative of the communities that they serve. Juries, on the other hand, are constitutionally required to be drawn from a representative cross-section of the community. Further, because juries are composed of several different individuals, they may draw on a broader range of knowledge and expertise in making their decisions. The historically trusted body to protect defendants from an overbearing government, juries, rather than judges, should be the ones empowered to determine these criminal constitutional moral matters.

^{*} Assistant Professor of Law, Southern Methodist University Dedman School of Law. I thank Will Berry, Rick Bierschbach, Beth Colgan, Andrew Ferguson, Todd Haugh, Carissa Hessick, Youngjae Lee, Paul Litton, Steve Morrison, Anna Roberts, Laurent Sacharoff, Giovanna Shay, Chris Slobogin, Jenia Turner, and the participants at the 2013 Law and Society Annual Meeting for their helpful suggestions and insights. I also thank Donna Wolff and Kelli Gavin for their excellent research assistance and the Emily Parker Endowed Faculty Research Fund and the SMU Dedman School of Law for their financial support.

INTRODUCTION	850
I. THE IMPORTANCE OF THE AMERICAN JURY	856
II. THE OMNIPOTENT JUDGE AND CRIMINAL CONSTITUTIONAL	
MORAL QUESTIONS	864
A. <i>Fourth Amendment Reasonableness</i>	867
B. <i>Eighth Amendment Cruelty and Unusualness</i>	868
C. <i>Eighth Amendment Excessiveness</i>	870
III. JUDGES' SHORTFALLS	871
A. <i>Judges' Lack of Training</i>	871
B. <i>Judges Are Not Representative</i>	874
IV. THE JURY'S STRENGTHS	877
A. <i>Representative of Society</i>	878
B. <i>Providing the People's Voice: Fighting Tyranny and</i> <i>Legitimizing Law</i>	880
C. <i>Broader Expertise: On the Cutting Edge of Morality and</i> <i>Technology</i>	883
V. OBJECTIONS: UNIFORMITY AND THE MAJORITARIAN DIFFICULTY	887
A. <i>Lack of Uniformity</i>	887
B. <i>The Majoritarian Difficulty</i>	889
VI. THE WORKABILITY OF EXPANDED JURY DECISIONMAKING IN	
ENFORCING THE CRIMINAL CONSTITUTION	891
A. <i>Admissibility Determinations in Texas</i>	892
B. <i>Section 1983 Litigation</i>	894
VII. CONTROLLING FOR UNDESIRABLES IN CRIMINAL	
CONSTITUTIONAL MORAL JURY DECISIONMAKING	898
A. <i>Review of Jury Decisions</i>	899
B. <i>Greater Judicial Involvement</i>	900
CONCLUSION	901

INTRODUCTION

Our American system of justice is singular in the importance it places on the role of the jury. Other states' representatives balk at our nation's faith in ordinary Americans to make decisions of legal significance, but the American jury defines our justice system. In fact, the Framers of our Constitution found the institution of the jury so important that they made certain to preserve the jury through no less than four protections in the foundational document, making the jury the most frequently named

safeguard of our freedom in the Constitution and its Amendments.¹ But despite this prevalence of the jury in our constitutional history, the jury has faced serious criticism and lost significant power over the years.² Not only have jury trials become uncommon in practice due to plea bargaining, bench trials, and out-of-court settlements, but when juries are empaneled to decide important matters, judges no longer trust them to decide the same questions that they once did.³ Especially when questions of constitutional significance are at issue, judges often limit juries' input on both legal and factual questions.⁴ This is even the case when judges' analyses of these questions are explicitly based on the community's moral standards.⁵ For example, when determining whether a police intrusion on an individual's privacy comports with the Fourth Amendment, courts examine whether the intrusion is consistent with societal standards of reasonableness, yet they do not ordinarily consult data on the issue, nor do they ask jurors what those societal standards might be.⁶ Similarly, when determining whether a punishment is "cruel and unusual" under the Eighth Amendment, courts purport to assess society's "standards of decency," but they do not ask

1. See U.S. CONST. Art. III, § 2 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ."); U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

2. See *infra* Part I.

3. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 6, 18 (1979); *infra* Part I.

4. See *infra* Parts I–II; see also Matthew Harrington, *The Law-Finding Function of the American Jury*, 1999 WIS. L. REV. 377, 434–35 (1999) (explaining that "by the early part of the twentieth century most state and federal courts had rejected the jury's power to declare the law as well as the fact in criminal cases").

5. See *infra* Part II.

6. See *infra* Part II.A; e.g., *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) ("In reviewing the propriety of an officer's conduct, courts do not have available empirical studies dealing with inferences drawn from suspicious behavior, and we cannot reasonably demand scientific certainty from judges or law enforcement officers where none exists. Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior."). See generally Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993) (offering tentative empirical data on society's actual expectations of privacy and noting that the Court, "given [its] past reaction to empirical research," is likely to simply "reject or ignore the data").

jurors what society's standards actually are.⁷ Instead, judges turn to their own morals and values in formulating their correct constitutional answers.⁸

This phenomenon of judicial decisionmaking in the context of constitutional moral questions is especially troublesome in the area of criminal law and procedure. The powers of the criminal jury were the ones our Framers were most adamant about safeguarding, because it is in this area that there is a heightened need for protecting individual rights.⁹ The jury acts as a bulwark between the government and the people to ensure that the government is not overbearing and engaging in overzealous prosecution.¹⁰ Further, the jury injects a democratic component into the criminal justice system to ensure that justice, rather than vengeance or an invidious legislative agenda, is served.¹¹ Also, because of its democratic nature, a jury can reach better decisions than an ordinary individual decisionmaker would due to the jury's opportunity to engage in the consensus-building process of deliberative democracy.¹² And, because juries can draw on the variety of experiences and knowledge bases possessed by their members, they may be more likely to understand the evolving values and cutting-edge technologies that have become important to modern-day constitutional decisionmaking.¹³

A combination of these vanguard issues of evolving values and technology coalesced in the recent U.S. Supreme Court case of *United States v. Jones*.¹⁴ In this case, the Court contemplated whether emerging global-positioning system (GPS) technology could constitutionally be used to track vehicular movements on public streets or whether this violated society's reasonable expectations of privacy under the Fourth

7. U.S. CONST. amend. VIII; *see infra* Part II.B.

8. *See infra* Part II.

9. *See Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights."); *Neder v. United States*, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) ("William Blackstone, the Framers' accepted authority on English law and the English Constitution, described the right to trial by jury in criminal prosecutions as 'the grand bulwark of the Englishman's liberties secured to him by the great charter.'" (alterations omitted)); Harrington, *supra* note 4, at 379, 423 (explaining that the jury was viewed as especially important in criminal cases just after the Revolution "because judges still revered the jury's role as a check on oppressive prosecutions" and that later supporters of retaining the jury's "law-finding function in criminal trials" viewed the jury as "a necessary component of popular sovereignty and a safeguard for the rights of the accused").

10. *See* Harrington, *supra* note 4, at 378, 386; *infra* Part I.

11. *See infra* Parts I & IV.

12. *See infra* Part IV.B.

13. *See infra* Part IV.C.

14. 132 S. Ct. 945 (2012).

Amendment.¹⁵ As with other matters in this area, though, the Supreme Court Justices offered their individual opinions of society's reasonable expectations of privacy but did not consult any data to determine what society's reasonable expectations of privacy actually are.¹⁶ Juries could provide this missing information.

In contrast to juries, judges are unrepresentative of the people they serve in numerous dimensions.¹⁷ Judges are overwhelmingly Caucasian, male, highly-educated, politically active, and wealthy.¹⁸ As such, judges are likely to have different values than ordinary Americans, and these values drive the criminal constitutional moral decisions that are allegedly based on societal standards. Some might believe that judges, because of these homogenous traits, are best equipped to decide matters of constitutional import. But because the questions that they are deciding are explicitly based on societal standards, this makes little sense. If judges really are the best decisionmakers in this regard, then the legal fiction that their decisions are based on societal standards should be acknowledged and then disregarded.

Still, although juries are best positioned to decide these criminal constitutional moral matters, difficulties remain in entrusting this important task to jurors. First, juries cannot always offer the same uniformity of results that judges can.¹⁹ However, although jury verdicts pose the possibility of variability of outcomes, this risk of lack of uniformity of the law is something that our nation has accepted since the time of the Founding by rejecting a federal common law.²⁰ Further, because criminal

15. *See generally id.* at 948, 950. The Court ultimately deviated from the reasonable-expectation-of-privacy approach in this case and determined that the government's placement of the GPS device on the defendant's car was an unconstitutional Fourth Amendment search because it constituted a trespass. *See id.* at 949, 953.

16. *See generally id.* Indeed, the Court instead resorted to a trespass test to determine whether there was a Fourth Amendment violation. *See id.* at 949. In the Justices' supplemental opinions, they opine on how electronic surveillance may affect reasonable expectations of privacy, but they do not refer to or cite any sources indicative of what those standards might be. *See, e.g., id.* at 964 (Alito, J., concurring) (concluding, based on little more than his own judgment, that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable" but that "the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy"); *Id.* at 955–56 (Sotomayor, J., concurring) (agreeing with Justice Alito that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" and stating that, in determining whether there has been a violation "of a reasonable societal expectation of privacy," she would consider the "attributes of GPS monitoring" and ask herself "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain [personal and intimate details of one's life]").

17. *See infra* Part III.B.

18. *See infra* Part III.B.

19. *See infra* Part V.A.

20. *See infra* Part V.A.

constitutional moral questions are hybrid questions of law and fact, any “uniformity” is not really possible in this area anyway.²¹ Whether a particular punishment is too cruel and unusual for the crime committed, or whether police officers may reasonably invade an individual’s privacy in seeking evidence of a crime, is highly fact-dependent.²² Even if judges continue to decide these matters, no true uniformity can exist.

In addition to apprehension about lack of uniformity, juries pose the age-old problem of the majoritarian difficulty.²³ This concern that the will of the majority will stamp out minority rights is considered pressing under even the current system of judges deciding criminal constitutional moral matters.²⁴ This is because judges, whether appointed by political figures or elected, are, themselves, “relatively majoritarian.”²⁵ Historically, this concern for minorities was overshadowed by the more pressing matter of protecting local communities from an overbearing government—a problem for which juries were considered the optimal solution.²⁶ Today, minority rights have taken a more prominent position in legal and political discourse and should certainly be taken seriously. But criminal constitutional moral questions are explicitly based on societal standards, so it only makes sense for juries to provide guidance as to what these societal standards actually are. To the extent that societal standards violate minority rights, this reliance on societal standards, rather than the jury espousing the societal standards, ought to be viewed as suspect.

Commentators sometimes question juries’ decisionmaking competence, but there is evidence that jurors are very capable of deciding these moral questions of constitutional import. For example, jurors regularly decide constitutional moral matters in the civil system pursuant to the Civil Rights

21. See *infra* Part V.A.

22. See *infra* Part V.A.

23. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993) (explaining that judges are “relatively majoritarian”); Meghan J. Ryan, *The Missing Jury: The Neglected Role of Juries in Eighth Amendment Punishments Clause Determinations*, 64 FLA. L. REV. 549, 570 (2012) (“It is questionable whether leaving the question of obscenity to judges rather than juries would remedy this majoritarian concern.”); *infra* Part V.B.

24. See, e.g., Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 88 & n.200 (1989) (criticizing the Court’s Eighth Amendment jurisprudence for allowing majority preferences to determine the nature of the constitutional prohibition on cruel and unusual punishments); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1113 (2006) (suggesting that the Court’s majoritarian “evolving standards of decency” jurisprudence is problematic); see also John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 905–06 n.26 (2011) (“Numerous scholars have criticized the evolving standards of decency test on the ground that it uses majority opinion as the standard for determining whether criminal offenders will receive protection from majority opinion.”).

25. Friedman, *supra* note 23, at 586.

26. See Ryan, *supra* note 23, at 571.

Act, under which plaintiffs make civil claims for constitutional violations.²⁷ Moreover, in Texas, the courts allow juries to consider questions of Fourth Amendment admissibility in certain circumstances.²⁸ That they are able to assess these moral matters in civil cases, as well as in criminal cases in some jurisdictions, suggests that having juries decide this is a workable solution.

Still, some observers are likely to remain uncomfortable with affording juries this greater decisionmaking power on matters of constitutional import. Juries would not be unlimited in their power, though; jury decisions would still be subject to judicial review.²⁹ Further, for those still skeptical of trusting juries, there are other ways to limit concerns about jury decisionmaking. For example, criminal constitutional moral questions could be given to juries only if judges rule against defendants on the matters, rendering the jury's assessment as an additional defendant-protection device.³⁰

Ultimately, consulting juries in deciding questions that explicitly rely on societal standards is important so that we do not continue to engage with this legal fiction that unrepresentative judges' determinations in these matters reflect societal views. To explain this perspective, Part I of this Article lays out the historical importance of juries and how their role has evolved since the time of the Founding.³¹ Part II introduces the concept of criminal constitutional moral questions and provides several examples of these questions that are today ordinarily decided by judges, rather than juries, despite their explicit reliance on societal standards.³² Part III explains how judges may not be the best decisionmakers in these matters reflecting societal morals and values because, first, judges are not representative of society, and, second, they are not trained in making moral determinations, nor in assessing society's moral standards.³³ In Part IV, I provide juries as a counterpoint, explaining how they offer several advantages over judges in deciding these criminal constitutional moral matters.³⁴ Unlike judges, juries are generally representative of society.³⁵

27. See *infra* Part VI.B.

28. See TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005) (providing that, when an admissibility question is raised in a case, "the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of [the federal or state laws or constitutions] . . . then and in such event, the jury shall disregard any such evidence so obtained"); *infra* Part VI.A.

29. See *infra* Part VII.A.

30. See *infra* Part VII.B.

31. See *infra* Part I.

32. See *infra* Part II.

33. See *infra* Part III.

34. See *infra* Part IV.

Juries have been established to fight governmental tyranny, and they serve to legitimate the law by expressing the will of the people.³⁶ Additionally, juries can form better decisions through the consensus-building process of deliberative democracy and also because, by virtue of their numbers and diversity, juries often possess a greater breadth of relevant knowledge than judges.³⁷ Part V lays out two primary objections to delegating decisionmaking power to juries on criminal constitutional moral matters—the concerns of the lack of uniformity that jury decision making in this area might bring and the majoritarian difficulty that a democratic body such as the jury poses.³⁸ This Part explains, however, that these concerns are likely overblown for several reasons, including the historical importance of community autonomy and acceptance of legal diversity, as well as the fact that even judges are “relatively majoritarian.”³⁹ Part VI then explains how jury decisionmaking has proved workable in the constitutional moral areas of civil rights claims and admissibility determinations in Texas.⁴⁰ And Part VII offers some additional mechanisms to control for feared undesirables associated with jury decisionmaking in this area.⁴¹ This Article concludes that juries, rather than judges, ought to be the primary decisionmakers on criminal constitutional moral matters. Courts’ current analyses in these areas explicitly rely on societal standards, and juries, rather than judges, are most capable of discerning what those standards are. To allow judges to continue deciding things such as society’s reasonable expectations of privacy or society’s evolving standards of decency is only perpetuating an unhelpful and inaccurate legal fiction.

I. THE IMPORTANCE OF THE AMERICAN JURY

Juries play an important role in our justice system. They act as a bulwark of liberty and invite citizen participation in the government.⁴² Our Constitution showcases the jury throughout its body and Amendments, and the document especially highlights the jury’s importance in the prosecution and adjudication of criminal actions.⁴³ Article III of the Constitution

35. See *infra* Part IV.A.

36. See *infra* Part IV.B.

37. See *infra* Parts IV. B–C.

38. See *infra* Part V.

39. See Friedman, *supra* note 23, at 586; *infra* Part V.

40. See *infra* Part VI.

41. See *infra* Part VII.

42. See Harrington, *supra* note 4, at 378, 386.

43. See, e.g., U.S. CONST. Art. III, § 2 (“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury”); U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases

assures one's right to a jury trial by providing that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."⁴⁴ Further, the Fifth Amendment requires indictment by a grand jury in most cases before an individual may be tried "for a capital, or otherwise infamous crime."⁴⁵ And the Sixth Amendment provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."⁴⁶ The Constitution, through the Seventh Amendment, even protects the right to jury trial in civil cases, where the concern that the jury is necessary to protect an individual from an abusive government is less pressing.⁴⁷ The right to a jury trial is the only right protected in both the original Constitution and the Bill of Rights,⁴⁸ indicating the significance of this right at the time of the Founding. As both courts and scholars have recognized, the right to a jury trial is the cornerstone of our justice system.⁴⁹

arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ."); U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.").

44. U.S. CONST. Art. III, § 2.

45. U.S. CONST. amend. V. Generally, "infamous" crimes have been determined to be felonies. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* 772–73 (5th ed. 2009); Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 MINN. L. REV. 398, 412 n.54 (2006) (referring, "[f]or the sake of simplicity," to "infamous crimes" as "felonies"); Reuben Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 HARV. L. REV. 299, 302 (1923) (explaining that the Fifth Amendment, at least according to the Supreme Court's interpretation of it in *Ex parte Wilson*, 114 U.S. 417 (1885), "narrowed the common law rule by substituting 'infamous crimes' for felonies"). This oversimplifies the law, however. For a more thorough understanding of the scope of the Grand Jury Clause of the Fifth Amendment, see generally *Ex parte Wilson*, 114 U.S. 417 (1885) (examining the scope of the Clause); *Fairfax*, *supra* (examining the "jurisdictional heritage of the grand jury"); Oppenheimer, *supra* (examining the history and jurisprudence related to interpreting the Clause); see also LAFAVE, ET AL., *supra*, at 772 (summarizing the judicially-interpreted meaning of "[i]nfamous crime").

46. U.S. CONST. amend. VI.

47. See U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."). The jury's role as a bulwark of liberty between the individual and an abusive government is less concerning in the criminal context than the civil one because it is only in the criminal context that the stringent penalties of imprisonment, or even death, are at stake.

48. See U.S. CONST. Art. III, § 2; U.S. CONST. amend. V; U.S. CONST. amend. VI; U.S. CONST. amend. VII; see also Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1618 (2011) ("The right to trial by jury is the only right guaranteed both in the Constitution itself and in the Bill of Rights.").

49. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (holding that "trial by jury in criminal cases is fundamental to the American scheme of justice"); Laura I. Appleman, *The Plea Jury*, 85 IND. L.J. 731, 734 (2010) ("With its enshrinement of the jury trial, the Sixth Amendment delineates perhaps the most important right in our criminal justice system . . ."); Rory K. Little, *The Eyes of the*

Despite the prominence of the jury in the Constitution, the jury's power has vacillated over time.⁵⁰ The American colonists borrowed the idea of the jury from their English predecessors, but the Americans expanded on it.⁵¹ In England, the jury was charged with determining the facts of a case, but jurors frequently massaged the facts to acquit defendants whom the jurors believed were being unjustly prosecuted.⁵² Having this power to protect citizens from an overzealous and arbitrary government, the jury was celebrated by many as a bulwark of the English people's liberty.⁵³ Building on this tradition, the Americans endowed their juries with even greater rights and powers than their English predecessors.⁵⁴ Where the English juries had the power and right to find only facts, early American juries also had the power and right to decide questions of law.⁵⁵

Juries took on special meaning for the colonists as they struggled against the tyrannical British Crown, which was prosecuting them for offenses that lacked colonial support—such as sedition and smuggling—in the years leading up to the American Revolution.⁵⁶ There were several instances in which colonial jurors acquitted their colonial peers of crimes simply because the jurors considered the laws unjust.⁵⁷ For example, in 1734, John Peter Zenger was charged with publishing “seditious libels” when he printed an accusation that royalist New York Governor William Crosby, who had fired a New York Supreme Court justice for deciding against him in a case, was guilty of corruption and misfeasance in office.⁵⁸ Zenger admitted to having published the papers at issue, which, under the law at that time, was enough to convict.⁵⁹ Yet Zenger's attorney, Andrew Hamilton, argued to the colonial jury that it should not convict Zenger

Beholders, 4 OHIO ST. J. CRIM. L. 237, 239 (2006) (noting that “the criminal jury trial right [has] been recognized as ‘fundamental to the American system of justice’”).

50. See Ryan, *supra* note 23, at 575–79.

51. See Harrington, *supra* note 4, at 387.

52. See Ryan, *supra* note 23, at 575.

53. See Harrington, *supra* note 4, at 378, 385–86.

54. See *id.* at 387; Ryan, *supra* note 23, at 575.

55. See Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 101–02 (2006); Ryan, *supra* note 23, at 575.

56. See Harrington, *supra* note 4, at 393–94. The institution of the jury was so important that it “had become a symbol of the colonists' struggle for self-government.” *Id.* at 395–96.

57. See Harrington, *supra* note 4, at 393–94; Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 321 (2003).

58. See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 2–9, 17–19 (1963); see also Albert W. Alschuler & Andrew G. Deiss, *A Brief History of Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 871–72 (1994).

59. See Alschuler & Deiss, *supra* note 58, at 873.

because Zenger's allegations were true.⁶⁰ Exercising their role as a bulwark of liberty between an overzealous government and the people,⁶¹ the jurors overlooked the then-current law that truth was no defense and instead voted to acquit.⁶² Through their power as a jury, these ordinary Americans had expressed the popular will of the people and protected Zenger from conviction. Faced with other similar scenarios and continuing to struggle for convictions, the British Crown began denying colonists traditional jury trials.⁶³ This became a major point of contention between Great Britain and the colonies because the colonists viewed the jury as an important protector of liberty.⁶⁴ And this concern is exhibited in the colonists' list of grievances set out in their Declaration of Independence from Great Britain.⁶⁵

60. *See id.* In response to the Chief Justice's conclusion that the jury was to decide the issue of publication, while the court was to decide the issue of libel, Hamilton stated:

I know . . . the jury may do so; but I do likewise know they may do otherwise. I know they have the right beyond all dispute to determine both the law and the fact, and where they do not doubt of the law, they ought to do so. . . . [L]eaving it to the judgment of the Court whether the words are libelous or not in effect renders juries useless. . . .

ALEXANDER, *supra* note 58, at 78 (emphasis omitted).

61. *See* Harrington, *supra* note 4, at 378.

62. *See id.* at 428. Although truth was not a defense to libel at the time, the jury's verdict laid the groundwork for today's rule that truth is a complete defense to claims of libel. *See* JOHN FISKE, 2 THE DUTCH AND QUAKER COLONIES IN AMERICA 254 (1899) ("Hamilton may be said to have conducted the case according to the law of the future, and thus to have helped to make that law."). *But see* ALEXANDER, *supra* note 58, at 1–2, 28–31 (asserting that "[t]he reformation of the law of libel and the associated unshackling of the press came about . . . as if Peter Zenger had never existed," explaining that truth was not considered a defense to libel until 1843, and arguing that because Hamilton's defense of Zenger laid "in the realm of political theory" the outcome in the case primarily highlighted the jury's power to nullify).

63. *See* Harrington, *supra* note 4, at 394–95.

64. *See id.* at 395–96. Factors in addition to the revolutionary historical reasons also contributed to powerful juries in early America. First, judges at that time often had no formal legal training and therefore possessed little expertise to properly instruct juries on what the law was. *See* Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407, 419–20 (1999); Ryan, *supra* note 23, at 576. Further, judges frequently sat in panels, and each judge had the power to instruct the jury, *see* WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, 165–70 (1975); Harrington, *supra* note 4, at 390, which led to juries sometimes receiving contradictory instructions regarding the state of the law, *see* NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 49 (2007); Harrington, *supra* note 4, at 390. Moreover, juries—even when they were given unanimous instructions by the judges—were told that they had the power, and the right, to determine both the facts and the law in the case. *See* *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1, 4 (1794) (instructing the jury that it had the "right to take upon [itself] to judge of both [the fact and the law], and to determine the law as well as the fact in controversy"); Harrington, *supra* note 4, at 389–91, 401. Further, there was little consequence if the jury failed to follow the judges' instructions—even if the panel of judges was unanimous as to the requirements of law. *See* Harrington, *supra* note 4, at 390. Courts were very reluctant to set aside jury verdicts, and several states even prohibited them from doing so. *See id.* at 390–91. There were a few limitations on the jury, though, even at this apex of jury power. *See id.* at 391. There could be special pleadings, there were the restraints of evidentiary rules, juries could be instructed to issue special verdicts, or there could be demurrers. *See id.* at 391–92. These devices were not often used, though, and sometimes juries could even opt to ignore them. *See id.* During this time when the jury was embracing its power, few judges had formal legal training and therefore resembled

These powerful early American juries that represented the colonists' long struggle for independence, and who were charged with deciding both law and fact, initially maintained their power as the new American nation emerged after the Revolution.⁶⁶ Every state constitution provided a right to a jury trial in criminal cases, and most provided the right in civil cases as well.⁶⁷ As the nation evolved, though, the role of the jury changed, and soon the American jury's power began to wane.⁶⁸ At the national level, U.S. business interests became concerned about the unreliability of, and variability among, jury verdicts, which they believed would certainly stifle the new nation's fragile economy and possibly even embarrass the country in the international arena.⁶⁹ Separate from this concern, some individuals believed that, now that the nation was run by the people rather than by the abusive British Crown, there was no longer a need for the jury to act as a bulwark between the government and its citizens.⁷⁰ But others maintained that this check on the government remained essential to preserving citizens' liberties.⁷¹ This clash of ideals fed into the debate between the Federalists and Anti-Federalists as they worked to shape the new government and draft the U.S. Constitution and Bill of Rights.⁷² The Federalists believed that a powerful jury would weaken the new nation, whereas the Anti-Federalists thought that the jury was essential to securing citizens' long-fought-for liberties.⁷³ The Anti-Federalists ultimately prevailed in securing the right to

the juries that were deciding law. *See id.* These judges often did not even advise jurors on the law and, when they did, they regularly informed the jury that it was not bound by the judge's view of the law. *See id.* And because of this, lawyers were allowed to argue the law to juries. *See id.*, at 390, 402.

65. THE DECLARATION OF INDEPENDENCE para. 2, 3 (U.S. 1776) (stating that the British king's history was one "of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over the[] States" and that one example of this was "depriving [the colonists] in many cases, of the benefits of Trial by Jury").

66. *See* Harrington, *supra* note 4, at 396.

67. *See id.* The jury's power was even more significant in criminal cases. *See* Iontcheva, *supra* note 57, at 319–20.

68. *See* Ryan, *supra* note 23, at 575.

69. *See* Harrington, *supra* note 4, at 396–98.

70. *See id.* at 399.

71. *See id.* at 398–400; Michael J. Zydney Mannheim, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 99–120 (2012); *cf.* Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 YALE L.J. 1131, 1183 (1991) ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury."); Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment: An Unresolved Fable of Heroes and Villains*, 62 GEO. WASH. L. REV. 359, 383 (1994) (suggesting that the Framers of the Bill of Rights viewed the jury as "a mainstay of liberty and an integral part of democratic government because the common man in the jury box, no less than the citizen in the voting booth, was central to a democratic theory that asserted the sovereignty of the people through self-government").

72. *See* Harrington, *supra* note 4, at 398–400; Mannheim, *supra* note 71, at 99–120.

73. *See* Harrington, *supra* note 4, at 398–99.

jury trial in the Constitution and Bill of Rights, even in civil cases, where less was at stake in terms of citizens' liberties.⁷⁴

The federal judiciary that arose in the new nation still gave juries the power, and the right, to decide both law and fact.⁷⁵ As in the colonies, judges instructed jurors that they had the "right . . . to determine the law as well as the fact in controversy" in cases.⁷⁶ But the same beliefs that the jury was no longer needed as a bulwark of liberty and that inconsistent jury verdicts would weaken the nation continued to persist.⁷⁷ Further, the business of judging gradually became more professionalized—especially in the federal courts—leading judges to undertake greater control in cases.⁷⁸ Judges began instructing jurors on the law more frequently, and these instructions were often more detailed than previously.⁷⁹ This judicial professionalization, paired with the concern that juries undercut commercial interests, led to significant diminishment of civil juries' powers.⁸⁰ Moreover, judges began granting new trials to reverse verdicts where juries had acted contrary to judges' instructions on the law.⁸¹ By about 1820, then, the jury's power over the law in civil cases had essentially disappeared.⁸²

The jury's power to decide law in criminal cases, however, continued through the end of the nineteenth century.⁸³ It was in these types of cases that the jury's function as a bulwark of liberty was considered especially important.⁸⁴ There is more at stake for criminal defendants—their liberty

74. See *id.* at 400; Mannheim, *supra* note 71, at 108 (explaining that it is essential to examine the Anti-Federalists' perspective when studying the Bill of Rights even though "the Anti-Federalists were on the losing side of history," because "the inclusion of the Bill of Rights represents a victory for the Anti-Federalists"); *infra* text accompanying notes 85–86 (explaining why more is at stake for criminal defendants than civil ones); see also U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

75. See Harrington, *supra* note 4, at 401.

76. *Georgia v. Brailsford*, 3 U.S. 1, 4 (Dall.) (1794); see also Ryan, *supra* note 23, at 575.

77. See Harrington, *supra* note 4, at 399, 404–05.

78. See *id.* at 380 ("As legal education became more sophisticated, judges became more convinced that the bench was the proper place in which to lodge the law-finding function."); see also Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 641 (1994) (stating that, in the nineteenth century, American courts "[d]eveloped the procedural tools that would capture trial from the juries").

79. See Harrington, *supra* note 4, at 403.

80. See *id.* at 369–70, 414–23.

81. See *id.* at 379, 419.

82. See *id.* at 379, 414, 423.

83. See *id.* at 379–80, 423, 434–35.

84. See *id.* at 379, 435 ("The fact that the jury was able to retain its law-finding power in criminal cases for as long as it did is clearly due to the reluctance of many lawyers and judges to abandon a principle of popular sovereignty with a long pedigree in the American judicial system.").

and even lives in certain cases⁸⁵—and it is in criminal cases that an overzealous government is of special concern because the government is the charging party.⁸⁶ In addition to the jury's special significance in the criminal context, the civil judges' solution of reining in the jury by granting new trials when juries disregarded a judge's instructions was much tougher in criminal cases because of the limitations of the Constitution's Double Jeopardy Clause.⁸⁷ By the end of the nineteenth century, though, the jury's right to decide law even in criminal cases had essentially disappeared, and judges began instructing juries on the law and prohibiting lawyers from arguing the law to juries and informing juries of their power to nullify.⁸⁸

Also at the end of the nineteenth century, juries lost some of their influence for another reason. Around this time, criminal jury trials became somewhat of a rarity as plea bargaining became the predominant mechanism for resolving criminal matters.⁸⁹ The practice of plea bargaining continued to balloon throughout the twentieth century,⁹⁰ heightened by legislatures' impositions of more stringent sentencing regimes in the 1980s.⁹¹ By the twenty-first century, no more than about 12% of cases were decided through full-blown trials, and not even all of these involved juries.⁹² And in several jurisdictions, even the number of criminal bench

85. See Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1089–90 (2012).

86. See *id.* at 1066–67.

87. See U.S. CONST. amend. V; see also Harrington, *supra* note 4, at 379, 426, 434. The Fifth Amendment provides that “[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

88. Harrington, *supra* note 4, at 380 (“By the end of the nineteenth century, judges shed their earlier hesitance and took upon themselves the power to grant new trials in cases of conviction.”).

89. See Alschuler, *supra* note 3, at 6, 18; see also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDIES 459, 492–93, 510 (2004) (explaining that the percentage of federal and state “criminal dispositions by trial” dropped significantly in the latter half of the twentieth century and that “the absolute number of [federal] criminal trials” similarly dropped during this period).

90. See JENIA I. TURNER, PLEA BARGAINING ACROSS BORDERS 9–10 (2009).

91. See Richard A. Oppel, Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. TIMES, Sept. 26, 2011, at A1.

92. See, e.g., LINDSEY DEVERS, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING: RESEARCH SUMMARY 1 (2011), available at <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf> (“While there are no exact estimates of the proportion of cases that are resolved through plea bargaining, scholars estimate that about 90 to 95 percent of both federal and state court cases are resolved through this process.”); MARK MOTIVANS, BUREAU OF JUSTICE STATISTICS, FEDERAL JUSTICE STATISTICS, 2009, at 12 tbls. 9 & 10 (2011), available at <http://www.bjs.gov/content/pub/pdf/fjs09.pdf> (showing that 87.9% of defendants pled guilty in U.S. district courts in 2009); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1150 (2001) (“Fewer than four percent of adjudicated felony defendants have jury trials, and another five percent have bench trials. Ninety-one percent plead guilty. Our world is no longer one of trials, but of guilty pleas.” (internal citation omitted)); see also, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59, 62 (2006), available at <http://bjs.gov/content/pub/pdf/cfjs04.pdf> (suggesting that approximately 86% of defendants pled guilty

trials outweighed the number of criminal jury trials.⁹³ The American jury, then, not only had less power when it decided cases, but it was able to wield this power in a smaller percentage of cases. This left judges to assess even the facts in a significant number of criminal cases.

Although the American jury's power waned considerably after the close of the nineteenth century, it has recently gained back some of its former glory, at least in the criminal context.⁹⁴ In 2000, the Supreme Court decided *Apprendi v. New Jersey*,⁹⁵ in which the Court "upended decades of criminal sentencing practices" when it determined that judges may not base a criminal offender's sentence on a factor not decided by a jury by proof beyond a reasonable doubt (unless, of course, the trial was a bench trial).⁹⁶ Prior to that, judges had regularly based their sentencing decisions on factors found by only the judges, themselves, and by a lesser standard of proof: a mere preponderance of the evidence.⁹⁷ Drawing on the history of the jury, the *Apprendi* Court explained that depriving the jury of these decisions robbed the jury of its historical roles of acting as a guard against governmental oppression and "as the great bulwark of [our] civil and political liberties."⁹⁸ In more recent cases, the Court has drawn on this same reasoning in further curtailing judicial power. For example, in *United States v. Booker*, the Court struck down the Federal Sentencing Guidelines' system in which judges could enhance offender sentences based on factors they found by only a preponderance of the evidence.⁹⁹ Similar to the Court in *Apprendi*, the *Booker* Court emphasized its concern that, by allocating this factfinding to judges, courts were severely diminishing the jury's power.¹⁰⁰ The Court's focus on the importance of the jury in these cases

in U.S. district courts in 2004); cf. TURNER, *supra* note 90, at 10 ("By 2004, more than 95 percent of convictions in federal court and a similar number in state systems were resolved through no-contest or guilty pleas.").

93. See T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 192 (2012); see also Bibas, *supra* note 92, at 1150 ("Fewer than four percent of adjudicated felony defendants have jury trials, and another five percent have bench trials."). Moreover, the total number of bench trials (in the twenty-three states that were studied) has, year after year, exceeded the total number of jury trials. See Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUDY 755, 764 (2004).

94. See Ryan, *supra* note 23, at 578–79.

95. 530 U.S. 466 (2000).

96. Ryan, *supra* note 23, at 578; *Apprendi*, 530 U.S. at 490–92 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.").

97. See *Apprendi*, 530 U.S. at 490–92.

98. *Id.* at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)); *id.* at 497.

99. 543 U.S. 220, 245, 259 (2005); see also Ryan, *supra* note 23, at 578 ("In *United States v. Booker*, the Court applied [*Apprendi*] to hold unconstitutional the Federal Sentencing Guidelines as they had been applied for nearly twenty years.").

100. See *Booker*, 543 U.S. at 236.

and their progeny has in a way acted to shift some power back to American juries.¹⁰¹ These cases do not come close to restoring the American jury to its revolutionary height, but the cases have resurrected the notion that juries are important in protecting the people from an overzealous government; they are an essential bulwark of liberty.¹⁰² In that sense, these cases open the door to possibly reviving more of the jury's historical power in future cases.¹⁰³

II. THE OMNIPOTENT JUDGE AND CRIMINAL CONSTITUTIONAL MORAL QUESTIONS

The judge's eclipse of the jury's power at the end of the nineteenth century left judges with greater power than ever before. They now had nearly complete control over legal determinations in cases.¹⁰⁴ And judges' power continued to grow as criminal defendants were pressured to surrender their rights to jury trials and instead agree to plea bargains with prosecutors.¹⁰⁵ Judges' power goes beyond just deciding questions of law and fact in bench trials and pure questions of law when a criminal defendant has exercised his right to trial by jury, though. Judges are also resolving hybrid questions of law and fact on issues of criminal constitutional law, forcing them to make constitutional decisions rooted in their own morals and values.

Charged with interpreting the Constitution and its limitations on the state and federal governments, judges find themselves adjudicating within an array of theories of constitutional interpretation. In some instances, the text of the Constitution provides fairly clear answers, such as Article II's proscription that no one is "eligible to th[e] Office [of President] who shall not have attained to the Age of thirty five Years."¹⁰⁶ Other provisions of the Constitution are more ambiguous and require significant interpretation. For example, what is the meaning of the Constitution's prohibition on "cruel and unusual punishments"?¹⁰⁷ And what is the scope of the document's

101. See Ryan, *supra* note 23, at 578–79.

102. See *id.* at 579.

103. See Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 685 (2012) ("As the *Apprendi* case line pushes the role of the jury further toward assessing true culpability, it opens the possibility of returning the jury to its historical role of judging not only the facts of a case but also the meaning of the law as applied to a particular defendant."); Ryan, *supra* note 23, at 579.

104. Of course juries still had the power to nullify, as they do today. See LAFAYE, *supra* note 45, at 1075–76.

105. See *supra* text accompanying notes 89–92. While many scholars explain that this movement increased *prosecutorial* power, it also increased judicial power by virtue of judges' power to accept or reject guilty pleas and sentence offenders.

106. U.S. CONST. art. II, § 1, cl. 5.

107. U.S. CONST. amend. VIII.

articulated “right . . . against unreasonable searches and seizures”?¹⁰⁸ Professor Paul Brest has explained that interpreters must confront language such as this with the intent to “translate” its meaning into modern terms.¹⁰⁹ Regardless of whether judicial interpreters subscribe to originalists’ views or the views of living constitutionalists, they are faced with ascertaining the meanings of often ambiguous constitutional provisions as they apply them to contemporary problems—a task that often involves assessing modern society’s morals and values.

On straightforward questions of pure constitutional law, lower court judges can often rely on Supreme Court precedent in determining the applicability of a constitutional provision. When it comes to applying constitutional law to facts, however, clear precedent is often more difficult to find.¹¹⁰ For example, is it “reasonable” under the Fourth Amendment for the government to persistently track an individual’s whereabouts and activities through the use of drones?¹¹¹ Is it “cruel and unusual” under the

108. U.S. CONST. amend. IV.

109. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 218 (1980) (asserting that interpreters must not only “immerse [themselves] in the world of the adopters” to truly understand the concepts and values of the Constitution and “ascertain the adopters’ interpretive intent and the intended scope of the provision in question,” but they must also “‘translate’ the adopters’ concepts and intentions into our time and apply them to situations that the adopters did not foresee”); cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 132–37, 147 (1977) (suggesting that those consenting to and adopting the terms of the Constitution would have intended future interpreters of the text to develop their own “conceptions” of the document’s text). As an example of this “translation,” Professor Brest examines the meaning of the Eighth Amendment Punishments Clause. See Brest, *supra*, at 220–21. He explains that those adopting the Clause certainly did not understand it to prohibit capital punishment. See *id.* at 220; see also Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 568 (2010) (explaining that the text of the Constitution “enshrine[s] the practice” of capital punishment). But the practice of imposing death at the time the Constitution was drafted and ratified differed significantly from capital punishment today. See Brest, *supra*, at 220. “Death was not only a much more routine and public phenomenon then, but the fear of death was more effectively contained within a system of religious belief. Twentieth-century Americans have a more secular cast of mind and seem less willing to accept this dreadful, forbidden, solitary, and shameful event.” *Id.* at 221 (internal citations omitted). According to Professor Brest, this indicates that interpreters of the Constitution ought to consider this change in time, practice, and values in assessing whether the death penalty should be viewed now just as it was at the time the Constitution was adopted. *Id.* But Professor Brest explains that this task of “translation” leaves the interpreter in “a fantasy world,” so attempting to interpret the Constitution in accordance with the adopters’ intentions is misdirected. *Id.*

110. See *Scott v. Harris*, 550 U.S. 372, 383 (2007) (“[I]n the end [the Court] must . . . slosh [its] way through the factbound morass of [Fourth Amendment] ‘reasonableness.’”); *Scott v. United States*, 436 U.S. 128, 139 (1978) (“Because of the necessarily ad hoc nature of any determination of [Fourth Amendment] reasonableness, there can be no inflexible rule of law which will decide every case.”); cf. Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1158 (2012) (“[T]he multifarious circumstances of law enforcement make consistent rulemaking and application difficult.”).

111. See RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R42701, *DRONES IN DOMESTIC SURVEILLANCE OPERATIONS: FOURTH AMENDMENT IMPLICATIONS AND LEGISLATIVE RESPONSES*, 12–17 (2013), available at <http://www.fas.org/sgp/crs/natsec/R42701.pdf> (examining the issue).

Eighth Amendment for a criminal defendant to be sentenced to life in prison without the possibility of parole as a repeat offender for grand theft auto, when his first two offenses were petty larceny and minor assault?¹¹² Answering these questions requires decisionmakers to apply the law to the facts in the specific case.

These hybrid questions of law and fact are generally resolved by juries (unless the parties have opted for a bench trial),¹¹³ but in this context of deciding constitutional criminal procedure questions that are rooted in moral and value judgments—in this area of “criminal constitutional moral decisionmaking”—the system instead entrusts this decisionmaking to judges. Complicating these judicial moral assessments, both the text of the Constitution and the Supreme Court’s interpretation of it dictate that judges resolve these matters based not only on their own moral views but also on the views of society at large. Determining how to decide these issues can be very problematic for judges.

Courts’ interpretations of the Constitution and its applicability to various factual scenarios involve several of these difficult moral questions. Among them are interpreting the scope of the Fourth Amendment right against “unreasonable searches and seizures”¹¹⁴ and the Eighth Amendment’s prohibitions on “cruel and unusual punishments”¹¹⁵ and “[e]xcessive . . . fines.”¹¹⁶

112. U.S. CONST. amend VIII. *Compare, e.g.,* *Solem v. Helm*, 463 U.S. 277, 279–82, 303 (1983) (finding unconstitutional the punishment of life in prison without the possibility of parole for the crime of uttering a no-account check, where the offender had a long list of prior offenses), *with* *Ewing v. California*, 538 U.S. 11, 18–19, 30 (2003) (finding constitutional the punishment of twenty-five years to life in prison for the crime of felony grand theft where the offender had a long list of prior offenses).

113. *See* *United States v. Gaudin*, 515 U.S. 506, 512, 514 (1995) (stating that mixed questions of law and fact have “typically been resolved by juries” and that the jury has a “constitutional responsibility . . . to apply the law to [the] facts”); *LAFAVE, supra* note 45, at 1075 (“The function of the jury is commonly said to be that of ascertaining the facts and then applying the law, as stated by the judge, to those facts.”); Ronald J. Bacigal, *A Case for Jury Determination of Search and Seizure Law*, 15 U. RICH. L. REV. 791, 816 (1981) (stating that “questions of the application of a legal standard to the facts . . . [are] often determined by the jury”); Josh Savitz & Erica Trachtman, *False Statements and False Claims*, 49 AM. CRIM. L. REV. 703, 710 (2012) (stating that the Supreme Court has determined that such hybrid questions of law and fact are to be determined by juries); *see also* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33 (2003) (recognizing that juries decide mixed questions of law and fact due to their right to “decide guilt or innocence on every issue, which includes application of the law to the facts”); *cf.* JAMES A. HENDERSON, JR., ET AL., *THE TORTS PROCESS* 85 (8th ed. 2012) (stating that questions of law and fact “are almost universally treated, in this country, as issues for the jury to resolve”); Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1279 (2000) (“Juries in criminal cases define the prohibitory norms that they apply, because these norms present predominantly mixed questions of law and fact for decision, and because the jury inevitably possesses substantial latitude to interpret the law in the course of applying it to facts.”).

114. U.S. CONST. amend. IV.

115. U.S. CONST. amend. VIII.

116. *Id.*

A. *Fourth Amendment Reasonableness*

Fourth Amendment reasonableness is a good example of one of the difficult criminal constitutional moral inquiries that judges face today. The Fourth Amendment protects individuals against “unreasonable searches and seizures.”¹¹⁷ As Professor Carol Steiker has pointed out, though, the Amendment’s use of the term “unreasonable” is ambiguous¹¹⁸ and requires judges applying this law to draw on their own senses of constitutional meaning. The Court has, in most instances, concluded that the Amendment protects individuals from intrusions into areas in which they have a “reasonable expectation of privacy” unless the government has a valid warrant authorizing the intrusion.¹¹⁹ But again, this assessment of reasonableness is very open-ended and is at bottom a “value judgment.”¹²⁰ It requires balancing the benefits of the police activity against the extent to which individual privacy is diminished, with the aim of maintaining a free society.¹²¹

Any constitutional standard like this one of “reasonableness” has both advantages and disadvantages. Such standards are flexible and, here, allow our conception of the Fourth Amendment to adapt to changing circumstances and advancing technologies.¹²² This flexibility was

117. U.S. CONST. amend. IV.

118. See Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823–24, 852 (1994) (explaining that Fourth Amendment interpretation invites “a fairly high level of abstraction of purpose” and referring to unreasonableness as an “amorphous” standard); see also Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 COLUM. L. REV. 1751, 1770 (1994) (suggesting that Fourth Amendment reasonableness is “amorphous”).

119. *United States v. Jones*, 132 S. Ct. 945, 950–51 (2012); see also Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 490 (2011) (“[T]he ‘reasonable expectation of privacy’ test . . . is the best-known doctrinal test in Fourth Amendment law.”); cf. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that an individual’s expectation of privacy must “be one that society is prepared to recognize as reasonable”); WAYNE R. LAFAYE, ET AL., *CRIMINAL PROCEDURE* 128–29 (4th ed. 2004) (asserting that the “reasonable expectation of privacy” test should be interpreted as requiring a *justified* expectation of privacy and also explaining that a requirement that an individual subjectively have an expectation of privacy would frustrate the Fourth Amendment’s protection because “the government could diminish that protection by announcing in advance an intention to do so”). But cf. generally Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that reasonableness, not a warrant requirement, is the touchstone of the Fourth Amendment). In its 2012 case of *United States v. Jones*, 132 S. Ct. 945, the Court explained that, in addition to protecting areas in which an individual has a reasonable expectation of privacy, the Fourth Amendment protects individuals from the government physically trespassing on the Fourth-Amendment-protected items of “persons, houses, papers, and effects.” *Id.* at 950–53 & n.8.

120. LAFAYE, ET AL., *supra* note 119, at 129; Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974); Kerr, *supra* note 119, at 490.

121. See Amsterdam, *supra* note 120, at 403.

122. See Steiker, *supra* note 118, at 824 (“[T]he Fourth Amendment, more than many other parts of the Constitution, appears to require a fairly high level of abstraction of purpose; its use of the term

incorporated into Fourth Amendment doctrine in the famous case of *Kyllo v. United States*,¹²³ in which the Court determined that the government may not constitutionally employ “technology [that] is not in general public use” to gather information that traditionally could not “have been obtained without physical intrusion into a constitutionally protected area.”¹²⁴ As the general public embraces and employs new technologies, it transforms the technologies from tools prohibited to spy on generally constitutionally-protected areas into tools that may be so used. This same flexibility that is desirable in Fourth Amendment jurisprudence has a downside, though. Applying the test to real cases results in some inconsistency and incoherency—producing cases that one legal scholar has described as “all over the map.”¹²⁵ This is because Fourth Amendment reasonableness requires judges to draw on their own senses of what society views as an acceptable balance of individual privacy and the government’s need to protect society. It requires them to assess for themselves whether new technology has entered into “general public use.”¹²⁶ Because judges will differ in their assessments of changing societal values, consistency in these cases proves difficult.¹²⁷

B. Eighth Amendment Cruelty and Unusuality

Just like Fourth Amendment reasonableness determinations, Eighth Amendment conclusions of whether a punishment is unconstitutionally cruel and unusual require judges to draw on their own morals and values. The Eighth Amendment textually prohibits “cruel and unusual punishments,” and the Court has concluded that this proscription must “draw its meaning from the evolving standards of decency that mark the

‘reasonable’ (actually, ‘unreasonable’) positively invites constructions that change with changing circumstances.”). *See generally* Kerr, *supra* note 119 (describing the flexibility of the Fourth Amendment). Even Justice Scalia, a well-known proponent of originalism, has stated that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” *Kyllo v. United States*, 533 U.S. 27, 33–34 (2001); *see also* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 82, 89 (2012) (stating that “originalism remains the normal, natural approach to understanding anything that has been said or written in the past” and that “[t]he conclusive argument in favor of originalism is a simple one: It is the only objective standard of interpretation even competing for acceptance”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997) (“What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended.”).

123. 533 U.S. 27 (2001).

124. *Id.* at 34 (internal quotations omitted).

125. *See* Kerr, *supra* note 119, at 490–91.

126. *Kyllo*, 533 U.S. at 34.

127. *See* Kerr, *supra* note 119, at 490–91.

progress of a maturing society.”¹²⁸ This standard of decency is to be determined by judges. The Court has explained that these Punishments Clause determinations “embod[y] . . . moral judgment[s]” and that, although “[t]he standard itself remains the same, . . . its applicability must change as the basic mores of society change.”¹²⁹

The Court has articulated that, in order to reach individual conclusions about the cruelty and unusualness of a punishment, it is to examine certain “objective indicia” of the evolving standards of decency and also rely on its own “independent judgment.”¹³⁰ The first part of the Court’s cruel and unusual inquiry may appear dispassionate: Here, the Court primarily assesses the number of jurisdictions employing or prohibiting a particular punishment. In reality, however, the Court has been inconsistent in this calculation and also sometimes places greater weight on the “consistency and direction of change in states’ legislation” than on the simple number of states adopting or prohibiting the punishment.¹³¹ This suggests that individual judges’ personal preferences may be interfering with their arithmetic in these cases.¹³² The second part of the Court’s inquiry—the application of its own independent judgment—more explicitly relies on individual judges’ moral assessments. The subjectivity of this judgment is exacerbated by the Court’s lack of principled criteria to employ in assessing a punishment under this prong of the analysis.¹³³ And in reaching this judgment, the Court has relied on factors as varied as the purposes of punishment, offenders’ competencies, whether the punishment will cause other offenders to commit further crimes, and the reliability of the evidence

128. U.S. CONST. amend. VIII; *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

129. *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)).

130. See, e.g., *Graham v. Florida*, 560 U.S. 48, 61 (2010) (explaining that “[t]he Court first considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’” and then “determine[s] in the exercise of its own independent judgment whether the punishment in question violates the Constitution”); *Kennedy*, 554 U.S. at 421 (“Based both on consensus and our own independent judgment, our holding is that a death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.”).

131. Ryan, *supra* note 109, at 587. The Court also examines actual sentencing practices, as well as other “objective indicia,” under this first prong of its Punishments Clause analysis. See, e.g., *Graham*, 560 U.S. at 62 (“There are measures of consensus other than legislation. Actual sentencing practices are an important part of the Court’s inquiry into consensus.” (internal quotations omitted)).

132. See William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of “Death-Is-Different” Jurisprudence*, 28 PACE L. REV. 15, 23–24 (2007) (alleging that the Court’s subjective views have influenced its calculations of the objective indicia of consensus).

133. See Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 99–121 (2010) (outlining the vast array of factors that the Court has historically relied upon in forming its own independent judgment in Punishments Clause cases and calling for a more focused inquiry in this context).

on which the underlying conviction was based.¹³⁴ As in the context of Fourth Amendment reasonableness, this highly unbounded decisionmaking by judges has led to inconsistency in these Punishments Clause assessments.

C. Eighth Amendment Excessiveness

As with the Eighth Amendment's prohibition on cruel and unusual punishments, the Amendment's limitation on "excessive fines" calls out for judgment based upon societal values.¹³⁵ The Supreme Court has had only a few opportunities to examine the Excessive Fines Clause,¹³⁶ but the Court has concluded that the Clause "limits the government's power to extract

134. See *id.* at 99–119.

135. See U.S. CONST. amend. VIII (providing that "excessive fines [shall not be] imposed"). The Court's understanding of the Eighth Amendment's prohibition on excessive bail, see U.S. CONST. amend. VIII ("Excessive bail shall not be required . . ."), diverges somewhat from its understanding of excessive fines. The text of the Excessive Bail Clause may suggest that "excessiveness," or proportionality, should be interpreted similarly under that Clause as under the Excessive Fines Clause. However, while the Court assesses proportionality for excessive fines by comparing the amount of the fine to the gravity of the offense, see *infra* text accompanying note 139, the Court assesses proportionality for excessive bail by focusing instead on whether the amount of bail is no more than necessary to ensure the defendant's presence at trial. See *Stack v. Boyle*, 342 U.S. 1, 3 (1951) ("Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose"—"giving adequate assurance that [the defendant] will stand trial and submit to sentence if found guilty"—"is 'excessive' under the Eighth Amendment."). After all, it may not make sense for the excessiveness inquiry in the bail context to mirror the inquiry in the fines context: setting a defendant's bail at an amount proportionate to the defendant's culpability is inappropriate, because the defendant has not yet been found guilty. Professor Richard Frase has characterized the Court's excessiveness inquiry in the fines context as applying both retributive and utilitarian frameworks, see Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 602–04 (2005), and he has characterized the Court's excessiveness inquiry in the bail context as solely utilitarian in nature, see *id.* at 603. More specifically, Professor Frase has suggested that, in the bail context, the Court applies "means proportionality"—the amount becomes too costly or burdensome if the goal can be achieved in a less burdensome way. See *id.* at 595, 603 (stating that the Court's language in *Stack v. Boyle* "implies a form of means proportionality"—a principle that "recognizes basic utilitarian efficiency values: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred"). ("In the punishment context, Norval Morris calls this the principle of parsimony." *Id.* at 595.) Despite the similar text in the two clauses, the Court's "means" analysis under the Excessive Bail Clause suggests that something more than a moral, or societal, judgment is necessary in determining excessiveness here. Instead, some technical expertise in determining what might compel the defendant's presence at trial may be necessary. Thus, while the constitutional text suggests that all Eighth Amendment excessiveness is, at root, a question of morals, the way that the Court has approached the Excessive Bail Clause renders the assessment of excessiveness in that context possibly subject to a more technical analysis.

136. See *United States v. Bajakajian*, 524 U.S. 321, 327 (1998); cf. Frase, *supra* note 135, at 602 ("Curiously, the Supreme Court had no occasion to interpret the Excessive Fines Clause until the 1990s, and then did so only in cases involving criminal and civil forfeitures.").

payments, whether in cash or in kind, ‘as punishment for some offense.’”¹³⁷ Proportionality is key to the constitutionality of a fine,¹³⁸ and a fine is constitutionally excessive under the Eighth Amendment if it is grossly disproportionate to the gravity of the defendant’s offense.¹³⁹ The Court has acknowledged the inherent imprecision involved in resolving this question¹⁴⁰—an imprecision that stems from the fact that this is a judgment call based on one’s assessment of the defendant’s culpability and how that relates to dollars and cents.¹⁴¹ Such subjective value judgments are inherent in these criminal constitutional moral questions that derive from malleable constitutional provisions.

III. JUDGES’ SHORTFALLS

Judges face these difficult criminal constitutional moral questions on a regular basis, and they struggle to reach reliable decisions on these matters. While judges are well trained in the law, they are ordinarily not trained in moral decisionmaking. Moreover, although these criminal constitutional moral questions often change with societal preferences and advancing technologies, as demonstrated in the Fourth and Eighth Amendment contexts, judges are generally not representative of society. It is difficult, then, for these judges to have their fingers on the pulses of rapidly-changing societal norms.

A. *Judges’ Lack of Training*

Since the rise in the professionalization of judging in the 1800s,¹⁴² judges have been well positioned to make legal determinations. Unlike in the early days of the Republic, today’s judges are highly trained. In most instances they have received college degrees and Juris Doctors and have often spent a significant amount of time practicing law as well before being elevated to a judgeship through either appointment or election. This legal

137. *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (emphasis omitted) (quoting *Browning-Ferris Industries of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)); *see also Bajakajian*, 524 U.S. at 327–28 (quoting *Austin*, 509 U.S. at 609–10).

138. *See Bajakajian*, 524 U.S. at 334 (“The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”).

139. *See id.*

140. *See id.* at 336 (noting that “any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise”).

141. Professor Richard Frase has characterized this approach as retributive in nature. *See Frase, supra* note 135, at 602–04.

142. Harrington, *supra* note 4, at 380, 432; Ryan, *supra* note 23, at 575–76.

expertise makes judges good arbiters of questions such as what are the elements of a manslaughter offense and what is the statutory maximum for the crime of embezzlement.

Judges' legal expertise, though, does not mean that judges are best suited to make all decisions involved in legal disputes. Questions of fact, for example, are ordinarily reserved for juries (unless the parties have agreed that the case should be decided by the judge instead).¹⁴³ Juries, then, are considered the best deciders of fact.¹⁴⁴ Mixed questions of law and fact are also usually reserved for juries.¹⁴⁵ For example, juries are often charged with determining matters such as whether a defendant was legally insane at the time he committed the crime and whether a defendant was under duress when he acted.¹⁴⁶ Judges are generally not specifically trained to decide questions of fact, or even mixed questions of law and fact, and there appears to be no evidence that they are better factfinders than jurors.

Unlike with other mixed questions of law and fact, judges reserve the mixed questions of law and fact dealing with criminal constitutional moral matters for themselves.¹⁴⁷ These questions, though, such as whether a government's intrusion on the defendant's privacy was "reasonable" under the Fourth Amendment, are questions of morality and value judgment for which judges have not been specifically trained. Although judges' law degrees suggest that they have been instructed on how to make thoughtful legal decisions, a Juris Doctor does not adequately train judges to make moral decisions. A typical law school curriculum requires students to take courses in civil procedure, constitutional law, contracts, criminal law, legal

143. See Melanie D. Wilson, *The Return of Reasonableness: Saving the Fourth Amendment From the Supreme Court*, 59 CASE W. RES. L. REV. 1, 6 (2008) ("Juries routinely decide questions of fact in both civil and criminal cases . . ."). *But cf. generally* Jonathan F. Mitchell, *Apprendi's Domain*, 2006 SUP. CT. REV. 297, 303–04 (2006) (explaining that the Supreme Court has recently enlarged the right to have a jury decide factual issues at sentencing but that some factual issues—such as mitigating sentencing factors—are still decided by judges).

144. See W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 609 (2008) ("The judicial system is at its best when it permits a jury to bring a mix of common sense, sincerity and passion to the jury box, giving their best efforts to decide hard fact questions."); Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After Booker: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895, 905 (2005) ("As our system has implicitly recognized for centuries, juries are simply the best actors to decide fact questions."); Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 723, 745 (1993) ("The Founders considered the jury to be superior to a single judge in finding facts because it embodied the common sense of twelve individuals with a variety of experiences and knowledge.")

145. See *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (noting that "mixed question[s] of law and fact" are "typically . . . resolved by juries"); see also *supra* text accompanying note 113.

146. See WAYNE R. LAFAYE, *CRIMINAL LAW* 456, 518–19 (5th ed. 2010).

147. See *supra* Part II.

writing, professional responsibility, property, and torts.¹⁴⁸ Some schools also require other courses like international law or administrative law.¹⁴⁹ Law school courses ordinarily do not specifically train students to make moral decisions, although they may touch on the moral implications of law. This means that judges are not more qualified than any other decisionmaker to engage in the moral reasoning involved in this type of decisionmaking.¹⁵⁰ Moreover, not only are judges not trained to make moral decisions, but they are also not trained to objectively assess the moral norms of their communities—a skill that would prove useful for judges under the current system because many of these criminal constitutional moral matters are rooted in societal norms.¹⁵¹

Judges' lack of training in this area of criminal constitutional moral questions has led judges to employ proxies in their attempts to assess society's norms. In the Fourth Amendment context, for example, judges might rely on the bright-line rule that police officers may use technology that has entered into "general public use" to gain information about individuals and then rely on their own intuitions as to whether the technology at issue has indeed entered into "general public use."¹⁵² In the Punishments Clause context, judges rely on their own "independent

148. For example, Yale Law School requires its first-year students to take "Constitutional Law, Contracts, Procedure, and Torts," and it requires its students to have taken criminal law, administrative law, and professional responsibility by the time they graduate. *See About the First Term*, YALE LAW SCHOOL, <http://www.law.yale.edu/academics/jdfirstterm.htm> (last visited Feb. 1, 2014).

149. *See id.*

150. *See* Ronald J. Allen, *Moral Choices, Moral Truth, and the Eighth Amendment*, 31 HARV. J.L. & PUB. POL'Y 25, 28 (2008) ("Here the evidence is pretty plain: judges are no better than the rest of us at moral reasoning."); *see also* Ryan, *supra* note 23, at 550–61 (explaining how judges might approach this moral decisionmaking and how it should instead be "patrolled by society").

151. *See supra* Part II.

152. In the recent case of *Shafer v. Boulder*, 896 F. Supp. 2d 915 (D. Nev. 2012), for example, the U.S. District Court for the District of Nevada concluded that the surveillance at issue constituted a search:

The DHS cameras provided to [the government's agent] were long-range, infrared, heavy-duty, waterproof, daytime/nighttime cameras, purchased as part of a \$50,000 Department of Homeland Security grant to combat terrorism and similar criminal activity. The DHS cameras undoubtedly contained superior video-recording capabilities than a video camera purchased from a department store. As such, this case presents similar facts to cases where "the Government uses a device that is not in general public use[] to explore details of a home that would previously have been unknowable without physical intrusion."

Id. at 932 (citing and quoting *Kyllo v. United States*, 533 U.S. 27, 40 (2001)). In contrast, in the case of *United States v. Sayer*, the U.S. District Court for the District of Maine found that the technology at issue—technology used to assess whether there was a wireless signal available for use in defendant's house—was in "general public use." *United States v. Sayer*, No. 2:11-cr-113-DBH, 2012 WL 2180577, at *2 (D. Me. 2012). According to the court, "anyone with a laptop with wireless capability can find evidence of WiFi signals," thus "[t]his is not *Kyllo's* advanced technology 'not in general public use.'" *Id.*

judgment”¹⁵³ and also rely on state legislative action to determine societal norms.¹⁵⁴ Such “state-counting” on the part of courts is an imperfect proxy, though, for assessing society’s view on the propriety of a punishment, as “state legislation does not necessarily reflect moral values;”¹⁵⁵ such legislation may be adopted or rejected for reasons unrelated to the perceived cruelty and unusualness of a punishment.¹⁵⁶ These varying approaches to criminal constitutional moral questions reflect judges’ lack of training in the area and obscure the true societal consensus upon which these constitutional decisions are purportedly based. Accordingly, they render the societally-based standard a legal fiction.

B. *Judges Are Not Representative*

Not only are judges not trained to make the moral determinations necessary to resolve criminal constitutional moral questions, but judges are not representative of the societal standards upon which these questions are based, thus likely skewing judges’ conclusions in these areas. Individual moral determinations vary from person to person, and moral norms vary from community to community. To the extent that constitutional decisions are based on a community’s moral norms, they are better made by a group of individuals representative of that community rather than individuals who have not been trained to make moral determinations based on a community’s values.

Judges as a whole are not representative of society, nor are they usually representative of the individual communities that they serve.¹⁵⁷ For example, looking at the Supreme Court, only a third of Justices are female, whereas females comprise over half of the U.S. population.¹⁵⁸ The

153. See Ryan, *supra* note 133, at 85–88; *supra* text accompanying notes 130–34. This “independent judgment” analysis employed by judges in the Punishments Clause context lacks focus and legal guidance. See Ryan, *supra* note 133, at 98–99.

154. See *supra* text accompanying notes 130–131.

155. Ryan, *supra* note 109, at 593.

156. Bryan Lester Dupler, *Another Look at Evolving Standards: Will Decency Prevail Against Executing the Mentally Retarded?*, 52 OKLA. L. REV. 593, 604 (1999); Ryan, *supra* note 109, at 593–94 (“[T]his metric can serve as only a proxy, and an imperfect one at that, for how the public views the cruelty of [a] practice.”). Moreover, state-tallying fails to account for the different populations of each state. See Ryan, *supra* note 109, at 593–94.

157. There are various reasons why this might be the case. First, an unrepresentative number of minorities enter the legal profession. See Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 178 (2004). Second, the method by which judges are chosen—whether by appointment or election—might affect diversity on the bench. See *id.* at 178–79.

158. See U.S. CENSUS BUREAU, AGE AND SEX COMPOSITION: 2010 2 (May 2011) [hereinafter 2010 AGE & SEX CENSUS], available at <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>; Ryan, *supra* note 23, at 560. Of course it makes sense that the average American is younger than the

percentage of Justices on the Supreme Court who are sixty-two years of age or older is over four times the national average.¹⁵⁹ And every single Justice on the Court possesses college and law school degrees, whereas only about a third of adult Americans hold even bachelor's degrees.¹⁶⁰

The same is true with federal judges generally.¹⁶¹ A 2004 study examining diversity among judges found that African Americans, Asian/Pacific Islanders, Latinos, and American Indians were all underrepresented on the federal bench as recently as 2001.¹⁶² (More recent data has not yet been made available.) For example, while Latinos comprised about 12.5% of the U.S. population around that time, Latinos comprised just 6.7% of the judges in the federal circuit courts of appeals and just 5.7% of judges in the federal district courts in 2001.¹⁶³ And while the U.S. population of women ordinarily hovers around 50%,¹⁶⁴ women represented just around 25% of the judges of the U.S. courts of appeals in 2005.¹⁶⁵ Moreover, where the average age of federal judges was fifty-three in 2010, the average age of Americans in that year was approximately thirty-seven.¹⁶⁶

average Supreme Court Justice, or any judge, because children, who are included in the calculation of the average age of Americans, ordinarily cannot be judges.

159. See 2010 AGE & SEX CENSUS, *supra* note 158, at 2; Ryan, *supra* note 23, at 560. Sixty-seven percent of the Justices are sixty-two years of age or older, whereas only 16.2% of Americans are this old. See 2010 AGE & SEX CENSUS, *supra* note 158, at 2.

160. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2012, at 151, available at <http://www.census.gov/prod/2011pubs/12statab/educ.pdf> (providing that 29.9% of Americans who are of at least twenty-five years of age had at least received a college degree by 2010).

161. See Graham, *supra* note 157, at 158, 161–63, 179 (explaining that “judges of color are underrepresented at all levels of the federal and state court systems and that particular racial and ethnic groups are virtually excluded from federal and state benches”).

162. See *id.* at tbl.1, app. at 181–83. Graham obtained her data by consulting *The Directory of Minority Judges of the United States*. See *id.* at 156.

163. See *id.* at tbl.1; U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING 1 (May 2001) [hereinafter 2000 POP. & HOUSING CENSUS], available at http://www2.census.gov/census_2000/datasets/demographic_profile/0_United_States/2kh00.pdf.

164. See 2010 AGE & SEX CENSUS, *supra* note 158, at 2 (finding women to comprise 50.9% of the U.S. population in 2000 and 50.8% of the U.S. population in 2010).

165. See Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 63, tbl.6 (2008) (placing the figure at 25.15%).

166. Compare LEE EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 338–39 (2013) (stating that the average age of the nine U.S. Supreme Court Justices in 2010 was 64, the average age of the 163 active judges serving on the federal courts of appeals was 62.2, and the average age of the 632 active federal district court judges in that year was 59.9), with 2010 AGE & SEX CENSUS, *supra* note 158, at 4 (providing population figures for five-year age ranges). See also Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Federal Court Judges: 1945–2000*, 91 CALIF. L. REV. 1029, 1047–48 (2003) (stating that, through at least the year 2000, the average age of federal judges has remained steady between about sixty-one and sixty-five years of age); U.S. CENSUS BUREAU, CENSUS 2000 BRIEF: AGE: 2000, at 4 (Oct. 2001) [hereinafter 2000 AGE CENSUS], available at <http://www.census.gov/prod/2001pubs/c2kbr01-12.pdf> (providing

There exists a similar pattern of unrepresentativeness in the state courts. For example, falling below the 2000 U.S. African-American population of 12.3%, African Americans comprised just 6.8% of the justices on state supreme courts, 6.5% of the judges on the state intermediate appellate courts, and 5.9% of the judges on the state general jurisdiction courts that same year.¹⁶⁷ And Latinos comprised 2.1% of the justices on state supreme courts, 2.8% of the judges on state appellate courts, and 2.6% of the judges on state district courts, whereas they comprised 12.5% of the U.S. population around that time.¹⁶⁸ In fact, more than 80% of the states underrepresented African Americans, Asian/Pacific Islanders, Latinos, and American Indians on the bench in state courts that year.¹⁶⁹ Further, just as in the federal context, women represented just about 26% of the judges on the state appellate court level despite the fact that about half of the U.S. population is female.¹⁷⁰ And, again, state court judges are on average significantly older than most Americans.¹⁷¹

Underrepresentation exists on both the state and federal levels along many lines: race, sex, religion, education, wealth,¹⁷² politics,¹⁷³ and other

population figures for five-year age ranges, which suggests that the average age of Americans in 2000 was about thirty-six). *But cf. supra* note 158 (noting that it makes sense for the average age of an American to be lower than the average age for a judge).

167. *See* Graham, *supra* note 157, at tbl.2.

168. *See id.*

169. *See id.* Forty-two out of the fifty states underrepresented African Americans, *see id.* at tbl.3, forty-eight underrepresented Asian/Pacific Islanders and American Indians, *see id.* at tbls.4 & 6, and all fifty underrepresented Latinos, *see id.* at tbl.5.

170. *See* 2010 AGE & SEX CENSUS, *supra* note 158, at 2 (finding women to comprise 50.9% of the U.S. population in 2000 and 50.8% of the U.S. population in 2010); Hurwitz & Lanier, *supra* note 165, at 53 tbl.2, 59 tbl.3, 62 tbl.5 (concluding that either 26.18% or 26.61% of the judges on the state courts of appeals were female in 2005). This assumes that the male-to-female ratio does not differ significantly from state to state—an assumption supported by U.S. Census data. *See generally* U.S. CENSUS BUREAU, STATE & COUNTY QUICKFACTS, *available at* <http://quickfacts.census.gov/qfd/index.html> (exhibiting that the male-to-female population in the states hovers around 50%) (last visited Feb. 25, 2013).

171. *Compare* Erin J. Williamson, *Demographic Snapshot of State Trial Court Judges: 1979 and 2004* at 11, *available at* https://web.archive.org/web/20101216112512/http://naspa.org/initiatives/paa/pdf/Erin_Williamson.pdf (last visited Mar. 21, 2014) (stating that, in 2004, the average age of state trial judges was fifty-five), *with* 2000 AGE CENSUS, *supra* note 166, at 1 (providing population figures for five-year age ranges), *and* note 166.

172. Further, judges ordinarily come out of the upper middle class. *Cf.* Anita Bernstein, *Muss Es Sein? Not Necessarily, Says Tort Law*, 67 LAW & CONTEMP. PROBS. 7, 12 (2004) (“Most contemporary judges . . . were reared and educated in affluent settings. . . . In most of their demographic traits, including race, gender, and class, judges do not constitute a representative specimen of Americans. They deviate in a direction favoring wealth and power.”). *But cf.* Daniel M. Schneider, *Statutory Construction in Federal Appellate Cases: The Effect of Judges’ Social Backgrounds and of Other Aspects of Litigation*, 13 WASH. U. J.L. & POL’Y 257, 258 (2003) (arguing that judges’ socio-economic backgrounds have no effect on how they decide cases).

173. Judges—whether appointed or elected—often must be more politically active or connected to acquire a judgeship in today’s political environment. *See* Robert A. Heineman, POLITICAL SCIENCE: AN INTRODUCTION 196 (1996) (“[J]udges are selected from the ranks of lawyers; usually these

areas. There has been progress in recent years, though, to increase diversity in the courts.¹⁷⁴ And increasing diversity and thus diminishing underrepresentation may go a long way in matching judges' constitutional moral decisionmaking to the values of the communities they serve. Even increasing diversity on the courts, though, cannot render judges entirely representative of their communities. Most judges will likely still be older, more educated, wealthier, and possibly more political than the communities they serve,¹⁷⁵ and significant evidence suggests that attributes such as these significantly affect judges' decisionmaking.¹⁷⁶ Moreover, solitary judges cannot represent every element of their communities as well as juries, by virtue of their multi-member bodies, can.

IV. THE JURY'S STRENGTHS

Juries, rather than judges, are the ones who should be deciding the criminal constitutional moral questions that judges often face today.¹⁷⁷ Just as juries decide hybrid questions of law and fact on an everyday basis, they are capable of deciding hybrid questions of law and fact that relate to constitutional matters. And trusting jury decisionmaking in this regard would be consistent with the historical role of juries deciding a broader range of questions¹⁷⁸ and the Court's recently returned faith in the jury as exhibited in *Apprendi* and its progeny.¹⁷⁹ Most importantly, though, juries

attorneys have been politically active or have contributed heavily to political parties [J]udicial positions . . . usually are patronage rewards for political support.”); Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 906 (2001) (“Most federal judges were politically active prior to their appointment.”). As one scholar has stated, “[P]olitics and ideology are the primary determinants of who will sit on the federal courts.” Graham, *supra* note 157, at 161.

174. *But see* Graham, *supra* note 157, at 158 (painting “a disquieting portrait that erodes the myth of progress toward the attainment of a multiracial and multiethnic American judiciary”).

175. In fact, political activism has been said to be the single most telling demographic characteristic in the outcome of judicial decisions. *See* Sylvia R. Lazos Vargas, *Does a Diverse Judiciary Attain a Rule of Law That Is Inclusive?: What Grutter v. Bollinger Has to Say About Diversity on the Bench*, 10 MICH. J. RACE & L. 101, 132 (2004) (“Of all personal attributes, political ideology seems to be the most influential attribute in predicting a judge’s decisions.”).

176. *See* Angela Onwuachi-Willig, *Using the Master’s “Tool” to Dismantle His House: Why Justice Clarence Thomas Makes the Case for Affirmative Action*, 47 ARIZ. L. REV. 113, 137 (2005).

177. Indeed, a handful of other scholars have argued—although with somewhat different reasoning—that juries should decide Fourth Amendment issues in the criminal context. *See generally*, e.g., Amar, *supra* note 119 (urging that civil juries should determine matters of Fourth Amendment reasonableness and award damages accordingly, thereby deterring officers from invading individuals’ Fourth Amendment rights); Bacigal, *supra* note 113 (suggesting that a jury can assess reasonable expectations of privacy better than judges and that juries should apply guidelines offered by judges to the particular facts of Fourth Amendment matters); Erik Luna, *The Katz Jury*, 41 U.C. DAVIS L. REV. 839 (2008) (engaging in a “thought experiment” and suggesting that jurors—more specifically grand jurors—determine whether there was a Fourth Amendment search).

178. *See supra* Part I.

179. *See supra* text accompanying notes 94–103.

are better equipped than judges to make criminal constitutional moral decisions, which are based upon societal standards. Juries are more representative of the communities they serve than are judges.¹⁸⁰ They play important roles in fighting governmental tyranny and legitimating law, and they reach better decisions through their democratic and consensus-building decisionmaking processes.¹⁸¹ Further, juries can draw on their broader bases of knowledge and expertise than judges due to juries' composition of a greater number of individuals who collectively possess a wider range of life experiences.¹⁸² For all of these reasons, juries are better positioned than judges to decide these criminal procedure questions of constitutional import.

A. *Representative of Society*

Juries are better positioned to assess matters reflecting their communities' values than are judges because they are more representative of their communities than judges. In contrast to judges, juries are drawn from the local vicinage and are considered bodies "truly representative of the community."¹⁸³ They better represent various races, socio-economic classes, various levels of formal education, differing religions, and a broader spectrum of political engagement than do judges. To achieve this representative quality, jurors are randomly selected from a database usually assembled from local driver's license or voter registration lists.¹⁸⁴ They are then asked to serve on juries regardless of their race, sex, education, or religion.

Of course juries cannot be perfectly representative. Matters such as the luck of randomization, the fact that driver's license and voting databases do not contain the names of the entire population, potential jurors' excuses for avoiding jury service,¹⁸⁵ and attorneys' voir dire challenges¹⁸⁶ may cause a

180. See *infra* Part IV.A.

181. See *infra* Parts IV.B.

182. See *infra* Part IV.C.

183. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (1994).

184. See Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 154–55 (1998).

185. See PAULA DiPERNA, *JURIES ON TRIAL: FACES OF AMERICAN JUSTICE* 86 (1984) ("The effect of exemptions is to eliminate whole categories of people . . .").

186. See Douglas W. Ell, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775, 782 (1978). *But see* Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 328 (2006) (finding that there is "no evidence that juries are undereducated relative to the venires from which they are selected" and observing that, "[i]ndeed, juries seem to be *better* educated than the Connecticut population demographics reported by U.S. census data" (internal citation omitted)).

jury's composition to depart somewhat from true community representativeness.¹⁸⁷ Still, as one scholar has explained, "the modern jury is the most diverse of our democratic bodies."¹⁸⁸ In fact, some measure of

187. Moreover, in capital cases, prosecutors' practice of death-qualifying the jury further skews the representativeness of the jury. See Susan D. Rozelle, *The Utility of Witt: Understanding the Language of Death Qualification*, 54 BAYLOR L. REV. 677, 691–92 (2002) (explaining that death qualification renders the jury unrepresentative of the community in several respects); Alec T. Swafford, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 158 (2011) (explaining that "[d]eath qualification results in juries that are more prone to convict" and suggesting that the practice also results in the "disproportionate exclusion of African-Americans from capital juries").

188. Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 (1995). In fact, today's juries are more representative than ever before. See VIDMAR & HANS, *supra* note 64, at 66, 81; Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78 CHI.-KENT L. REV. 909, 922 (2003) (noting that today's jury "is far more representative than it ever has been"). Juries at the time of the American Revolution—when jury power was at its height—consisted primarily of only Caucasian males. See VIDMAR & HANS, *supra* note 64, at 71 ("Excluded by law in the colonial period, women and minorities began serving in substantial numbers only in the latter half of the twentieth century."). Often, local jury commissioners hand-picked "key me[n]" of the community who exhibited exemplary morality, integrity, and intelligence to serve on juries. See ABRAMSON, *supra* note 183, at 99; VIDMAR & HANS, *supra* note 64, at 67. As can be imagined, this resulted in discrimination and unrepresentative juries. See ABRAMSON, *supra* note 183, at 100; VIDMAR & HANS, *supra* note 64, at 66–67. Prior to the Civil War, African Americans were only rarely allowed to serve on juries, see VIDMAR & HANS, *supra* note 64, at 66–67, 71, and women were not ordinarily included in American juries—save in exceptional cases, such as when the jurors had to determine whether a female defendant was pregnant—until the late 1800s, see ABRAMSON, *supra* note 183, at 112; VIDMAR & HANS, *supra* note 64, at 73. In 1940, the Supreme Court finally stated that juries must be "truly representative of the community." *Smith v. Texas*, 311 U.S. 128, 130 (1940); see also ABRAMSON, *supra* note 183, at 115 ("In the 1940 case *Smith v. Texas*, the Supreme Court for the first time referred to the need to make the jury a 'body truly representative of the community.'"). This was interpreted, however, to just exclude discrimination, and jury commissioners' practices of appointing "blue-ribbon juries" continued into the 1960s. See ABRAMSON, *supra* note 183, at 99. Despite the Court's meager constitutional command, discrimination appeared to persist in jury commissioners' selections of juries—a problem that Congress sought to remedy at the federal level by passing the Jury Selection and Service Act of 1968. See 28 U.S.C. §§ 1861–69 (1968); ABRAMSON, *supra* note 183, at 117. The law abolished much of jury commissioners' discretion in selecting juries and instead required that jurors be selected at random. See 28 U.S.C. § 1861 (1968); ABRAMSON, *supra* note 183, at 117. Over time, the Court's views on jury selection evolved such that it became a constitutional requirement for even women to be included in jury pools. See *Taylor v. Louisiana*, 419 U.S. 522, 535–36 (1975); see also ABRAMSON, *supra* note 183, at 113 ("Not until 1975 did the Constitution begin to definitively require that the jury pool represent women as equally as men."). Still, the Supreme Court has held that individual juries need not be actually representative in that they are fair and accurate representations of the community's various "economic, social, religious, racial, political and geographical groups." See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 220 (1946); see also *Taylor*, 419 U.S. at 538 ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population."). Instead, "petit juries must be drawn from a source fairly representative of the community." *Taylor*, 419 U.S. at 538 (emphasis added). In fact, commentators have suggested that juries, themselves, tend not to be completely representative of their communities. See, e.g., RANDALL KENNEDY, RACE, CRIME, AND THE LAW 232 (1997) ("Even in the absence of illegal racial discrimination, traditional methods of jury selection often yield a substantial 'underrepresentation' of blacks. By underrepresentation, I mean that the percentage of blacks serving on juries is lower than the percentage of blacks living in the jurisdictions from which jurors are drawn."). Despite the fact that juries may not perfectly mirror our communities, juries are "the most diverse of our democratic bodies." Dooley, *supra*, at 325; see also VIDMAR & HANS, *supra* note 64, at 66, 81 ("While

jury representativeness is constitutionally required.¹⁸⁹ In *Smith v. Texas*,¹⁹⁰ a unanimous Court emphasized that “[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.”¹⁹¹ Accordingly, it is “essential” that a jury is selected “from a representative cross-section of the community.”¹⁹² Such mandated representativeness is not something similarly required of judges.

B. Providing the People’s Voice: Fighting Tyranny and Legitimizing Law

Representative of their communities, juries have the power to fight tyranny and legitimate the law. Unconstrained by the government in the same way that judges are, juries have historically been relied upon to protect the people by reaching just results even in hard cases.¹⁹³ Although juries today are said to lack the right to depart from harsh results dictated by unjust and draconian laws, juries’ *power* to protect the people from an overzealous government that is attempting to reach such results has been retained, and celebrated, throughout the centuries.¹⁹⁴ Thus, if a jury

the ideal of juries truly representative of the population has not been entirely solved, today the American jury is more representative than ever before in its history.”). (Note, however, that Dooley’s assertion is somewhat speculative, as it is based on statistics of “serving jurors” rather than those seated on petit juries. See Dooley, *supra*, at 325 n.3.)

189. While the petit jury need not, itself, “mirror the community and reflect the various distinctive groups in the population,” juries “must be drawn from a source fairly representative of the community.” *Taylor*, 419 U.S. at 538; cf. generally Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099 (2005) (explaining the difference between “first-order and second-order diversity”).

190. 311 U.S. 128 (1940).

191. *Id.* at 130.

192. *Taylor*, 419 U.S. at 522.

193. In hard cases—including cases in which straightforward application of the law may seem to lead to injustice—juries have the power to reach just results. See *The Value of the Civil Jury*, 110 HARV. L. REV. 1421, 1429–36 (1997) (categorizing the jury’s ability to reach just results in hard cases as part of the jury’s role as “a [l]egitimater of [t]rial [o]utcomes” rather than as “an [i]nstrument of [e]quity [a]gainst the [a]rbitrary [e]xercise of [p]ower”).

194. See Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 995 (1995) (“‘Jury nullification’ of broad and rigid rules is a familiar and often celebrated phenomenon.”); see also David C. Brody, Sparf and Dougherty Revisited: *Why the Court Should Instruct the Jury of Its Nullification Right*, 33 AM. CRIM. L. REV. 89, 108 (1995) (“[T]he jury possesses an absolute, unreviewable power to acquit against the weight of the evidence, and, in certain cases, society expects juries to exercise this power.”). But see Jonathan Bressler, *Reconstruction and the Transformation of Jury Nullification*, 78 U. CHI. L. REV. 1133, 1137–38 (2011) (“[T]he law of the land has been that though juries may have the unauthorized power to nullify, they have no legal or moral right to do so, and courts have the authority to prevent it.”); David Alan Sklansky, *Evidentiary Instructions and the Jury as Other*, 65 STAN. L. REV. 407, 442 (2013) (stating that, although “[e]veryone agrees” that juries still engage in jury nullification today, there is a debate about “how common the practice is, how happy or distraught it should make us,

concludes that its government has acted improperly in enacting or enforcing a law, the jury has the power to frustrate the government's efforts to execute the law by finding the individual charged of its violation not guilty.¹⁹⁵ In this way, juries continue to act as a bulwark between the government and the people, just as they did at the time of the Founding.

Additionally, by acting as the voice of the people, juries serve to legitimate the law.¹⁹⁶ Because juries consist of a representative cross-section of the communities they serve, and because juries vote on the outcomes of trials, juries are democratic institutions.¹⁹⁷ Accordingly, juries have the power to incorporate societal norms and values into their decisions. This voice of the people is especially important when dealing with criminal constitutional moral matters that explicitly rely on the value judgments of the people.¹⁹⁸ Juries are better able to assess matters such as the state of society's expectations of privacy, society's standards of decency, and what an ordinary person would view as an excessive fine. Indeed, as commentators have suggested, it is in these types of cases—where societal values are at issue—that juries are especially useful.¹⁹⁹ It is only if the people are truly represented in these determinations of society's values that citizens can view these determinations as legitimate and as not influenced by the political leanings of government-employed judges.²⁰⁰ The

and whether juries have a 'right' or merely a 'power' to refuse to apply laws that they think are unwise or unjust").

195. In this way, juries act as a "safety valve" in the legal system. *See* *United States v. Dougherty*, 473 F.2d 1113, 1134 (1972) ("The jury system has worked out reasonably well overall, providing 'play in the joints' that imparts flexibility and avoid undue rigidity. An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution.").

196. *See The Value of the Civil Jury*, *supra* note 193, at 1432–36.

197. *See* Gerken, *supra* note 189, at 1099, 1155 (explaining that juries "provide a set of democratic benefits that other decisionmaking institutions cannot"); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 *TEX. L. REV.* 47, 58 (1977). *See generally* ABRAMSON, *supra* note 183 (describing the democratic aspects of the American jury).

198. *See supra* Part II.

199. *See The Value of the Civil Jury*, *supra* note 193, at 1434 (stating that "[t]he jury's legitimating function is especially necessary [in cases such as those] . . . in which societal values and community norms are especially salient"); *see also* Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 *VA. L. REV.* 1055, 1071 (1964) (suggesting that the civil jury is particularly useful in deciding defamation and negligence cases, where the jury is asked to decide the content of the law); Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 *HARV. L. REV.* 443, 456–57 (1899) (suggesting that juries should be relied on to determine issues on which there is no clear answer—"as we get near the dividing point, we call in the jury"). *But cf.* *The Value of the Civil Jury*, *supra* note 193, at 1434 (offering that "the introduction of community norms may not enhance the operation of the jury's legitimating function at all [because it] may sometimes produce unpalatable substantive results depending on how uncritically the public endorses societal norms simply because they are held within the community").

200. *See The Value of the Civil Jury*, *supra* note 193, at 1433. Reflecting society in this way, jury decisionmaking promotes the public's acceptance of the jury's decisions. *See id.* Moreover, juries also

decisions are not handed down by an authoritarian figure of some sort but are instead decisions of the people.²⁰¹

This democratic nature of jury decisionmaking, paired with the jury's deliberative nature, results in a process of "deliberative democracy"—"decision making by discussion among free and equal citizens."²⁰² This process was important to the Anti-Federalists because they believed that, even more important than establishing the jury to protect the people from the tyranny of the government, the jury was important in integrating "the people in[to] the administration of government."²⁰³ The deliberative democratic process that jurors engage in goes beyond just aggregating individual preferences; it instead involves dialogue among the jurors and consensus-building—a process that transforms the views of individual jurors into fuller, more comprehensive understandings of the group.²⁰⁴ The process thus improves the potential to reach better results, especially when the issues at hand are moral matters.

deflect the public's criticism of the justice system. *See id.* at 1433–34. Jury deliberations are opaque to all but the jurors who participate in them; they are a "black box." *See id.* As a result, it is difficult for outsiders to criticize juries' decisionmaking processes. *See id.* Even when jurors engage in jury nullification, the details of how they came to decide on a "not guilty" verdict are obscured by the secrecy of their deliberations. *See United States v. Olano*, 507 U.S. 725, 737 (1993) (noting that it is a "cardinal principle" that jury deliberations "shall remain private and secret"); Allison Orr Larsen, *Bargaining Inside the Black Box*, 99 GEO. L.J. 1567, 1572–73 (2011) ("Courts are adamant about protecting the mystery and secrecy of 'the black box'; jury discussions are among the most private and privileged in our legal system."). At the same time that juries are immune from public criticism, though, they draw criticism away from vulnerable judges. *See The Value of the Civil Jury*, *supra* note 193, at 1432–33; Kalven, *supra* note 199, at 1062. Juries are the ones who announce their verdicts even in the hard cases; juries are the ones who have the power to throw out the law to achieve justice. *See supra* note 104194 (discussing jury nullification).

201. *See The Value of the Civil Jury*, *supra* note 193, at 1433.

202. Jon Elster, *Introduction*, in *DELIBERATIVE DEMOCRACY* 1, 8–9 (Jon Elster ed. 1998); *see also id.* at 8 (noting that there are various definitions of "deliberative democracy" and outlining some of the core elements of the idea). Juries have another democracy-strengthening role, and that is encouraging lawyers and judges to make the law understandable to the average person. *See Higginbotham*, *supra* note 197, at 54. As Judge Higginbotham has observed, "One need only view how trials of complicated matters are conducted by able counsel to appreciate the powerful contribution that the presence of a jury makes to clarity of argumentation." *Id.*

203. Herbert J. Storing, *What the Anti-Federalists Were For*, in 1 *THE COMPLETE ANTI-FEDERALIST* 19 (Herbert J. Storing ed. 1981); *see also The Value of the Civil Jury*, *supra* note 193, at 1436–37 (quoting Storing).

204. *See Elster*, *supra* note 202, at 8; *see also JOHN S. DRYZEK, DELIBERATIVE DEMOCRACY & BEYOND: LIBERALS, CRITICS, CONTESTATIONS* 1 (2000) ("The essence of democracy itself is now widely taken to be deliberation, as opposed to voting, interest aggregation, constitutional rights, or even self-government.").

C. *Broader Expertise: On the Cutting-Edge of Morality and Technology*

In addition to the other strengths of jury decisionmaking, juries have the advantage of possessing a broader swath of knowledge and experience than isolated judges. Although judges are highly educated—especially in comparison to the average American²⁰⁵—judges often must make decisions independently, and without the aid of their own research,²⁰⁶ in areas such as whether the majority of Americans support the death penalty or how a particular technology works.²⁰⁷ As isolated decisionmakers they have a limited capacity for knowledge, expertise, and life experience. However, a twelve-, or even six-, member jury may collectively possess knowledge, experience, and understanding of, for example, racial or sexual discrimination, the death of a loved one, engineering, working for the federal government, giving birth, and teaching high school students. This greater capacity for knowledge, experience, and understanding provides juries with the ability to better grasp some of the factual bases for criminal constitutional moral decisionmaking. In particular, it places them in a position to better discern society's moral expectations, which are essential to resolving these difficult questions, and also to more thoroughly comprehend matters involving technology, which are increasingly becoming more pervasive in constitutional decisionmaking.

Society's morals and values are continuously evolving. Indeed, one wonderful aspect of American law is its organic quality—its ability to change with changing ideals and circumstances.²⁰⁸ Things that were considered unacceptable in the 1950s, for example—such as interracial marriage, pre-marital co-habitation, and gays serving in the military—have now become a commonly accepted part of everyday life. Considering

205. See *supra* text accompanying note 160.

206. See MODEL CODE OF JUDICIAL CONDUCT R. 2.9(C) (2011) (providing that “[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed” and also commenting that “[t]he prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic”); cf. Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131, 135 (2008) (asking whether appellate judges facing difficult decisions based on incomplete trial records ought to conduct their own independent research).

207. See *supra* Part II.

208. See Robin Kundis Craig, *Adapting to Climate Change: The Potential Role of State Common-Law Public Trust Doctrines*, 34 VT. L. REV. 781, 806 (2010) (“Common law is an inherently adaptive institution, a fact that is widely acknowledged.”); Frank Partnoy, *Synthetic Common Law*, 53 U. KAN. L. REV. 281, 297 (2005) (“[A] key advantage to a common law approach is that judicial rules evolve slowly as a flexible response to the actions and preferences of individuals and institutions involved in disputes.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 155 (2006) (referencing “the beautiful capacity for growth which characterizes the common law”).

judges' lack of representativeness, as well as their isolation, judges are less likely to recognize and internalize changing societal morals and values. As a result, their assessments of what constitutes cruel and unusual punishment under the "evolving standards of decency that mark the progress of a maturing society,"²⁰⁹ are likely less accurate than those of juries, which are more representative, less isolated, and can draw on a broader spectrum of opinions and values by virtue of their size. For the same reasons, juries are also better able to assess other evolving moral standards, such as Fourth Amendment reasonableness and Eighth Amendment excessiveness.

Many of today's criminal constitutional moral questions involve not only matters of evolving values but also matters of evolving technology. For example, in the recent decision of *United States v. Jones*,²¹⁰ the Court faced the question of whether attaching a global-positioning system (GPS) tracking device to a vehicle to monitor the vehicle's movements on public streets was unreasonable such that it constituted a Fourth Amendment search.²¹¹ The technology involved in these types of cases advances very rapidly, which makes it difficult for judges to stay abreast of such developments. One oft-cited example of judges' struggles with technology is in the Supreme Court case of *City of Ontario, California v. Quon*.²¹² In that case, a police officer filed a civil rights claim against the city, claiming that the police department's review of his text messages violated the Fourth Amendment.²¹³ In attempting to understand the claim better during oral arguments, the Justices asked questions that could sound ignorant to a technologically savvy individual. For example, Chief Justice Roberts inquired: "Maybe—maybe everybody else knows this, but what is the difference between a pager and e-mail?"²¹⁴ And Justice Kennedy asked what would happen if someone were to send a text message to an individual while he was texting with someone else: Does the individual have "a voice mail saying that your call is very important to us; we'll get back to you?"²¹⁵ If decisionmakers do not understand the technology underlying the legal dispute at issue, it makes it difficult for them to render meaningful, just decisions.

Understanding cutting-edge technology is of particular importance when judges are asked to relate technology to their moral decisionmaking

209. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

210. 132 S. Ct. 945 (2012).

211. *See id.*

212. 130 S. Ct. 2619 (2010).

213. *See id.* at 2626.

214. Transcript of Oral Argument at 29, *Ontario v. Quon*, 130 S. Ct. 2619 (2010) (No. 08-1332), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf.

215. *Id.* at 44.

in the constitutional context. Reasonableness determinations under the Fourth Amendment are perhaps the best example of this. In *Kyllo v. United States*,²¹⁶ the Supreme Court held that there are limits to the technologies that police officers may constitutionally use to surveil U.S. citizens.²¹⁷ Although police officers may have access to powerful surveillance tools, it is only reasonable for them to use those that are in general use in the population,²¹⁸ thus the fruits of more powerful, or rarer, surveillance devices are subject to exclusion at trial (and may subject the police officers using such tools to the threat of a civil suit under 42 U.S.C. § 1983) unless the officers had a warrant.²¹⁹ In determining whether such evidence should be excluded under *Kyllo*, then, judges must assess whether technology is in “general public use.”²²⁰ Perhaps judges could examine statistics about the popularity of these surveillance tools, but they ordinarily do not.²²¹ Instead, judges tend to draw on their own limited knowledge and perceptions of the technology. For example, consider a judge tasked with ruling on the admissibility of evidence indicative of criminal wrongdoing that was obtained by police officers tracking a radio-frequency identification (RFID) signal. Without understanding the pervasiveness of RFID, and without understanding the technology involved in this exercise, the judge is at a disadvantage in assessing the reasonableness of the police officers’ actions.

Judges’ struggles with technology may, in part, be due to one facet of their underrepresentativeness of society: they are, on average, much older

216. 533 U.S. 27 (2001).

217. See *id.* at 34–35 (finding that obtaining information through the use of “sense-enhancing technology” when that information could not have been obtained “without physical ‘intrusion into a constitutionally protected area’ . . . constitutes a search—at least where . . . the technology in question is not in general public use”).

218. See *id.* (suggesting that the relevant question is whether the technology used to surveil individuals’ actions is in “general public use”).

219. See *Nat’l Treasury Employee’s Union v. Von Raab*, 489 U.S. 656, 665 (1989) (“[A] search must be supported, as a general matter, by a warrant issued upon probable cause”); LAFAVE, *supra* note 45, at 127–28, 154 (referring to the exclusionary rule and *Kyllo*’s “general use” rule); Amar, *supra* note 119, at 762 (referencing the warrant requirement).

220. *Kyllo*, 533 U.S. at 34.

221. See, e.g., John B. Horrigan, *Home Broadband Adoption 2006: Home Broadband Adoption Is Going Mainstream and That Means User-Generated Content Is Coming From All Kinds of Internet Users*, PEW INTERNET & AMERICAN LIFE PROJECT (2006), available at http://www.pewinternet.org/~media/Files/Reports/2006/PIP_Broadband_trends2006.pdf.pdf (examining the number of Americans who have broadband at home); Aaron Smith, *46% of American Adults Are Smartphone Owners*, PEW INTERNET & AMERICAN LIFE PROJECT (2012), available at <http://www.pewinternet.org/~media/Files/Reports/2012/Smartphone%20ownership%202012.pdf> (surveying Americans’ adoption of smartphones). But, as already noted, the Model Code of Judicial Conduct prohibits judges from independently investigating the facts in a case. See MODEL CODE OF JUDICIAL CONDUCT R.2.9(C) (2011); *supra* text accompanying note 206.

than the average American.²²² Studies suggest that younger individuals stay on top of technological trends more frequently and easily than older Americans.²²³ Considering that the average juror is younger than the average judge by over a decade,²²⁴ it stands to reason that jurors may collectively be more interested in technological innovations and perhaps understand them more thoroughly than judges. Drawing on this connection between age and technology, an *Economist* writer commenting on the Justices' inquiries in the *Quon* case concluded: "Yes, the [J]ustices are old."²²⁵

Juries, in contrast, may have a better understanding of the technology involved and can therefore better understand whether police officers' use of technology in surveilling citizens' activities was reasonable. Possessing this greater technological understanding and knowledge of the technology's pervasiveness, as well as being more representative of Americans' reasonable expectations of privacy, juries are better equipped to make appropriate judgments in this area of Fourth Amendment reasonableness. More broadly, juries' greater expanse of knowledge and experience—especially in the areas of community values and technology—augments juries' heightened representativeness and role of providing the people's

222. See *supra* note 159 and accompanying text; text accompanying notes 166 & 171; see also *infra* note 224 (noting that it also seems that judges, on average, are older than jurors).

223. See generally PEW RESEARCH CTR., MILLENNIALS: A PORTRAIT OF GENERATION NEXT (2010), available at <http://pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf> ("Millennials' technological exceptionalism is chronicled throughout the survey. It's not just their gadgets—it's the way they've fused their social lives into them."); Kathryn Zickuhr, *Generations and Their Gadgets*, PEW INTERNET & AMERICAN LIFE PROJECT (2011), available at http://pewinternet.org/~media/Files/Reports/2011/PIP_Generations_and_Gadgets.pdf (suggesting that younger generations are more likely to own, and be intimately familiar with, new technological devices).

224. See Erin York Cornwall & Valerie P. Hans, *Representation Through Participation: A Multilevel Analysis of Jury Deliberations*, 45 L. & SOC'Y REV. 667, 675–76 (2011) (indicating that the average age of jurors fell at 3.110 on a scale from 1 to 6, where the third category was an age range of 36–45); cf. Nancy S. Marder, *Juries, Justice & Multiculturalism*, 75 S. CALIF. L. REV. 659, 685 (2002) (indicating that actual jury compositions contain significant numbers of young persons, contrary to "the stereotype of the typical juror [as] an older, retired person"). It is difficult to determine with accuracy the exact composition of most juries. While several researchers have studied the variations of demographics on venues and petit juries, very few, if any, have examined the variability of age with much detail. Some studies, though, have looked at age as one, among several, characteristics of juries. One such study found that the average age of individuals serving on criminal juries was approximately 37. See *id.* Another limited study found that the average age of the individuals called for jury duty (as opposed to serving on a petit jury) was 49. See Helen Eigenberg et al., *Doing Justice: Perceptions of Gender Neutrality in the Jury Selection Process*, 37 AM. J. CRIM. JUST. 258, 263 (2011). In comparison, studies have suggested that judges, on average, are significantly older. In 2004, the average age of state trial judges was 55, see Williamson, *supra* note 171 at 11, and, through at least the year 2000, the average age of federal judges has remained steady between about sixty-one and sixty-five years of age, see Yoon, *supra* note 166, at 1047–48.

225. B.G., *Yes, the Justices Are Old*, THE ECONOMIST, APR. 23, 2010, http://www.economist.com/blogs/babbage/2010/04/judges_and_technology.

voice in the criminal justice system, making juries, rather than judges, the best criminal constitutional moral decisionmakers.

V. OBJECTIONS: UNIFORMITY AND THE MAJORITARIAN DIFFICULTY

Juries possess many strengths that make them better at assessing criminal constitutional moral standards such as Fourth Amendment reasonableness, but there are certainly objections to according juries this greater decisionmaking power. First, having juries decide these questions may risk a lack of uniformity in decisions that perhaps judges can provide if they continue to be charged with this decisionmaking.²²⁶ Second, judges are ordinarily considered the protectors of minority rights because, unlike juries, they are viewed as not being controlled by the will of majorities.²²⁷ Accordingly, there may be fear that empowering juries to make decisions of constitutional import will undermine the minority-protection function of the Constitution. Each of these objections to increased jury power in this respect is valid, yet each is also overblown and outweighed by the many advantages that juries can bring to this decisionmaking process.

A. *Lack of Uniformity*

One of the primary objections to granting juries the power to make these criminal constitutional moral decisions is that allowing juries to make decisions of constitutional proportions on a regular basis would create a landscape in which individuals' rights vary from community to community. This lack of uniformity might be concerning because it could breed inequality among individuals—based on where they were tried and sentenced—and uncertainty among law enforcement officials and citizens alike.²²⁸

While the impression that rights are protected unequally throughout America may be perturbing, Professor Mark Rosen has explained that this flexibility in the application of the Constitution and its Amendments throughout the nation is essential to political liberty.²²⁹ The Constitution's greater guarantee of liberty, Professor Rosen explains, dictates that communities have the opportunity to "opt-out of [popular] culture and

226. See *infra* Part V.A.

227. See *infra* Part V.B.

228. Cf. Ryan, *supra* note 23, at 569 (noting commentators' concern about lack of uniformity in the similar context of juries deciding matters of obscenity).

229. See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1089–1106 (1998).

govern themselves subject to only minimal constraints.”²³⁰ Only with this freedom to self-govern can the diverse communities of our melting pot achieve the self-actualization that is fundamental to the liberty that our Constitution guarantees.²³¹

To the extent that lack of uniformity bred by jury decisionmaking is concerning, though, it is useful to recognize that ever since the Founding Era, the Court has embraced a lack of legal uniformity for the sake of retaining some local sovereignty. Shortly after the ratification of the Bill of Rights, a dispute arose about whether an individual could be prosecuted for a violation of the “federal criminal common law.”²³² The Anti-Federalists disputed the existence of such uniform national law because they viewed it as a method by which the federal government could seize power beyond the limited authority authorized to it under the Constitution.²³³ Despite the Federalists’ urging for a uniform federal common law,²³⁴ the Supreme Court ruled in its 1812 *United States v. Hudson*²³⁵ case that there was no such uniform law in the United States.²³⁶ And *Hudson* is still good law today.²³⁷

Whether according greater decisionmaking to juries on criminal constitutional moral questions will really create a concerning level of lack of uniformity, though, is up for debate. Decisions like whether police

230. *Id.* at 1056.

231. *See id.* at 1089–1106.

232. *See* Mannheimer, *supra* note 71, at 114–15. For a case in which this dispute came to a head, see *United States v. Worrall*, 2 U.S. 384 (D. Penn. 1798). Some scholars, though, have suggested that the common law was viewed as uniform during this time. *See* Mannheimer, *supra* note 71, at 110 (arguing that this view is mistaken); e.g., Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL’Y 119, 146–47 (2004) (explaining that the Founders viewed the law as “a unit,” “of a single theory,” of “one august corpus” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))); John Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1768–69 (2008) (describing the common law of the seventeenth and eighteenth centuries as a uniform body of law).

233. *See* Mannheimer, *supra* note 71, at 113 (“The Anti-Federalists, and later the Republicans, opposed the notion of a general federal common law because they saw its invocation as a mechanism by which the federal government could assert power far beyond that which it was granted in the Constitution.”); Henry P. Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 769–74 (2010); *see also* Ryan, *supra* note 23, at 574 (“The Anti-Federalists did not anticipate that the Bill of Rights would bring uniformity to this kaleidoscopic legal landscape—even on issues of constitutional magnitude.”).

234. *See* Mannheimer, *supra* note 71, at 111 (explaining that the divide between those who viewed the common law as uniform and non-uniform was along Federalist and Anti-Federalist lines).

235. 11 U.S. (7 Cranch) 32 (1812).

236. *See id.* at 32–33; *see also* FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 197 (1849) (“[T]he United States, as a Federal government, have no common law.”). The *Hudson* Court explained that the law was “varying in every state in the Union.” *Hudson*, 11 U.S. (7 Cranch) at 33.

237. *See generally Hudson*, 11 U.S. (7 Cranch) at 32.

officers were reasonable in their inspection of a suspect's home or office are very fact-dependent ones, so there can never really be true uniformity on these issues even when they are decided by judges.²³⁸ They are quintessential questions of applying the law to the facts at hand rather than pure questions of law. As such, what appears to be lack of uniformity may really just be law applied consistently to reach different outcomes in varying factual scenarios. Concerns about uniformity in this fact-rich environment, then, are misplaced.

B. *The Majoritarian Difficulty*

The majoritarian difficulty—the concern that the will of the majority will overrun minority rights—is another quandary raised by jury decisionmaking.²³⁹ In referencing this issue, scholars often invoke the famous fourth footnote of *United States v. Carolene Products Co.*,²⁴⁰ which states that a more exacting judicial review may be appropriate in cases in which “prejudice against discrete and insular minorities” may be present.²⁴¹ Although criminal constitutional moral matters are not necessarily at greater risk of being influenced by prejudice against minorities than other claims, because so much is at stake in criminal cases,²⁴² perhaps there is apprehension about entrusting juries to decide matters impinging on defendants’ lives and liberties. Although the majoritarian difficulty is always a concern, history and the realities of the alternative—judicial decisionmaking—suggest that this concern as particularly targeted at jury decisionmaking may be overblown.

Contrary to popular belief, the drafting of the Bill of Rights was primarily meant to safeguard the states and their local communities from the potentially unlimited power of the new federal government rather than safeguarding minorities from the tyranny of majorities.²⁴³ In fact, in insisting on a Bill of Rights, the Anti-Federalists relied in large part on juries to limit the scope of the federal government.²⁴⁴ This limitation is seen

238. See *supra* Part II.

239. See Ryan, *supra* note 23, at 569–70.

240. 304 U.S. 144 (1938).

241. *Id.* at 152–53 n.4 (stating that, in the case at bar, “[i]t is unnecessary to consider” whether there exists “prejudice against discrete and insular minorities” in certain contexts that may “tend[] seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” and thus may suggest that a “more searching judicial inquiry” is appropriate).

242. See *supra* text accompanying note 85.

243. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xii–xiii, 4–6 (1998); Amar, *supra* note 71, at 1136–37; Ryan, *supra* note 23, at 571.

244. See Ryan, *supra* note 23, at 571–72 (“The primary tool that the Bill of Rights employs to safeguard state sovereignty is that of the local jury.”); Arthur E. Wilmarth, Jr., *The Original Purpose of*

expressly in the Fifth Amendment's right to a grand jury, the Sixth Amendment's right to a jury trial in criminal matters, and the Seventh Amendment's right to a jury in most civil trials.²⁴⁵ And this concern for local autonomy that the institution of the jury serves was especially prevalent in the area of the criminal law. That is why the jury protections in this context are even more robust.²⁴⁶

Still, one might argue that despite this historical context the suppression of minority interests is concerning, especially in light of the Fourteenth Amendment's focus on equality among all individuals.²⁴⁷ This concern may even be exacerbated by the perception that juries are racist, sexist, or otherwise prejudicial toward particular groups of people. This view can be raised more broadly, in almost any use of the jury, and is certainly disconcerting. Efforts have been made to remedy the concern of prejudiced juries—ranging from attorneys' challenges of jurors and *Batson* claims based on attorneys' inappropriate challenges, to expanding the pool of potential jurors, to instructing or educating jurors on the issues of conscious and unconscious biases.²⁴⁸ But whatever jurors' deficiencies, their views are those of the people and, to the extent that criminal constitutional moral matters depend on the people's views, they should faithfully do so. If the people's views are not what we want our Constitution to reflect, then perhaps we ought to be honest about that fact and alter our constitutional tests so that they do not rest on criminal constitutional moral questions such as society's expectations of privacy and the evolving standards of decency.²⁴⁹

the Bill of Rights: James Madison and the Founders' Search for a Workable Balance between Federal and State Power, 26 AM. CRIM. L. REV. 1261, 1262 (1989).

245. See U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."); U.S. CONST. amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .").

246. See *supra* text accompanying notes 83–86.

247. See U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

248. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 84–98 (1986) (setting forth the framework for determining whether a prosecutor has exercised a peremptory challenge in violation of the Equal Protection Clause of the Constitution); Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 69, 113–14 (2003) (explaining that excluding felons from jury service contributes to a reduction of black men serving on juries and arguing that "excluding all felons from all juries per se is unwise"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1181–86 (2012) (suggesting that judges educate jurors about implicit bias).

249. See *supra* Part II. This is not to suggest that we should alter constitutional tests based upon our own policy choices. The aim here is to move closer to constitutional demands rather than contort the meaning of the Constitution.

Even if safeguarding minority interests related to criminal constitutional moral decisionmaking under the current constitutional tests is of utmost concern, preserving judicial decisionmaking in this area far from guarantees a solution to the majoritarian problem. Professor Barry Friedman and others have explained that courts, themselves, are generally quite majoritarian.²⁵⁰ Some judges are elected, holding them accountable to the majority.²⁵¹ And even appointed judges are, to some extent, held accountable to the majority by virtue of the political appointment process.²⁵² Moreover, scholars have pointed out that judicial decisions often follow the will of the people anyway, garnering a majority, or at least a significant plurality, of political support.²⁵³ Accordingly, perhaps any protection of minorities through judicial criminal constitutional moral decisionmaking is exaggerated, and not much would be lost by empowering juries to make these explicitly societally-based determinations.

VI. THE WORKABILITY OF EXPANDED JURY DECISIONMAKING IN ENFORCING THE CRIMINAL CONSTITUTION

Beyond concerns about lack of uniformity and the majoritarian difficulty involved in expanding the scope of jury decisionmaking, there may be apprehension about the simple workability of such a concept. How can a jury decide complicated issues such as the appropriateness of a police search? How can a jury rule on whether a punishment is cruel and unusual such that it constitutes a constitutional violation? How could a jury know if a criminal fine is constitutionally excessive? These are precisely the questions, though, that juries face on a regular basis. Juries in Texas are sometimes asked to determine in criminal trials whether evidence should be excluded for Fourth Amendment violations.²⁵⁴ Further, civil juries are often asked to determine whether there has been a violation of the Fourth Amendment or the Eighth Amendment's prohibitions on cruel and unusual punishments and excessive fines.²⁵⁵ If juries are capable of answering these questions in civil cases, or even in criminal cases in Texas, then it seems they would be equally capable of answering these questions on a more regular basis in criminal cases. In fact, it makes sense that it would be more acceptable for juries to decide these questions in criminal court than in civil

250. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 586 (1993).

251. *See id.* at 609–14.

252. *See id.*

253. *See id.* at 607–09.

254. *See infra* Part VI.A.

255. *See infra* Part VI.B.

court. After all, it is in criminal cases that juries are traditionally considered most important.²⁵⁶

A. Admissibility Determinations in Texas

The State of Texas provides evidence that empowering juries to decide precisely the criminal constitutional moral issues that I have outlined is workable. Since 1966, the state has had a unique criminal procedural rule providing for jury assessment of whether evidence in a criminal case was obtained in violation of federal or state constitutions or laws.²⁵⁷ The relevant statute provides that, when “the legal evidence raises an issue [of admissibility], the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of [the state or federal laws or Constitutions], then and in such event, the jury shall disregard any such evidence so obtained.”²⁵⁸ As in many jurisdictions, issues of admissibility may be decided by a judge in a pretrial hearing.²⁵⁹ If the judge rules that the evidence is admissible, however, a defendant may be entitled under this statute to “re-litigate” the issue at trial before the jury.²⁶⁰ The Texas courts have narrowed the

256. See *supra* text accompanying notes 83–86.

257. See TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005); Robert O. Dawson, *State-Created Exclusionary Rules in Search and Seizure: A Study of the Texas Experience*, 59 TEX. L. REV. 191, 242 (1981) (explaining that “Texas procedure is quite different” from the federal procedure in which judges conduct pretrial evidentiary hearings and rule on exclusion motions). The Texas provision provides:

(a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

(b) It is an exception to the provisions of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate based on probable cause.

TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005).

258. TEX. CODE CRIM. PROC. ANN. art. 38.23 (West 2005).

259. See Dawson, *supra* note 257, at 242. However, unlike in, for example, federal cases, Texas criminal defendants may opt to forgo a pretrial hearing and instead decide to raise their admissibility claims initially at trial. See *id.* “However, if a trial court schedul[e]s a pretrial hearing for any purpose on its own motion, on motion of the state, or on defendant’s motion, and the defendant fails to file a suppression motion, then he risks forfeiture of a fourth amendment or comparable state law claim.” *Id.* For additional details on the relevant Texas procedure, see *id.* at 242–43.

260. *Id.* at 245. Moreover, even when a trial court denies the defendant’s motion to suppress, and the jury reaches a guilty verdict after being charged to disregard evidence obtained in violation of the Texas or federal constitutions or laws, a Texas appellate court may still revisit the court’s denial of the suppression motion to determine whether it was proper. See *Pierce v. State*, 32 S.W.3d 247, 253 (Tex.

applicability of the statute somewhat by holding that admissibility questions must raise contested issues of fact before juries may be entrusted to decide these admissibility matters,²⁶¹ but this does not change the fact that Texas asks jurors to decide these hybrid questions of law and fact.²⁶² If the jury finds the evidence to be inadmissible, it is to disregard it.²⁶³

Turning to jury decisionmaking on this matter of admissibility is consistent with Texas's view of the importance of jury involvement overall and is viewed as a defendant-protection device.²⁶⁴ Perhaps the defendant's choice to re-litigate admissibility before the jury will prove fruitless, because the jury obviously has access to the evidence in order to rule on the matter and perhaps because the defendant's argument has no merit. Moreover, the state has the opportunity to present evidence on the issue, which could potentially impair the defendant's case.²⁶⁵ Still, the defendant

Crim. App. 2000). "The jury is given a role to be 'a backup protection against erroneous judicial rulings' that have admitted evidence, not to supplant them." *Id.*

261. See *Williams v. State*, 356 S.W.3d 508, 526 (Tex. Crim. App. 2011); see also *Pierce*, 32 S.W.3d at 251 ("There is no issue for the jury when the question is one of law only."); *Bell v. State*, 866 S.W.2d 284, 287 (Tex. Crim. App. 1993) ("Article 38.23(a) of the Texas Code of Criminal Procedure requires the jury to decide the lawfulness of an arrest or search only when the facts regarding that arrest or search are in controversy."). One Texas appellate court has explained that a criminal defendant is entitled to a jury instruction on the issue of admissibility when: "(1) [t]he evidence heard by the jury . . . raise[s] an issue of fact; (2) [t]he evidence on that fact [is] affirmatively contested; and (3) [t]hat contested factual issue [is] material to the lawfulness of the challenged conduct in obtaining the evidence." *Williams*, 356 S.W.3d at 526.

262. In *Black v. State*, however, the Texas Court of Criminal Appeals found no error when the trial court refused this jury instruction requested by the defendant:

"Article 38.23 of the Texas Code of Criminal Procedure provides that: No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.["]

Accordingly, you are instructed that if you believe, or have a reasonable doubt, that the evidence presented, or any of it, was obtained in violation of this Article, then and in such event, you will disregard any such evidence so obtained."

491 S.W.2d 428, 431 & n.1 (Tex. Crim. App. 1973) (quoting appellant's requested jury charge) (overruled on other grounds). The Texas Court of Criminal Appeals explained that the "requested charge would have submitted to the jury a question of law rather than of fact." *Id.* at 431. "Further, no disputed fact issue was raised by the evidence on the question of probable cause." *Id.*

263. See TEX. CODE CRIM. PROC. ANN. art. 38.23 (2005). Professor Adam Gershowitz has stated more broadly that Texas has "numerous criminal procedure rules that are very favorable to criminal defendants," including "extremely pro-defendant search and seizure guarantees." Adam M. Gershowitz, *Is Texas Tough on Crime but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31, 32 (2012).

264. See Gershowitz, *supra* note 263, at 61–65 (explaining how Texas defendants are entitled to jury trials in all criminal prosecutions and have the ability to choose whether a judge or jury will decide their sentences, and describing these provisions as favoring defendants). This is also consistent with the state's general protection of criminal defendants, which is not seen to the same extent in many other states. See generally *id.* (arguing that, while Texas has a reputation for being tough on crime, its criminal procedure law is, perhaps contradictorily, quite protective of criminal defendants).

265. See *Dawson*, *supra* note 257, at 246.

has the choice of whether he wants to take the risk,²⁶⁶ thus the opportunity to have the jury decide this criminal constitutional moral matter is to the defendant's advantage.

B. Section 1983 Litigation

Even outside of Texas, juries regularly make determinations on criminal constitutional moral questions in the civil context.²⁶⁷ Questions of Fourth Amendment reasonableness, Eighth Amendment cruelty and unusualness, and other questions of constitutional criminal procedure may be litigated in civil court in addition to a criminal trial. This civil avenue for relief is meant to reinforce the constitutional limitations on government force.²⁶⁸ For example, although police officers conducting an unauthorized search may suffer somewhat because the evidence they discover is excluded in a criminal trial, the exclusionary rule does not punish the officers directly for violating a citizen's constitutional rights.²⁶⁹ To reinforce the constitutional prohibition, the subject of an unconstitutional search may file a civil suit against the government, or even the individual officers, in the hope of recovering damages.²⁷⁰ Such a 42 U.S.C. § 1983 suit generally requires the plaintiff to establish by a preponderance of the evidence that one acting under color of state law deprived him of "rights,

266. See *id.* at 246. It is often difficult to determine whether the defendant ultimately made the right choice, as the ordinary procedure is for the jury to just deliver a general verdict on guilt, which incorporates the jury's determination of admissibility. See *id.* Indeed, "[t]he trial court need not submit a special issue to the jury to determine how the jury resolved the factual conflict presented to it under the article 38.23 instruction." *Id.*

267. See Ryan, *supra* note 23, at 586–87 (explaining the paradox of judges deciding Eighth Amendment questions in criminal cases and juries in civil ones).

268. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 505 (9th ed. 2010) (explaining that civil damages and criminal prosecutions for Fourth Amendment violations are considered "supplements to, rather than replacements for, suppression of evidence").

269. See Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1400 (1983) (explaining that "the exclusionary rule is not designed to serve a 'specific deterrence' function; that is, it is not designed to punish the particular police officer for violating a person's [F]ourth [A]mendment rights. Instead, the rule is designed to produce a 'systematic deterrence'"); cf. *United States v. Leon*, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) (arguing that the majority opinion in *Leon* "overlooks [the fact] that the deterrence rationale for the [exclusionary] rule is not designed to be, nor should it be thought of as, a form of 'punishment' of individual police officers for their failures to obey the restraints imposed by the Fourth Amendment").

270. See 42 U.S.C. § 1983 (2006). Of course this is subject to governmental and individual immunity doctrines. For a good discussion of immunity doctrines, see generally John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207 (2013) and see also Meghan J. Ryan, *Remedying Wrongful Execution*, 45 U. MICH. J.L. REFORM 261, 282–84 (2012) (explaining that many "states have enacted statutes waiving [their] traditional blanket[s] of immunity" but have "retain[ed] immunity in particular circumstances").

privileges, or immunities secured by the Constitution and laws” of the United States.²⁷¹ Section 1983 does not create substantive rights, but instead provides a civil remedy for the violation of constitutional and other rights.²⁷² Thus, in determining whether the plaintiff has established a § 1983 violation, the court, and often a jury, will turn to substantive constitutional law. This means that the court or jury will draw on the same or similar tests as invoked in courts’ criminal constitutional moral decisionmaking.

In resolving Fourth Amendment issues pursuant to § 1983, courts look to juries to determine whether an illegal search contrary to a defendant’s reasonable expectations of privacy took place.²⁷³ Accordingly, in *Specht v.*

271. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.; see also *Baker v. McCollan*, 443 U.S. 137, 140 (1979) (“The first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right ‘secured by the Constitution and laws.’”). In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court extended this right of action to violations by federal, as opposed to state, officials. See *id.* at 395–97. Suits alleged against federal officials are known as “*Bivens* actions.” See *Hartman v. Moore*, 547 U.S. 250, 254 n.2 (2006) (“Though more limited in some respects . . . a *Bivens* action is the federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983.”).

272. See *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (“By its terms, of course, the statute creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere.”); *Baker*, 443 U.S. at 144 n.3 (noting that § 1983 “is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes”).

273. Courts’ procedures in resolving constitutional moral questions pursuant to § 1983 are somewhat opaque. In the Fourth Amendment context, courts tend to blur the questions of whether there was a search and whether that search was reasonable. A look at some pattern jury instructions confirms this point. For example, the Fifth Circuit’s pattern jury instructions advise judges to instruct jurors that a plaintiff has a “right not to be subjected to an unreasonable search of one’s home or dwelling.” Comm. on Pattern Jury Instructions, Dist. Judges Ass’n, Fifth Circuit Pattern Jury Instructions—Civil, 10.1 (2006), available at <http://www.lb5.uscourts.gov/juryinstructions/fifth/2006civil.pdf>. The Ninth Circuit similarly advises judges to charge juries that, “[u]nder the Fourth Amendment, a person has the right to be free from an unreasonable search of his [person or property].” Ninth Circuit Manual of Model Jury Instructions: Civil, 9.11 (2007), available at http://www.akd.uscourts.gov/docs/general/model_jury_civil.pdf. The Ninth Circuit also encourages judges to instruct jurors that, “in order to prove the defendant[] deprived the plaintiff of this Fourth Amendment right, the plaintiff must prove [that defendant] searched the plaintiff’s [person or property], [that,] in conducting the search, [the defendant] acted intentionally[, and that] the search was unreasonable.” *Id.* Courts addressing the matter have explained that the question of whether there was a search—which addresses an individual’s reasonable expectations of privacy—is one for juries to decide. See *infra* text accompanying notes 274–78. In contrast, courts have intimated that the question of whether the search was reasonable is for judges to

Jensen,²⁷⁴ the U.S. District Court for the District of Colorado instructed the jury that “a search is a visual observation which infringes upon a person’s reasonable expectations of privacy.”²⁷⁵ Similarly, in *Reich v. Minnicus*,²⁷⁶ the U.S. District Court for the District of Indiana instructed a jury to determine what the court considered to be an assessment of the plaintiff’s “reasonable expectation[s] of privacy.”²⁷⁷ So while juries are not ordinarily allowed to assess these questions in the criminal context, they do evaluate them in the civil context—where juries have historically been deemed less

decide. In *Bolden v. Southeastern Pennsylvania Transportation Authority*, 953 F.2d 807 (3d Cir. 1991), for example, the Third Circuit explained that, “[u]nlike a determination of ‘reasonableness’ in ordinary tort cases and some other contexts, this balancing process presents a question of law.” *Id.* at 822; cf. MARTIN A. SCHWARTZ & GEORGE C. PRATT, SECTION 1983 LITIGATION JURY INSTRUCTIONS § 8.02(A) (2014) (distinguishing between such legal questions—where judges should balance “competing private and public interests to determine the constitutionality of a particular class of searches”—and related factual questions—where juries should balance competing interests based on the “particular facts and circumstances” of the case). It emphasized that: “The reasonableness of a search or seizure must be determined based on constitutional law, not a factual, reasonable-person determination. If the Fourth Amendment balancing process were submitted to juries, conflicting decisions regarding the constitutionality of identical drug testing provisions would almost certainly result.” *See Bolden*, 953 F.2d at 823 n.23. Although the Third Circuit was addressing the reasonableness of a search rather than whether there was a search at all, the court’s broad language, as well as the court’s reasoning, raises the question of whether these two matters should be treated differently.

274. 832 F.2d 1516 (10th Cir. 1987).

275. *Id.* at 1520 (summarizing the trial court’s actions); *see also* *McCardle v. Haddad*, 131 F.3d 43, 50 (2d Cir. 1997) (noting that the jury found that there was indeed a search); *Jones v. Lewis*, 874 F.2d 1125, 1131 (6th Cir. 1989) (noting in remanding the case for a new trial that the trial court may have to “instruct the jury on . . . [plaintiff’s] standing to vindicate the violation of his [F]ourth [A]mendment rights,” for which he “must demonstrate a reasonable expectation of privacy in the house which was entered by police to arrest him without a warrant”). This instruction was without objection. *See Specht*, 832 F.2d at 1520. On rehearing en banc, the Tenth Circuit held that the lower court had erred in allowing an attorney to testify as an expert that the defendants’ actions in the case would ordinarily be considered a search and that, under the circumstances, that search was illegal. *See Specht v. Jensen*, 853 F.2d 805, 806, 808 (10th Cir. 1988) (en banc). The en banc court concluded that an expert cannot “instruct the jury on how it should decide the case,” and that, by allowing the expert to testify as to whether a search took place and whether it was lawful, “the trial court allowed the expert to supplant both the court’s duty to set forth the law and the jury’s ability to apply this law to the evidence.” *Id.* at 808. The en banc court did not, however, find the trial court’s charge to the jury that it was to determine the plaintiffs’ reasonable expectations of privacy improper. *See generally id.* (not questioning the trial court’s jury charge).

276. 886 F. Supp. 674 (S.D. Ind. 1993).

277. *Id.* at 680. The court instructed the jury:

[The] right of privacy in the home, which is protected by the Fourth Amendment against unreasonable searches and seizures, applies also to the ‘curtilage’ around the home. The curtilage is the area around the home which encompasses those intimate activities associated with domestic life and the privacies of the home. In determining whether a particular area is within the curtilage, you may take into account the proximity of the area to the home, whether and how the area is enclosed, the nature of the uses to which the area is put, and the steps taken by the possessor to protect the area from observation or access by the public

Id. at 678.

important as a bulwark of liberty between the government and the people.²⁷⁸

Courts have also given to juries moral decisionmaking duties in the Eighth Amendment context. Most § 1983 claims rooted in the Eighth Amendment focus on excessive force or prisoners' conditions of confinement.²⁷⁹ In this context, jurors are asked to determine whether prison officers, with deliberate indifference, refused inmates proper physical living conditions or adequate medical care, or whether prison officials, with malice, used excessive force on a prisoner.²⁸⁰ Both of these are assessments of whether there was cruel and unusual punishment.²⁸¹ But here, just as in the § 1983 Fourth Amendment context, juries, rather than judges, make these determinations.²⁸² This can be seen, for example, in the pattern jury instructions for an excessive force claim.²⁸³ The Ninth Circuit's model jury instructions provide that, "[u]nder the Eighth Amendment, a convicted prisoner has the right to be free from 'cruel and unusual punishments.'"²⁸⁴ The instructions then direct the jurors to assess whether the plaintiff has proven that "the defendant used excessive and unnecessary force under all of the circumstances," that "the defendant acted maliciously and sadistically for the purpose of causing harm," and that "the act[s] of the defendant caused harm to the plaintiff."²⁸⁵ The Ninth Circuit's model jury

278. See *supra* text accompanying notes 83–86.

279. See Ryan, *supra* note 270, at 294. See generally SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:28 (2010) (explaining that § 1983 is a claim frequently alleged by prisoners challenging the conditions of their confinement). As I have explained elsewhere, though, "one could also argue that it is unconstitutionally 'cruel and unusual' to punish an innocent person," thus those wrongfully convicted and punished could potentially be able to recover under § 1983 for violation of their Eighth Amendment rights. Ryan, *supra* note 270, at 294–95.

280. See NAHMOD, *supra* note 279, at § 3:28.

281. See U.S. CONST. amend. VIII.

282. See also Ryan, *supra* note 23, at 586–87 ("Interestingly, when an Eighth Amendment complaint is raised as a 42 U.S.C. § 1983 claim, the question of cruel and unusual punishment is often left to juries to determine.")

283. According to the Ninth Circuit, just as the Fourth Amendment excessive force question is for the jury where reasonable persons can differ, so too are the questions of whether there was probable cause to search and whether a search warrant was lawfully executed. See *Howell v. Polk*, 532 F.3d 1025, 1027 (9th Cir. 2008). The Ninth Circuit explained that "[i]f a jury is capable of weighing the reasonableness of a use of force, then it is also capable of weighing the reasonableness of an entry into a building. . . . [And] [i]f the jury can weigh probable cause, a tricky and legalistic doctrine if there ever was one, then it can also decide whether a warrant was lawfully executed." *Id.*

284. Ninth Circuit Manual of Model Jury Instructions: Civil, *supra* note 273, at 9.24.

285. *Id.* The pattern instructions further provide:

In determining whether the defendant used excessive force in this case, consider the need to use force, the relationship between that need and the amount of force used, whether defendant applied the force in a good faith effort to maintain or restore discipline, any threat reasonably perceived by the defendant, any efforts made to temper the severity of a forceful response, and the extent of the injury suffered. In considering these factors, you should give

instructions for a “conditions of confinement” claim similarly ask jurors to decide the criminal constitutional moral question of cruel and unusual punishment, directing them to examine whether the prisoner has proven that he “faced a substantial risk of serious harm” or “a serious medical need,” that the civil “defendant was deliberately indifferent to that [risk or medical need],” and that the civil defendant’s “[act(s) or failure to act] . . . caused [the prisoner’s] harm.”²⁸⁶ Just as in the Fourth Amendment context, juries are widely trusted to make these Eighth Amendment determinations that are contrastingly reserved for judges in the criminal context.

VII. CONTROLLING FOR UNDESIRABLES IN CRIMINAL CONSTITUTIONAL MORAL JURY DECISIONMAKING

Concerns may still remain that, despite the historical pedigree of the jury, and its unique competencies in deciding criminal constitutional moral matters, juries should not be deciding issues that we regularly consider questions of law. Again, though, these criminal constitutional moral matters are really hybrid questions of law and fact rather than pure questions of law.²⁸⁷ By their nature, they vary from case to case based upon the particular facts involved.²⁸⁸ But of course they are of a constitutional magnitude, and one might fear that allowing juries to make these decisions allows juries to essentially decide the law, and the law of the Constitution at that. Certainly, there must be some checks on this jury decisionmaking. There should be limits to what juries can decide. What is up for debate is really whether jurors should have the opportunity to have any input on these criminal constitutional moral matters that are said to be based on societal standards.²⁸⁹

There are two primary ways to control for runaway juries deciding criminal constitutional moral questions. First, jury decisions can be reversed by judges—either in the district court or on appeal—so long as no reasonable jury could have reached that particular conclusion. Second, if juries really are suspect in their decisionmaking in these matters—which I do not think they are, but many do—then judges may play a greater role in deciding these matters, either by relegating juries to a safety-valve function

deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison.

Id.

286. *See id.* at 9.25.

287. *See supra* Part II; *supra* text accompanying notes 21–22, 110–16.

288. *See supra* Part V.A.

289. *See supra* Part II.

similar to that seen by Texas juries deciding matters of admissibility,²⁹⁰ or by charging judges with deciding these issues with real societal expectations in mind.

A. *Review of Jury Decisions*

Juries' greater representativeness, their democracy-promoting deliberative processes, and their greater capacities for relevant expertise make juries better decisionmakers than judges on criminal constitutional moral matters. But jury decisions cannot go entirely unchecked. Just as judges today review whether juries' decisions go beyond what any reasonable jury would determine,²⁹¹ juries' assessments on criminal constitutional moral questions should be similarly reviewed.²⁹² Like other jury assessments of hybrid law–fact questions, jury decisions of morals and values should be reviewed for reasonableness rather than being reviewed *de novo* by judges independently applying the constitutional standards—society's reasonable expectations of privacy, cruelty and unusualness, excessiveness, and the like—as courts ordinarily do with criminal constitutional moral matters.²⁹³ Jury decisions in this area should be accorded significant weight to account for juries' superior position to judge the communities' moral standards. This would comport with courts' reviews of civil juries' decisions in this area.²⁹⁴

290. See *supra* Part VI.A.

291. See FED. R. CIV. P. 50 (stating that a court may grant a renewed motion for judgment as a matter of law if “the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue”); *Alvin v. Calabrese*, 455 Fed. Appx. 171, 174 (3d Cir. 2011) (stating that the appellate court “review[s] *de novo* a district court’s denial of a motion for judgment notwithstanding the verdict,” which entails “view[ing] the evidence in the light most favorable to the verdict winner and draw[ing] all reasonable inferences in its favor,” and stating that the motion should be granted “only if, as a matter of law, the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief” (internal quotations omitted)); *Henry v. Dinelle*, No. 9:10–CV–0456 (GTS/DEP), 2013 WL 936584, at *3–7 (N.D.N.Y. Mar. 8, 2013) (applying Rule 50 to a motion for judgment notwithstanding the verdict on an Eighth Amendment excessive force claim); J. ERIC SMITHBURN, *APPELLATE REVIEW OF TRIAL COURT DECISIONS* 10 (2009); Joan E. Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts’ Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1522 n.3 (2012).

292. It would make sense for the jury to assess these criminal constitutional moral matters independently from determinations of guilt or innocence. In devising appropriate procedures for these determinations, legal decisionmakers should keep in mind the limitations imposed by the Double Jeopardy Clause. See U.S. CONST. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

293. See *United States v. Jerez*, 108 F.3d 684, 689–93 (7th Cir. 1997) (reviewing *de novo* whether there was a Fourth Amendment seizure); SMITHBURN, *supra* note 291, at 10; Steinman, *supra* note 291, at 1522 n.3 (noting that “[f]ederal appeals courts review juries’ findings of fact and applications of law to fact by reference to whether reasonable jurors acting reasonably could have so concluded”).

294. See *supra* note 267–86.

B. Greater Judicial Involvement

Jury determinations have proven workable for assessing constitutional moral questions, yet concerns of majoritarianism and lack of uniformity may remain pervasive because juries have not been trusted with deciding moral issues of constitutional magnitude in the criminal context for over a century.²⁹⁵ For those less confident in jury decisionmaking and those tethered to the idea that constitutional moral questions are legal determinations best left to judges, shoehorning greater jury decisionmaking into our already established system in more minor ways may be more palatable. In the Fourth Amendment context, Texas's unique procedure for allowing both judges and juries to assess Fourth Amendment reasonableness provides a useful model for tweaking many jurisdictions' methods of addressing this criminal constitutional moral question.²⁹⁶ By allowing juries to second-guess judges' determinations of admissibility, defendants are accorded an extra layer of constitutional protection, and this procedure ameliorates at least some concerns of majoritarianism because it cuts in favor of the criminal defendant.

When addressing the Eighth Amendment checks on fines and other punishments, a different type of diluted process may be desirable. Unlike questions of reasonableness under the Fourth Amendment, Eighth Amendment questions of cruelty and unusualness, as well as excessiveness, are ordinarily not decided at the trial stage. Instead, these Eighth Amendment issues are ordinarily raised on appeal or else in a post-conviction proceeding.²⁹⁷ This means that "a jury will often no longer be empaneled by the time that a defendant raises an Eighth Amendment challenge to his sentence."²⁹⁸ To infuse jury decisionmaking into these assessments, courts could empanel special juries to decide Eighth Amendment issues.²⁹⁹ However, as I have explained elsewhere, "[i]t would perhaps be more prudent . . . to have [Eighth Amendment issues] decided in the first instance as part of the penalty or sentencing phase of trial rather than on appeal when juries are ordinarily not readily available."³⁰⁰ In capital cases, where juries are involved in determining the appropriateness

295. See *supra* Part I.

296. See *supra* Part VI.A.

297. Ryan, *supra* note 23, at 585–86 ("The avenues for raising Eighth Amendment claims are clearly varied and depend upon the jurisdiction's particular rules and procedures, but they tend to be first raised on appeal or in a separate habeas corpus procedure and are not ordinarily decided at the sentencing stage itself.").

298. *Id.* at 586. "It might be easier to empanel a jury in a habeas case than on appeal, but the use of juries is not common in habeas." *Id.*

299. See *id.* at 588.

300. *Id.*

of imposing the death penalty, courts might simply specifically instruct the jury to consider whether the punishment comports with Eighth Amendment requirements.³⁰¹ A similar instruction could be given to juries even in noncapital cases in jurisdictions that trust juries to sentence criminal offenders.³⁰² In jurisdictions that trust judges, rather than juries, to sentence in noncapital cases, though, it may be difficult to find room for a jury's assessment of these criminal constitutional moral questions.

When jury decisionmaking on criminal constitutional moral matters is infeasible, or where jurisdictions cannot muster the courage to trust juries to determine criminal constitutional moral matters, courts should, at a minimum, treat criminal constitutional moral matters as "mixed questions of law and fact rather than as pure questions of law."³⁰³ This will empower judges to more closely examine and consider the specific facts involved in these issues, allowing for more individualized determinations of these moral matters.³⁰⁴ Among the facts that judges ought to consider are data regarding society's actual expectations of privacy, the public's views on the cruelty and unusualness of punishments, and society's sense of fines' excessiveness. While judges likely will not be as accurate as juries in assessing these societal values, their conscious attempt to do so will most likely be an improvement over disregarding societal expectations altogether. In addition to allowing judges to more closely examine these facts involved in deciding criminal constitutional moral issues, treating these matters as mixed questions of law and fact will also encourage appellate courts, which may not clearly grasp the factual nuances of the relevant community's moral beliefs, to provide greater deference to the trial court's determinations.

CONCLUSION

Society's morals and values continue to evolve. The only way to effectively track these changes and incorporate them into the law is to call on the body most representative of society to assess these developments—the jury. Juries' qualifications for deciding these issues go beyond their representative nature. Juries have also been long esteemed in the criminal justice system for their role in protecting the people from an arbitrary and overbearing government, and they are well positioned to make better decisions than solitary judges on moral matters due to their broad

301. *See id.*

302. *See id.* at 589.

303. *Id.*

304. *See id.*

knowledge and experience bases and democratic processes. Juries have their fingers on the pulse of society. As a result, criminal constitutional moral matters, such as Fourth Amendment reasonableness, Eighth Amendment cruelty and unusualness, and Eighth Amendment excessiveness, ought to be decided by juries rather than judges.