

## PROTEST IS DIFFERENT

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### INTRODUCTION

Sometimes dramatic, sometimes mundane, acts of civil disobedience bring attention to issues that have recently included climate change, policing, and high school closings.<sup>1</sup> In the United States, we are surrounded by protest. The stories of these protests capture deep aspects of the human experience and our relationship to government power.<sup>2</sup> These stories often involve a confrontation between the protester and the law. Popular media is full of stories of protesters who have stepped over the law: the news article regarding a nun who served seven years in federal prison for pouring a vial of human blood on a Trident missile silo;<sup>3</sup> the movie about an environmental protester who broke up a fed-

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\* Associate Professor of Law, Vermont Law School. This article is dedicated to members of the generations on either side of me: my parents and my children. Vocal anti-war and civil rights activists, my parents' activities etched into my young mind the power of protest. My children, Anaya West and Chloe West, themselves activists with a strong sense of justice, give me hope for the future.

1. See, e.g., Sarah Berger, *Ferguson Protests Arrests: Cornel West, DeRay McKesson, Johnetta Elzie and Osagyefo Sekou Arrested In St. Louis*, INT'L BUS. TIMES \*Aug. 10, 2015, 4:29 PM, <http://www.ibtimes.com/ferguson-protests-arrests-cornel-west-deray-mckesson-johnetta-elzie-osagyefo-sekou-2047082>; Hal Burton, *Shell Icebreaker Moves Out as Protesters in Portland Dangle From Bridge to Block It*, SEATTLE TIMES (July 30, 2015, 7:27 AM), <http://www.seattletimes.com/seattle-news/environment/protesters-in-portland-rappel-off-bridge-to-block-shell-icebreaker>; Lauren Fitzpatrick, *Dyett High School Supporters Arrested After City Hall Sit-In*, CHI. SUN-TIMES (July 29, 2015, 11:02 AM), <http://chicago.suntimes.com/news/7/71/833430/dyett-high-school-supporters-arrested-city-hall-sit-in>.

2. See Andy Merrifield, *The Enigma of Revolt: Militant Politics in a Post-Political Age*, in THE POST-POLITICAL AND ITS DISCONTENTS: SPACES OF DEPOLITICISATION, SPECTRES OF RADICAL POLITICS 279, 290 (Japhy Wilson & Eric Swyngedouw eds., 2014) ("Perhaps it's possible to draw up a list of 'archetypes of dissent' . . . that symbolise . . . some innate disposition to make trouble, to dissent and protest, to revolt against the structures of modern power . . . .").

3. See Linda Stasi, *EXCLUSIVE: 84-Year-Old Activist Nun Imprisoned in Brooklyn Jail Hellhole for Breaking into Nuclear Facility, Exposing Security Flaws*, N.Y. DAILY NEWS (Jan. 19, 2015, 2:30 AM), <http://www.nydailynews.com/new-york/brooklyn/exclusive-nun-84-brooklyn-jail-hellhole-activism-article-1.2083481>.

eral lease auction;<sup>4</sup> the business journal report on the \$20 million cost to the city of Baltimore for the police overtime and cleanup as a result of protests.<sup>5</sup>

The stories of protest weave a complex picture of its place in a society built on the rule of law. Usually without express acknowledgment, popular references highlight a fundamental democratic tension underlying each act of civil disobedience. Often, our cultural references embody recognition of the right to assemble, speak, and protest, and an acknowledgement of the protesters' underlying grievances. This sense of the "right" of protest competes with the similarly recognized importance of the primacy of the law and obedience to it. These different strands of public discourse epitomize this tension. On the one hand, popular sentiment is expressed through the sense that obedience to an unjust law is no virtue.<sup>6</sup> In this view, speech and dissent are fundamental principles, and protest is an embodiment of these values. On the other hand, some discourse emphasizes the economic costs of protest—the cost of police, the loss of business—while legal scholars and jurists tend to emphasize the social and legal disruption caused by protest.<sup>7</sup>

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4. See *About the Film*, BIDDER 70, <http://www.bidder70film.com/#!about/cee5> (last visited Dec. 1, 2015).

5. Yvonne Wenger, *Unrest Will Cost City \$20 Million, Officials Estimate*, BALTIMORE SUN (May 26, 2015, 7:11 PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-unrest-cost-20150526-story.html>.

6. "One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws." Martin Luther King, Jr., *Letter from a Birmingham Jail*, Apr. 16, 1963. "An unjust law is itself a species of violence. Arrest for its breach is more so. Now the law of nonviolence says that violence should be resisted not by counter-violence but by nonviolence . . . . This I do, by breaking the law and by peacefully submitting to arrest and imprisonment." Mohandas Gandhi, NON-VIOLENCE IN PEACE AND WAR 1942–49 (1962). "Protest beyond the law is not a departure from democracy; it is absolutely essential to it." HOWARD ZINN, THE ZINN READER: WRITINGS ON DISOBEDIENCE AND DEMOCRACY 383 (1997). "[I]f [the machine of government] is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law." Henry David Thoreau, ON CIVIL DISOBEDIENCE 142–43 (Wendell Glick ed. 1982) (1849). "[A]n unjust law is no law at all." Saint Augustine, ON FREE CHOICE OF THE WILL 8 (Thomas Williams trans. 1993).

7. See, e.g., *Charges Filed Against MOA Protesters*, KARE 11 (Jan. 14, 2015, 11:22 PM), <http://www.kare11.com/story/news/crime/2015/01/14/charges-filed-against-moa-protesters-black-lives-matter/21752595/> (reporting that, in a case involving a protest at the Mall of America, the Deputy Chief of Police noted for the news station that "the protest has resulted in police overtime costs that now exceed \$25,000 to taxpayers" and that the mall "has incurred more than \$8,000 in security costs").

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When a protest, even a non-violent protest, results in violation of a criminal prohibition, it exacerbates the strain. The competition between acquiescence to the law and opposition to the law creates, in trials of criminally disobedient protesters, a deep tension of values. Prosecutors and courts may expressly acknowledge the costs not only of the individual act of protest, but of protest and disobedience in general and the risks it poses to the legal and political systems. In the midst of this, questions arise regarding the extent protesters should be held criminally liable and punished for their actions. Among these questions are: whether protesters should be criminally liable? Does a protester's sense of the correctness of their action translate to a lack of remorse and thus justify a harsher sentence than that of a remorseful non-protester defendant? Should a protester's motivation to act in what they believed to be the public interest mitigate their culpability?

The tensions between protest and obedience are not easily resolved. How one evaluates the actions of a civilly disobedient protester will likely depend not only on how one evaluates the individual act but also upon how one views protest, the right of protest, the individual protester's motivations, and the overall costs of the protest action. Ultimately, the culpability of a protester may depend not only on the individual's actions, but also on the value the prosecutor, judge, or jury ascribes to protest and competing interests.<sup>8</sup> The determination of the justice or injustice of a protester's action thus requires inquiry into, and a balancing of, many factors. Important in the weighing might be individual and group disruption caused, the rationale for the protest, and the economic, legal, and political costs of the action. Inevitably, this balancing of values is individual to each action and each pro-

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8. In response to a recent incident in which a woman climbed the flagpole at the South Carolina capital, the national office of the NAACP publicly "call[ed] on state prosecutors to consider the moral inspiration behind the civil disobedience of this young practitioner of democracy. Prosecutors should treat [the activist] with the same large-hearted measure of justice that inspired her actions." Sammy Fretwell & Sarah Ellis, *Confederate Flag Pulled from SC Capitol Grounds By Activists*, THE STATE (June 27, 2015), <http://www.thestate.com/news/local/article25652377.html> ("The national NAACP office compared [the protester] to Henry David Thoreau, Dr. Martin Luther King Jr. and 'numerous Americans who have engaged in civil disobedience.'"). In the previously mentioned case involving a protest at the Mall of America, the police noted the costs of policing the protest and prompted the news station to report that "[t]hose [fiscal] impacts likely played a role in the decision to charge [the protesters]." *Charges Filed Against MOA Protesters*, *supra* note 7 ("I was shocked to see I was charged with 8 misdemeanor counts," stated one of the individuals charged).

tester. The specificity of these individual determinations of culpability can result in widely disparate determinations as to the culpability of a civilly disobedient protester. Some protesters are lauded, while others are vilified. Some protesters' charges are dismissed, while others face sentences more lengthy than their non-protester counterparts.<sup>9</sup>

These disparate outcomes reflect a deep complexity underlying an evaluation as to the culpability of a civilly disobedient protester. The social motivation underlying even a criminal act of protest as well as the competing societal interests at play in a protester's trial make determinations of culpability more complex than in ordinary criminal trials.<sup>10</sup> Despite the fact that civilly disobedient protesters are distinct from non-protester criminal defendants, the current criminal system makes no room for distinction.<sup>11</sup> Given the challenges inherent in weighing the competing societal interests and the lack of analogy to a traditional criminal case, this article looks to other contexts to create a meaningful framework in which to balance these competing interests.

The competing interests that underlie a criminal prosecution of a civilly disobedient protester, while distinct in obvious and important ways from a traditional criminal prosecution, can be analogized to the complex balancing of values in a death penalty

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9. See Kelsey O'Connor, *Charges Dismissed for "We Are Seneca Lake" Protesters*, ITHACA J. (Mar. 19, 2015, 4:46 PM), <http://www.ithacajournal.com/story/news/local/2015/03/19/crestwood-protesters-charges-dismissed-protesters/25010935/> (Defense attorney Sujata Gibson noted the varied responses to protest, saying that "[w]e've seen a sea change in the way the court and the prosecutors have reacted to our cases—from maximum sentences for jail terms for trespassing violations to large-scale offers to support dismissals in the interests of justice"); Lee Shearer, *Charges Dismissed Against Demonstrators Who Protested Regents Policy on Undocumented Students*, ATHENS BANNER-HERALD (May 29, 2015, 6:23 AM), <http://onlineathens.com/uga/2015-05-29/charges-dismissed-against-demonstrators-who-protested-regents-policy-undocumented> (the County Solicitor declined to prosecute the protesters, stating that "prosecuting the cases would not serve the public interest nor the interests of justice . . .").

10. See Henry M. Hart, Jr. *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 404 (1958) (asserting that the distinguishing factor of criminal law is that it involves the community's condemnation); Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. Rev. 201, 206 (1996).

11. Under current criminal jurisprudence, there may be very little recognition of the distinctions between a civilly disobedient protesters and a non-protester criminal defendant. An attempt by the protester to introduce evidence of his distinct motivation is likely to be turned away as not relevant. See Martin L. Loesch, *Motive Testimony and a Civil Disobedience Justification*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 1064, 1100-02 (1991) (concluding that criminal law generally rejects motive testimony in civil disobedience cases).

case.<sup>12</sup> Death penalty proceedings acknowledge the social desire for retribution, and yet the significant procedural limitations required in a capital proceeding recognize equally weighty concerns as to fairness, equity, finality, and individuation.<sup>13</sup> In a capital case, the balancing of these interests is accomplished by individualized determinations in which the jury balances factors and makes a judgment as to community condemnation. This requirement of an individual determination—though existing in tension with other goals, including consistency across sentences and the avoidance of arbitrary sentences—is essential and necessary to impose a sentence of death.<sup>14</sup>

One obvious difficulty with drawing analogies from capital cases is that death penalty jurisprudence has held itself apart with the concept that “death is different,” and the proceedings underlying these cases are distinct from non-capital proceedings.<sup>15</sup> Among

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12. Though I analogize aspects of protester trials with capital proceedings, I do not intend in any way to diminish the severity of a proceeding in which the government seeks authorization to take a human life. In the words of the incomparable Anthony Amsterdam,

The decisions that lawyers make and mediate in capital prosecutions come as close to exercising God's own powers as humanity can come. Not only is the judgment to take life irreversible; it is literally incomprehensible. Whatever else we humans know, life and death are mysteries beyond our understanding; and when we decree that a person's life is forfeited, however solemnly, however righteously, we commit an act whose nature and whose consequences we cannot pretend to grasp.

Symposium, *A Review of the Administration of the Death Penalty and the Need for a Nationwide Response to the ABA's Moratorium Call*, 4 N.Y. CITY L. REV. 117, 120 (2002).

13. See *Ring v. Arizona*, 536 U.S. 584, 614 (2002) (Breyer, J., concurring) (arguing that there are special procedural safeguards in death penalty cases); Claire Finkelstein, *Death and Retribution*, 21 CRIM. JUST. ETHICS 12, 13 (2002) (arguing that death penalty proponents' reliance on retributivist theories of punishment is misplaced).

14. The decision to impose the death penalty cannot be prescribed by law or imposed by a judge; it must be imposed by a jury. See *Ring*, 536 U.S. at 609 (holding that the decision as to the existence of aggravating factors, which makes a defendant eligible for a death sentence, must be made by a jury); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (finding that, despite concerns about inconsistent application of the death penalty, a capital scheme that limits discretion by imposing categorical death sentences is impermissible); see also *Enmund v. Florida*, 458 U.S., 782, 801 (1982) (stating that when imposing the death penalty, an offender's “punishment must be tailored to his personal responsibility and moral guilt”); Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the Lockett Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 290 (1991) (“[A]ll mandatory schemes by their nature circumscribe the range of moral considerations that are taken into account in an individual case to those which happen to be reflected in the substantive criminal law's doctrinal provisions.”).

15. The other, and more obvious, difference is that an execution is a uniquely severe punishment. As a former capital defender, I in no way intend to minimize the importance of proceedings in which the government seeks legal justification to kill.

the rationales underlying death's difference are concepts that the severity of the sentence and the finality inherent in its imposition are unique. While certainly valid distinctions, these rationales do not tell the whole story as to why death penalty jurisprudence is held out as distinct. A distinction cited frequently by the Supreme Court is that the moral complexity of balancing the complex issues requires a community determination as to societal norms.<sup>16</sup> While certainly different in terms of severity, the complex balancing required in death penalty proceedings can inform the weighing of values in protester trials. In both proceedings the determination is complex and morally based, and the need for a community conscience is particularly appropriate.

Death penalty jurisprudence, once an island unto itself, is evolving and its reach expanding. Since 2010, two broad jurisprudential trends, one in interpretations of the Eighth Amendment and the other in the Sixth Amendment jury trial arena, have eroded the partition between capital and non-capital offenses. The significance of these jurisprudential shifts can hardly be overstated, and their implications are just beginning to be felt. One unassailable conclusion is that, while the distinction between a sentence of death and imprisonment is unmistakable, the jurisprudential line between capital jurisprudence and non-capital criminal jurisprudence is eroding.

While the jurisprudential shifts in death penalty law resonate in a number of legal contexts, they provide particularly significant insight in trials of protesters. Acts of civil disobedience, though criminal, are in fact unlike ordinary criminal acts, and, as in the capital arena, significant competing values underlie the criminal prosecution of acts of civil disobedience. To courts and juries facing the challenge of navigating the complex, competing interests involved, death penalty jurisprudence can provide some guidance. As trials of protesters implicate important competing

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16. Juries "reflect more accurately the composition and experiences of the community as a whole" and are thus "more likely to 'express the conscience of the community on the ultimate question of life or death.'" *Ring*, 536 U.S. at 615–16 (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968)); see also Stephen Gillers, *Deciding Who Dies*, 129 U.P.A.L.REV. 1, 60 (1980) (stating that retribution is an expression of the will of the community); Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 155–56 (2004) (noting that the right to jury trial "has nothing to do with 'the relative rationality, fairness, or efficiency' of a jury, but that a jury trial is more 'free' in that it allows a community check on government power").

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community values, determinations as to community condemnation are appropriate. Capital jurisprudence provides an illustration of how individualized determinations of moral blameworthiness can ensure community participation in balancing the complex, competing values underlying the prosecution of criminally disobedient protesters.

Part I of this article discusses the rationales underlying concepts of death as different and the procedural requirements—including input by the jury—necessitated by the deeply moral nature of an execution determination. Part II of the article discusses two independent jurisprudential shifts that expand jurisprudential requirements previously confined to the death penalty arena. The final section, Part III, discusses the legal and moral underpinnings of civilly disobedient protest, the important community role in evaluating the culpability of civilly disobedient protesters, and the implications of recognizing civilly disobedient protest as different. The article concludes that evolving concepts in death penalty jurisprudence provide helpful analytical constructs for determining culpability in trials of civilly disobedient protesters.

## I. “DEATH IS DIFFERENT” JURISPRUDENCE

### A. *The Bases for “Death Is Different” Jurisprudence*

The first articulation of death’s difference by the high court is found in Justice Brennan’s concurrence in the 1972 per curium opinion of *Furman v. Georgia*.<sup>17</sup> Invalidating Georgia’s death penalty scheme, *Furman* ushered in a *de facto* moratorium on capital punishment in the United States.<sup>18</sup> Four years after *Furman*, in *Gregg v. Georgia*, a plurality of the Court reiterated the rhetoric of difference while upholding the constitutionality of Georgia’s

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17. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam) (holding “that the imposition and carrying out of the death penalty” would have amounted to “cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments”).

18. Though *Furman*’s impact was significant, the Justices’ opinions were fractured, and the case did not produce a majority opinion. Despite the divergence, two concurring Justices articulated the concept that death is different. Justice Brennan, in his concurrence noted that the death penalty “is a unique punishment” and “in a class by itself.” *Id.* at 286, 289 (Brennan, J., concurring). Justice Stewart articulated the oft-cited opinion that “[t]he penalty of death differs from all other forms of criminal punishment, not in degree but in kind.” *Id.* at 306 (Stewart, J., concurring).

new death penalty statute.<sup>19</sup> In the more than thirty years since *Furman*, the language of difference has been reiterated many times by the Supreme Court.<sup>20</sup> Though, as this article discusses, the parameters and implications of death's difference have evolved over the life of the doctrine, it is well-settled that "death is different."<sup>21</sup>

The jurisprudential result of acknowledging death as different from other sanctions is the recognition that capital proceedings can be imposed only if the procedures employed are sufficient to guide the decision maker through the complex values at play.<sup>22</sup> A set of procedural systems has arisen in order to implement these heightened protections, designed to ensure both that a defendant is "actually guilty" of the offense and that a death sentence is the "appropriate" punishment.<sup>23</sup>

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19. 428 U.S. 153, 188 (1976) (plurality opinion). The joint opinion of Justices Stewart, Powell, and Stevens both acknowledged the "uniqueness" of the death penalty and stated that the "penalty of death is different in kind from any other punishment." *Id.*

20. *Miller v. Alabama*, 132 S. Ct. 2455, 2470 (2012) (noting prior recognition that "death is different"); *Graham v. Florida*, 560 U.S. 48, 103 (2010) (Thomas, J., dissenting) (criticizing the application of jurisprudence previously reserved for capital proceedings and dramatically stating "[d]eath is different' no longer"); *Ring*, 536 U.S. at 605–06 (noting that there is "no doubt that '[d]eath is different'"); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) ("[T]his Court has consistently acknowledged the uniqueness of the punishment of death."); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (calling attention to the "previously unquestioned principle" that unique safeguards are necessary because "the death penalty is qualitatively different . . . ."); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (noting the Court's recognition of the "qualitative difference" of the death penalty); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (noting that the "death penalty is qualitatively different" and "must be accompanied by unique safeguards . . . ."); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality) (stating that "death is qualitatively different . . . ."); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (Brennan, J., concurring) ("[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.").

21. Justice Stevens wrote in 1984 that "[i]n the 12 years since *Furman v. Georgia* . . . every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment . . . ." *Spaziano*, 468 U.S. at 468 (Stevens, J., concurring in part and dissenting in part). Though this unanimity likely no longer exists, see *Atkins v. Virginia*, 536 U.S. 304, 337–38, 345 (2002) (Scalia, J., dissenting), it still has a strong precedential basis and the support of a majority of the Court.

22. *Zant v. Stephens*, 462 U.S. 862, 885 (1983) ("death is different" jurisprudence "mandates careful scrutiny in the review of any colorable claim of error"). According to Hugo Bedau, the determination of the difference of death is a means to employing a variety of "standards that govern capital cases." HUGO BEAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT 236 (1987).

23. The courts have struggled with questions as to the degree to which the Constitution requires substantive accuracy, as opposed to just greater procedural protections in capital proceedings. *Compare Dobbert v. Wainwright*, 468 U.S. 1231, 1239 (Bren-

The first step in a capital sentencing proceeding is a narrowing of the scope of those offenders sentenced to death. This first step attempts to ensure that the death penalty is reserved for only “the worst of the worst,”<sup>24</sup> by distinguishing death-eligible offenses from others for which a death sentence is not appropriate.<sup>25</sup> In this initial filtering, an individual becomes eligible for a sentence of death only upon the finding of one or more aggravating circumstances.<sup>26</sup> The potential aggravators that render an individual eligible for execution are limited and must be delineated by statute.<sup>27</sup> Only upon a finding of one or more of the statutory aggravating factors does an individual become eligible for imposition of a death sentence.<sup>28</sup>

If an individual is found eligible for a death sentence pursuant to step one, capital sentencing jurisprudence requires an inquiry to determine the existence of factors mitigating implementation of the death penalty. Under step two, mitigating circumstances

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nan, J., dissenting) (“It is an outright abdication of our responsibility to minimize the risk that innocent people are put to death.”), *with Herrera v. Collins*, 506 U.S. 390, 404 (1993) (“[A]ctual innocence’ is not itself a constitutional claim . . . .”). Despite the Court’s rhetorical struggles, it is unlikely that current protections actually “ensure” either the guilt of the defendant or a sentence free from impermissible bias or arbitrary factors. See Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study*, 34 CARDOZO L. REV. 1227, 1275 (2013) (statistically showing disparities in the imposition of the death penalty based on factors including the “race of neighborhood” of the defendant).

24. See, e.g., Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 866 (1999) (“[B]y appropriately narrowing death eligibility [the Court intended that] . . . the death penalty could adequately be reserved for the ‘worst of the worst.’”); *Zant*, 462 U.S. at 877 (“[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.”).

25. 18 U.S.C. § 3592 (2012); see also *Zant*, 462 U.S. at 877.

26. See *Tuilaepa v. California*, 512 U.S. 967, 972 (1994); *Arave v. Creech*, 507 U.S. 463, 474 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm.”) (emphasis added).

27. The requirement that aggravating factors be specifically delineated by statute is an attempt to ameliorate concerns regarding the arbitrary imposition of the penalty. See, e.g., *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (“[T]he requirements of *Furman* are satisfied when the sentencing authority’s discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.”).

28. See, e.g., *California v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring) (finding that mitigation is necessary to ensure that a sentence is “a reasoned *moral* response to the defendant’s background, character, and crime rather than mere sympathy or emotion”) (emphasis added).

cannot be limited or defined in contrast to the way aggravating factors must be limited and defined at step one. Instead, under step two, the sentencer must be permitted to consider “any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”<sup>29</sup> In this second step, once mitigating circumstances are presented, the proceedings require a balancing of the aggravating and mitigating circumstances and a determination of the moral propriety of a sentence of death.<sup>30</sup> The moral determinations that underlie capital proceedings are the subject of the next section.

### B. *Moral Determinations in Capital Proceedings*

Though legal scholars point to the moral underpinnings of all criminal verdicts, and even of law in general, judicial rhetoric often omits mention of the underlying morality of legal determinations.<sup>31</sup> One of the distinctions of capital jurisprudence is that

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29. Lockett v. Ohio, 438 U.S. 586, 604 (1978); *see also* Romano v. Oklahoma, 512 U.S. 1, 7 (1994) (“States cannot limit the sentencer’s consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer’s discretion, but must allow it to consider any relevant information offered by the defendant.”) (quoting McCleskey v. Kemp, 481 U.S. 279, 306 (1987)).

30. Some states, such as Colorado, break this second step into two independent determinations: whether the mitigating circumstances outweigh the aggravating circumstances; and the moral determination as to whether the sentence of death is appropriate whether the defendant is so morally culpable as to have lost the entitlement to live. *See* COLO. REV. STAT. § 18-1.3-1201(2)(a) (2012). The procedures were recently on display with the trial of Aurora theater shooter, James Holmes, in which the jury, despite finding all requirements for execution, made the final moral determination at Colorado step three to spare Holmes’s life. *See Revealed: Families of Slain Victims in Dark Knight Massacre Walked Out of Colorado Courtroom on Hearing Holmes Had Avoided Death Sentence*, DAILYMAIL (Aug. 8, 2015, 8:53 PM), <http://www.dailymail.co.uk/news/article-3190686/Families-slain-victims-Dark-Knight-massacre-WALK-Colorado-courtroom-verdict-reading-James-Holmes-spend-rest-life-prison.html>.

31. *See* Erik Hagen, *The Moral Judiciary: Restoring Morality as a Basis of Judicial Decision-Making*, 48 NEW ENG. L. REV. 139, 141, 157 (2013) (arguing for expressly incorporating morality into judicial decision making); Nancy S. Kim, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. FLA. J.L. & PUB. POL’Y 199, 216 (2006) (explaining that the level of culpability attached to a criminal act is a direct reflection of society’s moral judgment of that act); Daniel F. Piar, *Morality as a Legitimate Government Interest*, 117 PENN ST. L. REV. 139, 140 (2012) (“[T]he Court’s inconsistency with regard to morals legislation ill serves the goals of a pluralistic, federalist society.”). *Compare* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 992 (1997) (“The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”), *with* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (“Moral disapproval of a group cannot be a legitimate gov-

courts expressly acknowledge the moral foundation underlying capital proceedings.<sup>32</sup> This judgment as to the “moral guilt” of the defendant is the final—and essential—part of every capital sentencing proceeding.<sup>33</sup> The moral foundation of these determinations in a capital case arises from the complex balancing of factors required to determine whether the culpability of an individual is so great as to establish that the person has “lost his moral entitlement to live.”<sup>34</sup> Justice O’Connor has stated that “the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant”<sup>35</sup> and indicated that imposition of a death sentence should represent a “reasoned moral response” to the offender and the offense.<sup>36</sup> Acknowledging the potential distinction between law and morality, the Court has said that “in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of . . . the ‘moral guilt’ of the defendant.”<sup>37</sup> Moral balancing is an essential component of a valid capital sentencing scheme and one

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ernmental interest under the Equal Protection Clause . . .”).

32. For recent Supreme Court discussions of the moral determination inherent in a death penalty determination, see *Valle v. Florida*, 132 S. Ct 1, 2 (2011) (Breyer, J., dissenting from denial of stay) (“I would focus upon the ‘moral sensibility’ of a community that finds in the death sentence an appropriate public reaction to a terrible crime.”); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263–64 (2007) (“Our line of cases in this area has long recognized that before a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant’s moral culpability and decide whether death is an appropriate punishment for that individual in light of his personal history and characteristics and the circumstances of the offense.”). See also Margaret J. Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143, 1159 (1980) (“The substantive judgment to be made [in a capital sentencing proceeding] is a moral judgment: Does this person deserve death as punishment?”).

33. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *California v. Brown*, 479 U.S. 538, 545 (1986) (O’Connor, J., concurring); *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985); *Spaziano v. Florida*, 468 U.S. 447, 468–69 (1983) (Stevens, J., concurring in part and dissenting in part); *Woodson v. North Carolina*, 428 U.S. 280, 320 (1976) (Rehnquist, J., dissenting) (describing the determination as to whether a sentence of death is morally justified as “a truly awesome responsibility”).

34. *Spaziano*, 468 U.S. at 469. The utilitarian philosopher Jeremy Bentham argued that, at a minimum, the death penalty must be reserved for “offences which in the highest degree shock the public feeling—to murders accompanied with circumstances of aggravation.” BENTHAMIANA: OR, SELECT EXTRACTS FROM THE WORKS OF JEREMY BENTHAM 319 (John Hill Burton ed., 1998); see also BEDAU, *supra* note 22, at 66.

35. *Brown*, 479 U.S. at 545 (O’Connor, J., concurring).

36. *Penry*, 492 U.S. at 319.

37. *Spaziano*, 468 U.S. at 481 (Stevens, J., concurring in part and dissenting in part).

that the Court has described as a “truly awesome responsibility.”<sup>38</sup>

Determination of entitlement to life must be made individually in each case.<sup>39</sup> The imposition of a death sentence should represent a “reasoned *moral response*” specific to the offender and the offense.<sup>40</sup> Because balancing culpability is individual, a death sentence cannot be mandated by law and its imposition must be determined on a case-by-case basis.<sup>41</sup> Among the most important of the procedures ensuring an individualized determination is that an individual is qualified to sit as a juror on a death penalty sentencing only if the juror has the ability to be swayed both in favor of mitigation or aggravation.<sup>42</sup> Not only can this individual moral weighting not be removed from the jury’s shoulders, but the burden cannot even be eased; it is impermissible for a party or the court to lighten or reduce the jury’s ultimate responsibility with regard to the determination of whether to impose a death sentence.<sup>43</sup>

The mandate of individuation, though one of the cornerstones of capital jurisprudence, exists in tension alongside significant concerns about consistent application of death sentences.<sup>44</sup> Arbi-

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38. *Woodson*, 428 U.S. at 320; *Caldwell v. Mississippi*, 472 U.S. 320, 330 (1985).

39. See *Brown*, 479 U.S. at 545 (O’Connor, J., concurring) (“[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant . . .”).

40. *Penry*, 492 U.S. at 319 (emphasis added).

41. See *Roberts v. Louisiana*, 428 U.S. 325, 331, 336 (1976) (plurality opinion) (holding unconstitutional Louisiana’s sentencing statute in mandating a death sentence upon conviction of certain offenses); see also *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion) (“There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant’s character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable . . .”).

42. See *Morgan v. Illinois*, 504 U.S. 719, 736 (1992) (holding impermissible under the Fourteenth Amendment and a line of capital jurisprudence that a defendant be sentenced by a juror who has indicated an unwillingness to be swayed by mitigation evidence); see also *id.* at 751–52 (Scalia, J., dissenting) (“[O]bscured within the fog of confusion that is our . . . ‘death is different’ jurisprudence, the Court strikes a further blow against the People in its campaign against the death penalty. Not only must mercy be allowed, but now only the merciful may be permitted to sit in judgment.”).

43. *Caldwell*, 472 U.S. at 330–31.

44. Justice Stewart in his *Furman* concurrence expressed concern about arbitrary imposition of the punishment, invoking oft-cited concerns that the punishment was imposed so “wantonly,” “freakishly,” and “capriciously” that it was as if the unfortunate defendant

itariness was a central concern to members of the majority in the Court's 1972 *Furman* decision.<sup>45</sup> In assessing the arbitrariness that infected Georgia's system for the imposition of death sentences, significant responsibility seemed to lie on the state's lack of procedures to guide sentencing discretion.<sup>46</sup> Capital jurisprudence since *Furman* has, to a large extent, been defined by the struggle to balance the mandate of individual determinations with the need to avoid "wanton and arbitrary" imposition of death sentences.<sup>47</sup> In the ten years following *Furman*, much of the Court's rhetoric in capital cases focused on its concerns as to the arbitrary application of the penalty.<sup>48</sup> In recent years, however, capital jurisprudence has moved away from concerns of consistency in favor of considerations of individuation.<sup>49</sup>

In order to allow for individualized moral determinations, there must exist both a voice for community values and a mechanism for channeling that input into criminal trials. The next section discusses the essential role of the jury as the conscience of the

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had been "struck by lightning." *Furman v. Georgia*, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring). Justice Stewart's concerns were echoed by other Justices in their individual *Furman* opinions. *Id.* at 242 (Douglas, J., concurring); *id.* at 260 (Brennan, J., concurring); *id.* at 311 (White, J., concurring); *id.* at 364 (Marshall, J., concurring).

45. *Id.* at 274 (Brennan, J., concurring); *id.* at 300 (Stewart, J., concurring). Cornell Professor Stephen Garvey criticizes the Court's somewhat inconsistent jurisprudence on mercy in capital proceedings as leading to a system that lacks consistency. Stephen P. Garvey, "*As the Gentle Rain From Heaven*": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 992 (1996) ("[T]he Court has no coherent understanding of mercy or its place in the structure of the penalty phase of a capital trial.").

46. See, e.g., *Furman*, 408 U.S. at 249–50 (Douglas, J., concurring) ("Finally, there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.") (quoting PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967)).

47. The struggle to reconcile the desire for individualized determinations as to the propriety of a death sentence in any case with the desire for consistency and fairness in imposition of the penalty defined much post-*Furman* capital jurisprudence. See, e.g., Abramson, *supra* note 16, at 125–26. Professor Stephen Garvey describes the "constitutional history of the penalty phase" as "the history of a supposed paradox between the goals of consistency and individualization . . ." Garvey, *supra* note 45, at 994.

48. *Furman*, 408 U.S. at 309–10 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.").

49. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (invalidating the North Carolina statute for "failure to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death"); see also Abramson, *supra* note 16, at 124–25.

community in balancing competing interests and evaluating an individual's level of blameworthiness.

### C. *The Essential Role of the Jury*

An evaluation of culpability is an essential part of a criminal trial. Though imperative that culpability be determined, it is less clear who must make the determination. We tend to think of the jury as the conscience of the community and the appropriate entity for determinations of criminal culpability. The other institutional actors in criminal proceedings lack the jury's ability to represent the community conscience.<sup>50</sup> This section begins by briefly evaluating each of these other institutional actors—legislators, prosecutors, and judges—as potential substitutes for the jury in making the requisite determination of condemnation in a criminal case.<sup>51</sup> Concluding that only the jury has the potential to translate community norms into legal consequence, this section explores the essential role of the jury in the criminal justice system.

As representative bodies whose election and retention depends upon their conformity with community sentiment, legislatures are arguably good barometers of the democratic will of the electorate and the moral conscience of the community.<sup>52</sup> As directly

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50. Though this article looks at these actors independently, it can also be useful to view the capital system holistically with each institutional actor playing a role in determining the propriety of the judgment. Professors Richard A. Bierschbach and Stephanos Bibas have done this in their 2013 article *Constitutionally Tailoring Punishment*. Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 409 (2013) ("The Court's constitutional regulation of the death penalty has thus resulted in a system in which capital sentencing determinations are filtered through multiple viewpoints that act as vetoes, giving each actor a chance to influence the process and kick the defendant out of the pipeline.").

51. Governors and Presidents also have a limited role through executive clemency, but they are inadequate representatives of community values in any but a very limited number of cases. See, e.g., Joseph L. Hoffmann & Nancy J. King, *Improving Criminal Justice: How Can We Make the American Criminal Justice System More Just?*, 95 JUDICATURE 59, 59 (2011).

52. See, e.g., Atkins v. Virginia, 536 U.S. 304, 312 (2002) ("[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'") (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). But see William J. Bowers et al., *Too Young for the Death Penalty: An Empirical Examination of Community Conscience and the Juvenile Death Penalty from the Perspective of Capital Jurors*, 84 B.U. L. REV. 609, 619 (2004); Craig Haney, *Commonsense Justice and Capital Punishment: Problematising the "Will of the People"*, 3 PSYCHOL., PUB. POL'Y & L. 303, 318–22 (1997) (identifying and analyzing the inherent problems of relying on legislative action to

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elected representatives, they are arguably as close to a substitute for the community as we have.<sup>53</sup> Upon examination, however, giving legislatures the responsibility to be the voice of community norms presents significant difficulties. For one thing, legislators, though elected, are likely to be influenced not just by community will but also by political pressure, special interests, and election posturing.<sup>54</sup> Another problem is that legislative enactments “are remarkably opaque,” and this inherent ambiguity of legislative actions makes it difficult to use legislative intent to discern any authoritative interpretation.<sup>55</sup> Even more than the pressures and opacity, however, it is the prospective nature of all legislative actions that make lawmakers particularly unsuited to the role of community conscience. While lawmakers can define offenses, or even abolish offenses or penalties, legislating is broad, and law-making lacks the individualization that is required in criminal trials.<sup>56</sup> The importance of individualized determinations in criminal proceedings is critical to provide a meaningful check on generalized support for a “tough on crime” approach.<sup>57</sup>

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infer popular sentiment).

53. See *Atkins*, 536 U.S. at 325–26 (Rehnquist, C.J., dissenting) (noting that public opinion polls should not be given weight unless “the elected representatives of a State’s populace have not deemed them persuasive enough to prompt legislative action”).

54. See, e.g., Bowers et al., *supra* note 52, at 619–20 (“Legislatures are a cauldron of political motivations and electoral concerns whose members play at least as large a role in creating and exploiting popular opinion as they do attempting to objectively assess it. The crass politicization of criminal justice issues over the last several decades has rendered the typical legislature ‘a dubious barometer’ of public opinion . . .”); see also Bierschbach & Bibas, *supra* note 50, at 403.

55. John F. Stinneford, *The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1752–53 (2008) (noting the inherent ambiguity of legislation, utilizing the example of one statutory scheme to illustrate the distinct conclusions that could be drawn: “If a state legislature imposes the death penalty for murder but not for rape, does this mean that the legislature morally condemns the death penalty for rape? Or might such legislation reflect a relatively weak policy preference? Might it merely reflect the pragmatic judgment that imposition of the death penalty for rape is likely to be struck down by the Supreme Court?”).

56. See, e.g., Bierschbach & Bibas, *supra* note 50, at 403, 412 (noting that legislatures can make only the first, broad, determination of appropriate culpability).

57. For example, in evaluating imposition of death sentences in California, studies by psychology professor Craig Haney have indicated that, despite “widespread abstract support for the death penalty,” when faced with certain categories of defendants or certain types of mitigation, “substantial numbers of people [are] unwilling to impose the death penalty . . .” Haney, *supra* note 52, at 321. The implications of Dr. Haney’s research indicate that the specifics of a situation matter and the legislative determination of the propriety of a death sentence in the abstract may not correlate to an individualized determination of the morally appropriate sentence. *Id.*; see also Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U.

Criminal prosecutors play a significant role in charging and plea decisions. Structurally, the prosecutor is fashioned as counsel for the state, government, or community and is charged with the “exercise [of] professional judgment, as the ABA Criminal Justice Standard directs, ‘solely for the benefit of the client—the people—free of any compromising influences or loyalties.’”<sup>58</sup> For that reason, the prosecutor’s ethical obligations compel focus not on victory but on seeing that justice is done.<sup>59</sup> Like legislatures, however, as an institutional actor, prosecutors fall short as a substitute for the jury. Prosecutors work closely with the police and often identify with the goal of conviction.<sup>60</sup> They may also labor under competing incentives; those with ambition to higher office may be motivated by the perception that a “tough on crime” stance will appeal to voters or that a high-profile conviction will be better for their career.<sup>61</sup> Even setting aside personal ambition or political pressures on the part of prosecutors, systemic pressures encourage prosecutorial overcharging in order to ensure extra room for plea negotiations, which can skew outcomes and lead to unjust results.<sup>62</sup> Thus, even in uncomplicated decisions, some studies have shown that a prosecutor may tend to act “according

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PA. L. REV. 33, 62 (2003) [hereinafter Barkow, *Recharging the Jury*] (“As voters, people consider the perceived overall threat of crime and tend to be harsher than when they are presented with a concrete case.”).

58. Bennet L. Gershman, *Prosecutorial Ethics and Victims’ Rights: The Prosecutor’s Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 579 (2005); STANDARDS FOR CRIMINAL JUSTICE § 3-1.3 (AM. BAR ASS’N 1993); cf. STANDARDS FOR CRIMINAL JUSTICE § 3.13 (AM. BAR ASS’N 2015) (“The prosecutor generally serves the public and not any particular government agency, law enforcement office or unit, witness, or victim.”).

59. See, e.g., STANDARDS FOR CRIMINAL JUSTICE § 3-3.9 (AM. BAR ASS’N 2015) (“A prosecutor should not institute, or cause to be instituted, or permit the continued pendency of criminal charges when the prosecutor knows that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.”); see also STANDARDS FOR CRIMINAL JUSTICE § 3-3.11 (AM. BAR ASS’N 2015) (“A prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment of the accused.”).

60. See Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion—Knowing there Will be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 382 (2000).

61. See *id.* at 382–83; Bierschbach & Bibas, *supra* note 50, at 424. See also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Those who wrote our constitutions knew from history and experience that [the right to a jury] was necessary to protect against unfounded criminal charges brought to eliminate enemies and . . . against the corrupt or overzealous prosecutor . . .”).

62. See Bierschbach & Bibas, *supra* note 50, at 424.

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to idiosyncratic rules, norms, preferences, and biases.”<sup>63</sup> At least as currently structured under our adversarial system, prosecutors are just as likely to need to be kept in check as they are to effectively function as a neutral community conscience.

Neither is the judiciary likely to serve as an effective conscience of the community. Though “[t]he first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community,”<sup>64</sup> ethical rules require that individual judicial determinations be driven by factors outside either the judge’s personal feelings or community conscience.<sup>65</sup> Additionally, judges are often unelected and, at least for those in the federal system, enjoy lifetime appointments, attributes designed to insulate judges from the pressures of community sentiment.<sup>66</sup> These features are likely to have the effect of removing judges from reliably expressing community norms and values.<sup>67</sup> While the perception of judges as entirely neutral is but mythology,<sup>68</sup> their attempts at insulation and neutrality likely render them unreliable harbingers of community norms or values.<sup>69</sup>

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63. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1723 (2010) (evaluating prosecutorial choices regarding whether to proceed or dismiss petty offenses). For a brilliant general critique of the role of prosecutors in the expanding system of criminal liability, see William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

64. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 28 (AM. BAR ASS’N 2009); see also RONALD DWORAKIN, LAW’S EMPIRE 380–81 (1986) (“An actual [judge] must sometimes adjust what he believes to be right as a matter of principle, and therefore as a matter of law, in order to gain the votes of other [judges] and to make their joint decision sufficiently acceptable to the community so that it can continue to act in the spirit of a community of principle . . . ”).

65. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (AM. BAR ASS’N 2011). A comment to the rule provides, in part, that “[a]n independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family.” *Id.*

66. See *id.* (“A judge shall not be swayed by public clamor or fear of criticism.”).

67. “Judges, it is sometimes necessary to remind ourselves, are part of the State—and an increasingly bureaucratic part of it, at that.” *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

68. See, e.g., Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 3, 59 (1994) (“[J]udges disserve themselves and the system if they presume that bias and prejudice do not enter the decisionmaking process . . . ”); JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 414 (1949).

69. For an interesting discussion of the difficulties of determining a single community norm, generally and specifically of relying on judges as harbingers of those norms, see

Given the institutional options, most scholars and non-scholars agree that the jury is the primary entity best-suited to uphold the conscience of the community.<sup>70</sup> The jury's role as conscience of the community has deep roots.<sup>71</sup> Since the early history of the emerging republic, the jury has been viewed as a bulwark against governmental overreach and oppression.<sup>72</sup> Despite scholarly wran-

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Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 360–65 (1987). See also, *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Those who wrote our constitutions knew from history and experience that [the right to a jury] was necessary to protect . . . against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the . . . compliant, biased, or eccentric judge.”).

70. See, e.g., *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) (labeling the jury as the “conscience of community”); Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 95 (2005) (“[T]he basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant’s moral blameworthiness.”); Sherman J. Clark, *The Courage of Our Convictions*, 97 MICH. L. REV. 2381, 2382 (1999) (discussing how criminal jury trials function not only to render judgments about culpability but also as expressions of community responsibility and identity); see also Richard E. Myers II, *Requiring a Jury Vote of Censure to Convict*, 88 N.C. L. REV. 137, 155 (2009) (“There is no more critical player in our constitutional system than the jury . . . .”).

71. For one analysis of the history of juries in the early republic, see Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 316–17 (2003). According to Iontcheva,

Legislators of many early American states abandoned the common law tradition and vested juries with sentencing power. . . . Reformers also thought that juries were uniquely capable of assessing the proper punishment because, as members of the local community, they were more likely to be well-acquainted with the defendant’s background and the particular circumstances of the offense. . . . As punishment options expanded beyond shaming sanctions and the mandatory death penalty and came to include various ranges and modes of imprisonment, there was more room for case-by-case decision making to which juries were thought to be well-suited.

*Id.*

72. There are volumes written on historical perceptions on the role of the jury. For a thorough discussion of the role of the jury in criminal sentencing, see Chris Kemmitt, *Function Over Form: Reviving the Criminal Jury’s Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 95, 98–115 (2006). Part of Kemmitt’s thesis includes the idea that the criminal jury originally contemplated by the founders of the United States Constitution was to determine the law as well as the facts of a case. See *id.* at 103, 107. This thesis is not universally accepted. See, e.g., Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIMINOLOGY, 111, 121–22 (1998) (finding that the published records do not support “conventional wisdom” as to the criminal jury’s right to determine the law in any colony but for Rhode Island). But see William E. Nelson, *The Lawfinding Power of Colonial American Juries*, 71 OHIO ST. L.J. 1003, 1028 (2010) (documenting a decade-long study into the question and concluding that “[o]n the issue of the lawfinding power of colonial juries, the score is roughly tied with my research not yet completed: juries possessed ultimate power over the law in New England and Virginia, but not in the Carolinas, New York, and Penn-

gling over the precise contours of the historical role of the American jury, the U.S. Supreme Court has repeatedly recognized that the criminal jury serves as a backstop against governmental action inconsistent with the community sensibility of moral norms.<sup>73</sup>

As representatives of community norms and values, juries serve a number of functions. They promote public acceptance of both the judicial process and the resulting verdicts.<sup>74</sup> Juries also satisfy an important communicative function.<sup>75</sup> In the words of one scholar, juries are intended to serve not only as a check on out-of-touch legislatures and overzealous prosecutors, but also on the judiciary as well since “[j]udges acting without juries could do outrageous deeds . . .”<sup>76</sup> By undertaking this evaluation, juries provide a backstop against government overreaching, over-criminalization, and the application of statutes that have ossified outdated values or social mores.<sup>77</sup> The jury thus operates as an

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sylvania”).

73. See, e.g., *Spaziano v. Florida*, 468 U.S. 447, 462 (1984) (“We do not denigrate the significance of the jury’s role as a link between the community and the penal system and as a bulwark between the accused and the State.”); *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“The purpose of the jury trial . . . is to prevent oppression by the Government.”); see also FEDERALIST NO. 83 (Alexander Hamilton) (“The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.”).

74. See, e.g., Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368 (1985) (“[T]he trial process is structured in a variety of ways that encourage the public to accept judicial conclusions . . .”).

75. See Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 803–04 (1997).

76. See AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 109 (1998); see also *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (“Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”).

77. Judge Learned Hand noted that

The institution of trial by jury—especially in criminal cases—has its hold up on public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither, at least to anything like the same degree.

*United States v. Adams*, 126 F.2d 774, 775–76 (2d Cir. 1942); see also *Williams*, 399 U.S. at 100 (discussing the jury as a barrier “to prevent oppression by the Government”).

additional check on police, prosecutors, and judges to ensure that these institutional actors are not the only arbiters of criminal responsibility.<sup>78</sup> Further, jury verdicts provide feedback to prosecutors, courts, and legislatures as to the community norms, enabling prosecutors and legislators to conform their discretion to community sensibilities.<sup>79</sup>

A number of structural elements empower the jury in performing its role.<sup>80</sup> It is a foundational aspect of criminal law that absent a defendant's waiver, a jury must issue a verdict of conviction; regardless of how powerful the evidence, a judge may not direct a verdict against a criminal defendant.<sup>81</sup> This unique authority places the criminal jury in a position arguably superior to that of the trial court judge. In order to ensure that the jury is unfettered by any judicial attempt to require justification for its verdict, a judge may not submit special verdicts to a criminal jury.<sup>82</sup> In a jurisprudential concept imported from England, the jury cannot be sanctioned for its verdict, even if that verdict disregards the letter of the law.<sup>83</sup> The jury's not-guilty verdict is also protected from appeal by the prosecution.<sup>84</sup>

In death penalty proceedings, community conscience plays an essential part in making individualized determinations of culpa-

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78. For a critique of the structural role of prosecutors as arbiters of community values and needs, see Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 827 (2000). For a critique of the assumption in criminal law that the judge and jury have the same cultural values and norms as a given defendant, see Kim, *supra* note 31, at 201–02 (2006).

79. Professor Richard Myers argues that juries should be part of a dialogue with lawmakers and prosecutors about criminal laws and prosecutions in order to allow the regular reevaluation of criminal laws. See Myers, *supra* note 70, at 142–43.

80. See *Duncan*, 391 U.S. at 156 (1968) (discussing the “common-sense judgment of [the] jury”).

81. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572–73 (1977) (“[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict regardless of how overwhelming the evidence may point in that direction.”) (citation omitted).

82. See, e.g., *United States v. Wilson*, 629 F.2d 439, 443 (6th Cir. 1980) (holding that the jury “has a general veto power, and this power should not be attenuated by requiring the jury to answer in writing a detailed list of questions or explain its reasons”).

83. *Bushnell’s Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670). See also AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 431 (2012).

84. Because judgments of conviction can be appealed while judgments of acquittal cannot, it has been said that juries have the last word on acquittal, but not on conviction. See AMAR, *supra* note 83, at 425. Professor Amar refers to this bias as one of the “pro-defendant asymmetries” within our constitutional structure. *Id.*; see also Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1844 (1997).

bility. This critical role can be served only by the jury. By undertaking an evaluation of the blameworthiness of the defendant, juries bring social norms and values to bear on the otherwise insular process of determining criminal culpability. Though the concept of the essential role of the jury arises in death penalty proceedings, where it has long been held that “death is different,” the uniqueness of capital proceedings has been eroded as its jurisprudential concepts have been applied in other proceedings. The next section explores this expansion of death penalty jurisprudence.

## II. DEATH IS NO LONGER UNIQUE—EXPANSION OF “DEATH IS DIFFERENT” JURISPRUDENCE

Enormous resources are spent on pursuit of the death penalty. Some of these resources reflect the heightened litigation standards and the reality that parties in capital cases push jurisprudential limits.<sup>85</sup> Not infrequently, death penalty proceedings pave new legal ground. From there, what starts as death penalty jurisprudence at times becomes general criminal law jurisprudence.<sup>86</sup>

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85. See generally RICHARD DIETER, DEATH PENALTY INFO. CTR., SMART ON CRIME: RECONSIDERING THE DEATH PENALTY IN A TIME OF ECONOMIC CRISIS, <http://www.deathpenaltyinfo.org/documents/CostsRptFinal.pdf> (last visited Dec. 1, 2015) (discussing the reasons and amount of resources required by death penalty cases).

86. See Carol S. Steiker & Jordan M. Steiker, *Opening A Window or Building A Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 155–56 (2008) (“[C]apital punishment receives a disproportionate share of popular, political, and legal attention. The sheer number of films, books, magazine, and newspaper articles discussing and depicting capital cases would suggest that capital prosecutions, sentences, and executions are far more common than they actually are. On the political side, state legislatures devote considerable attention to prevailing capital procedures and proposed reforms, despite, in relative terms, the extraordinary infrequency of capital cases and the increasingly large share of state resources consumed by non-capital incarceration. . . . The complete absence of any federal policy addressing the states’ unprecedented experiment with mass incarceration stands in notable contrast to Congress’s attention to the ways in which federal review of capital cases can influence state capital policies.”). But see Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1189 (2009) [hereinafter Barkow, *The Court of Life and Death*] (“Capital cases cannot be used as vehicles for reforming substantive sentencing review across the board because the Court has put them on a separate track.”). For one of the many well-reasoned critiques of the resource allocation drawn by capital cases, see generally Douglas A. Berman, *A Capital Waste of Time? Examining the Supreme Court’s Culture of Death*, 34 OHIO N.U. L. REV. 861 (2008) (arguing that the Supreme Court spends too much of its time and resources in reviewing death penalty cases which results in problems for the administration of the both capital and non-capital sentencing systems).

A criminal defendant's rights to effective assistance of counsel,<sup>87</sup> a racially representative jury pool,<sup>88</sup> access to the pre-sentence report,<sup>89</sup> and DNA preservation<sup>90</sup> all began with capital cases.<sup>91</sup> The line between protections afforded in capital proceedings and those offered in non-capital proceedings is hard to hold and can tend toward erosion.<sup>92</sup>

Even in “death is different” jurisprudence, the line between capital and non-capital proceedings is more permeable than the rhetoric of “death is different” indicates. The Constitution does not expressly distinguish between capital and non-capital criminal proceedings, and when a procedure or protection is adopted as important or constitutionally mandated in the capital setting, it is difficult to deny that same protection to non-capital defendants.<sup>93</sup> At the very least, the withholding from non-capital defendants of protections made available in capital proceedings subjects courts to regular criticism and attempts to stretch and expand capital jurisprudence.<sup>94</sup> Scholars and advocates are able to

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87. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

88. See *Norris v. Alabama*, 294 U.S. 587, 588, 596 (1935).

89. *Gardner v. Florida*, 430 U.S. 349, 351 (1977).

90. Steiker & Steiker, *supra* note 86, at 157.

91. *Id.* Professors Steiker and Steiker attribute much of this argument to the “much greater indifference that courts, policy makers, and the general public display toward non-capital criminal proceedings.” *Id.*

92. Though the Court sometimes creates separate rules for capital proceedings, it has also acknowledged the difficulties with a two-track approach and refused to utilize it. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 314–15 (1987) (refusing to carve out a distinct set of principles allowing the reliance on statistical evidence of systemic discrimination in capital cases).

93. *See, e.g., Erwin Chemerinsky, Evolving Standards of Decency in 2003—Is the Death Penalty on Life Support?*, 29 U. DAYTON L. REV. 201, 220 (2004) (“[A] general approach that says that death is different doesn’t make sense under the Constitution.”); Barkow, *The Court of Life and Death*, *supra* note 86, at 1162–63 (“One can hardly argue with the Court’s claim that death is a different kind of punishment. But as a matter of constitutional law, that does not get to the heart of the legal question raised by the two tracks. . . . [T]he Court’s claim of difference must be analyzed to determine whether it is not merely factually true, but legally significant.”); Steiker & Steiker, *supra* note 86, at 204 (“To recognize that ‘death is different’ is also to assert that incarceration (as opposed to death) is different, too—less severe, less final, less problematic, and less worthy of attention. In light of our current crisis of mass incarceration, we need to be wary of any such implication.”).

94. *See, e.g., Mary Berkheiser, Death Is Not So Different After All: Graham v. Florida and the Court’s “Kids Are Different” Eighth Amendment Jurisprudence*, 36 VT. L. REV. 1, 37 (2011) (“The deeply troubling question that remains is why . . . non-capital proportionality review withers on the vine while capital punishment review flourishes, as ever-increasing considerations hold sway with the Court.”); Barkow, *The Court of Life and Death*, *supra* note 86, at 1171 (“Once the Court recognizes a constitutional right, it should

point to areas of law in which capital cases have led the way in the institution of criminal justice reforms generally.<sup>95</sup>

Despite some analytical incoherence, the divide between death penalty jurisprudence and non-capital criminal jurisprudence remained largely intact until 2010. Between 2010 and 2015, however, two broad jurisprudential trends eroded the partition between capital and non-capital offenses. The first trend has been described by one scholar as a radical expansion of Eighth Amendment jurisprudence.<sup>96</sup> The second shift is seen in the sharpening focus on the important role of the jury in criminal proceedings.<sup>97</sup> These trends can be viewed and analyzed in concert, as part of a more fundamental structural shift toward the incorporation of community norms and values into complex criminal determinations.<sup>98</sup> The next two sections will discuss these trends.

#### A. *Expanding Eighth Amendment Jurisprudence*

The Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”<sup>99</sup> Its simple language, however, belies complex underlying jurisprudence. Understanding the doctrine’s expansion requires wading into some

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recognize the right for all, not just for those who might need the protection the most.”).

95. See, e.g., *Strickland v. Washington*, 466 U.S. 668, 671, 687 (1984) (recognizing that the Sixth Amendment right to counsel necessarily includes the right to the effective assistance of counsel); *Norris v. Alabama*, 294 U.S. 587, 588–89 (1935) (finding the exclusion of African Americans from the grand and petit jury pools unconstitutional in this “Scottsboro defendant” case); see also *Steiker & Steiker*, *supra* note 86, at 157 (“The death penalty, on this view, keeps criminal justice issues at the forefront of political and legal debate, and concerns about the fairness and reliability of the death penalty might trickle down to the much larger non-capital realm.”).

96. Bierschbach & Bibas, *supra* note 50, at 416; see also William W. Berry III, *The Mandate of Miller*, 51 AM. CRIM. L. REV. 327, 328 (2014) [hereinafter Berry, *The Mandate of Miller*] (“Recently . . . the Court has twice breached this formerly impervious barrier between capital and non-capital cases.”). The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

97. See discussion *infra* Part II.B.

98. For an excellent discussion of the unifying aspects of the Sixth and Eighth Amendment lines of cases and the authors’ hypotheses as to what they foretell, see Bierschbach & Bibas, *supra* note 50, at 452 (“Through *Graham* and *Apprendi*, the Court is awkwardly using rights-based doctrines to change the structures of criminal justice to ensure deliberation about individualized, morally appropriate sentences.”).

99. U.S. CONST. amend. VIII.

of the complexities. This section will discuss the two major, and until recently quite distinct, threads of Eighth Amendment jurisprudence and how two recent cases have woven them together to create a jurisprudence applicable outside the capital arena.

Prior to 2010, application of the Eighth Amendment to non-capital criminal sentences reflected “a clear separation between capital and non-capital cases” and “restraint and deference to the states” in matters of proportionality.<sup>100</sup> In contrast to the standard applied in capital cases, Eighth Amendment review in non-capital cases essentially consisted of a narrow proportionality review.<sup>101</sup> The non-capital review is limited and, according to the Court, the Eighth Amendment “does not require strict proportionality between crime and sentence,” instead “forbid[ing] only extreme sentences that are ‘grossly disproportionate’ to the crime.”<sup>102</sup> As the Supreme Court has acknowledged, under the parameters of the doctrine, “it has been difficult for the challenger to establish a lack of proportionality” in non-capital cases.<sup>103</sup> In capital cases, on the other hand, the Supreme Court looks to the “evolving standards of decency that mark the progress of a maturing society,” to determine whether a sentence of death is in line with contemporary values.<sup>104</sup> The standard used in capital cases of looking to community values is much more robust than the non-capital standard.<sup>105</sup>

Two contemporary Supreme Court cases, *Graham v. Florida*, decided in 2010, and *Miller v. Alabama*, decided in 2012, illustrate the recent expansion of Eighth Amendment jurisprudence as the standard previously applicable only in capital cases has

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100. William W. Berry III, *More Different Than Life, Less Different Than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review Under the Eighth Amendment After Graham v. Florida*, 71 OHIO ST. L.J. 1109, 1120 (2010) [hereinafter Berry, *More Different Than Life*].

101. See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (“A gross disproportionality principle is applicable to sentences for terms of years.”).

102. *Harmelin v. Michigan*, 501 U.S. 957, 997, 1000–01 (1991) (Kennedy, J., concurring in part and concurring in judgment).

103. See *Graham*, 560 U.S. at 59.

104. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

105. *Lockyer*, 538 U.S. at 68, 72; see also Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 678–79 (2005) (finding four categories of Eighth Amendment jurisprudence: torturous punishments; punishments that are disproportionate to the crimes for which they are imposed; capital cases; and punishments that are unconstitutionally administered).

been applied in non-capital arenas. The facts underlying the *Graham v. Florida* opinion involve a sixteen-year-old who received a sentence of life imprisonment for armed burglary and sought to invalidate that life sentence.<sup>106</sup> Rather than relying on the almost universally unsuccessful “narrow proportionality principles” applied to non-capital offenses, Graham asked the Court to apply the categorical analysis applicable to capital cases.<sup>107</sup> He claimed that his situation implicated the entire category of juvenile offenders sentenced to life sentences and merited, not a narrow proportionality review, but the “evolving standards of decency” review utilized in capital cases.<sup>108</sup>

The majority of the Court, in an opinion written by Justice Kennedy, not only fully engaged the Eighth Amendment issue as framed by Graham, but also agreed with him and applied the broader categorical analysis to the juvenile’s non-capital case.<sup>109</sup> The Court acknowledged that Graham’s claim was not cognizable under the then-existing jurisprudence.<sup>110</sup> Missing from the majority opinion, however, was a discussion of the implications of the opinion on capital jurisprudence and, especially, on concepts of death’s difference.<sup>111</sup> This omission from the majority opinion was not overlooked by the other Justices. Chief Justice Roberts noted that “[t]reating juvenile life sentences as analogous to capital punishment is at odds with our longstanding view that ‘the death penalty is different from other punishments in kind rather than

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106. *Graham*, 560 U.S. at 53–54, 57–58. Graham was sentenced originally to probation. Upon violating the terms of his probation, the trial court had discretion to impose a sentence of between five years and life. The probation report recommended a sentence below the statutory minimum, the defendant asked for five years, and the state argued for a thirty-year sentence on the charge. The trial court imposed a life sentence. *Id.* at 54–57.

107. *Id.* at 61–62, 125 (“The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence. . . . [H]ere a sentencing practice itself is in question. This case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes.”).

108. *Id.* at 125 (Alito, J., dissenting).

109. *Id.* at 74–75. See also Berry, *More Different Than Life*, *supra* note 100, at 1122 (claiming that “[t]he Court has crossed, without explanation, the clear and previously unquestioned Eighth Amendment divide between capital and non-capital cases” in the *Graham* opinion).

110. *Graham*, 560 U.S. at 59 (“The Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences given all the circumstances in a particular case. The second comprises cases in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty.”).

111. *Id.* at 88–89 (Roberts, C.J., concurring) (pointing to the similarities between a sentence of life imprisonment and imposition of the death penalty).

degree.”<sup>112</sup> Justice Thomas’s opinion contained the language that may become most cited from the case: “Death is different’ no longer.”<sup>113</sup>

Two years later, the Court solidified the jurisprudential expansion in *Miller v. Alabama*. *Miller* involved two cases, both addressing juveniles who were fourteen years old at the time of their offenses and who had been given mandatory sentences of life without the possibility of parole.<sup>114</sup> Those sentences were non-discretionary or, as Justice Kagan’s majority opinion put it, “[s]tate law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate.”<sup>115</sup> The question before the Court was whether the sentences violated the Eighth Amendment’s proportionality limitations.<sup>116</sup> Like in *Graham*, however, rather than apply just the narrow proportionality principles previously applicable to non-capital cases, the Court applied the “evolving standards of decency” jurisprudence previously reserved for capital cases as well as a narrow proportionality review.<sup>117</sup> Combining the two lines of jurisprudence, the Court ruled not that the juvenile sentences were *per se* unconstitutional, but rather that individualized determinations of the propriety of the sentences are mandated where a juvenile is given a sentence of life without the possibility of parole.<sup>118</sup>

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112. *Id.* at 89–90 (Roberts, C.J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 294 (1983)).

113. *Id.* at 103 (Thomas, J., dissenting) (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)) (“[T]he bright line the Court drew between two penalties has for many years served as the principal justification for the Court’s willingness to reject democratic choices regarding the death penalty. Today’s decision eviscerated that distinction. ‘Death is different’ no longer. . . . The Court’s departure from the ‘death is different’ distinction is especially mystifying when one considers how long it has resisted crossing that divide. Indeed, for a time the Court declined to apply proportionality principles to noncapital sentences at all, emphasizing that ‘a sentence of death differs in kind from any sentence of imprisonment, no matter how long.’”) (citations omitted).

114. 132 S. Ct. 2455 (2012) (consolidated opinion). *Miller* was consolidated with *Jackson v. Hobbs* for argument and opinion. As a standard, reference to *Miller v. Alabama* refers to both cases.

115. *Miller*, 132 S. Ct. at 2460.

116. *Id.* at 2460.

117. *Id.* at 2466–67, 78.

118. *Id.* at 2467–68.

In the short time since the decisions in *Graham* and *Miller*, scholars, courts, and practitioners have grappled with the implications of the clear expansion of Eighth Amendment jurisprudence.<sup>119</sup> Though the full implications of the cases have yet to be felt, discussion of the extent of the shift has been robust, with scholars and advocates analyzing the potential areas of impact. Scholars have surmised that the areas likely impacted range from the traditional Eighth Amendment area of prison conditions<sup>120</sup> to the entire area of juvenile law.<sup>121</sup> Despite a lack of consensus as to the areas into which the new Eighth Amendment jurisprudence will expand, it is clear that the cap is off the bottle and the Eighth Amendment has grown significantly outside its prior confines.<sup>122</sup> Important to the doctrinal shift and notable for the analysis set forth in this article, the Court has indicated that community values, represented by the Eighth Amendment's evolving standards of decency jurisprudence, have a role to play even outside the capital arena.

The next section discusses a parallel jurisprudential shift, that of the expansion of the jury's role in criminal cases. The potential implications of these changes upon trials of protesters will be discussed later in the article.

### B. *The Sharpening Role of the Jury*

The other area of great jurisprudential shift in the criminal arena since the turn of the millennium has been in the interpretation of the Sixth Amendment's jury trial provision.<sup>123</sup> The right

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119. See, e.g. Janet C. Hoeffel, *The Jurisprudence of Death and Youth: Now the Twain Should Meet*, 46 TEX. TECH. L. REV. 29, 53 (2013) (arguing for the expansion of "death is different" jurisprudence into the juvenile arena and that "if 'death is different,' children are different too") (quoting *Miller*, 132 S. Ct. at 2470); Berry, *The Mandate of Miller*, *supra* note 96, at 338–39 (2014) (arguing for an extension of "death is different" protections to all cases involving the possibility of a "death-in-custody" sentence in which the sentence exceeds the offender's life expectancy).

120. See Bierschbach & Bibas, *supra* note 50, at 416.

121. Ioana Tchoukleva, *Children Are Different: Bridging the Gap Between Rhetoric and Reality Post Miller v. Alabama*, 4 CALIF. L. REV. CIRCUIT 92, 106 (2013).

122. Craig S. Lerner, *Sentenced to Confusion: Miller v. Alabama and the Coming Wave of Eighth Amendment Cases*, 20 GEO. MASON L. REV. 25, 39 (2012) ("The larger question raised by *Graham* and *Miller* is whether the Court, having twice invalidated noncapital sentences, is prepared to embark upon an invigorated Eighth Amendment jurisprudence . . .").

123. The Sixth Amendment provides:

to a jury emerges from deep in our legal roots, with its constitutional foundation predating even the Sixth Amendment.<sup>124</sup> The extent of power that the Framers of the Constitution intended to rest with the jury is robustly debated.<sup>125</sup> Beyond significant dispute, however, is the importance of the jury's role as "guard against a spirit of oppression and tyranny . . .".<sup>126</sup> The importance of this function has been echoed by the Supreme Court in opinions calling the jury "fundamental to the American scheme of justice" and of "surpassing importance."<sup>127</sup>

In practice, however, many commentators have noted the irony that the jury's rhetorical power was accompanied for many years by a constriction of its actual authority.<sup>128</sup> Prior to the Sixth Amendment's recent expansion, the jury's role in a non-capital case was rigidly confined to that of "fact-finder" during proceedings on guilt.<sup>129</sup> In the death penalty arena, the Court for years re-

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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

124. Even before enactment of the Sixth Amendment, Article III of the Constitution embodied the requirement that "[t]he Trial of all Crimes . . . shall be by Jury . . . ." U.S. CONST. art. III, § 2, cl. 3; see also Barkow, *Recharging the Jury*, *supra* note 57, at 34 (stating that the criminal jury was put into place by the Constitution to act as a check on the government well before Sixth Amendment guarantees were enacted).

125. Compare, e.g., ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 21 (1941) (arguing that the First Amendment was intended to eliminate the crime of sedition and prevent criminal prosecutions for criticism of the government), with, e.g., LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY*, at vii (1960) (claiming that the Constitution drew upon theory *justifying* government suppression of seditious speech).

126. *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (quoting 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 540–41 (4th ed., 1873)); FEDERALIST NO. 83 (Alexander Hamilton) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon trial by jury; or if there is any difference between them it consists in this: the former regarded it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

127. *Apprendi*, 530 U.S. at 476; *Duncan v. Louisiana*, 391 U.S. 145, 149 (1967).

128. See, e.g., T. Ward Frampton, Note, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 186 (2012) ("If the right to a jury trial is 'the spinal column of American democracy,' this Comment identifies a severe case of scoliosis.").

129. Benjamin F. Diamond, *The Sixth Amendment: Where Did the Jury Go? Florida's*

jected the argument that the Constitution required a jury to make the final decision imposing the death penalty on a defendant.<sup>130</sup> Instead, a judge, or panel of judges, could decide themselves the balancing of aggravating and mitigating factors and even override the jury's decision that a life sentence was most appropriate. Until 2000, the Court's position on the Sixth Amendment was that, while it guaranteed the right to a jury trial at the conviction stage, “[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of [the appropriate punishment].”<sup>131</sup>

The harbinger of the Sixth Amendment revolution was a footnote, technically dicta, in a fairly ordinary carjacking case in which the judge found “serious bodily injury” and increased the defendant’s sentence.<sup>132</sup> That case, *Jones v. United States*, upended business as usual in sentencing courts by raising the specter of a constitutional problem with judicial determination of sentencing facts.<sup>133</sup> A year later, significant upheaval began with *Apprendi v. New Jersey*’s holding that the Sixth Amendment right to a jury trial requires that, except for prior convictions, “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.”<sup>134</sup> Summoning the historical role of the jury, Justice Stevens, writing for the Court, noted that the Sixth Amendment constitutionalized the core functions of eighteenth century

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*Flawed Sentencing in Death Penalty Cases*, 55 FLORIDA L. REV. 905, 911 (2003).

130. *Id.* at 912–13.

131. Spaziano v. Florida, 468 U.S. 447, 459 (1983).

132. *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999) (containing the language that would become the holding in *Apprendi*: “[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.”). See, e.g., G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 88 (2008) (“[T]he Court’s Sixth Amendment jurisprudence is in the midst of an originalist revolution. Starting with *Jones v. United States* and continuing through *Apprendi v. New Jersey*, *Ring v. Arizona*, *Blakely v. Washington*, and *Crawford v. Washington*, the Court stands poised to refasten Sixth Amendment jurisprudence to its historical underpinnings.”).

133. See *Jones*, 526 U.S. at 239 (noting the Court’s concerns in the context of applying the doctrine of constitutional avoidance).

134. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Justice O’Connor, in her dissent wrote: “Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.” *Id.* at 524 (O’Connor, J., dissenting).

juries.<sup>135</sup> Primary among those functions, according to the Court, was the jury's role as bulwark against governmental overreaching.<sup>136</sup>

Importantly, *Apprendi* is more than a decision about jury sentencing. The case also prioritizes individual decision making in a manner analogous to that required in the capital arena.<sup>137</sup> Though the case at first appears to involve a tension between the judiciary and the jury, the true impact of *Apprendi* has been to shift the balance of authority for determinations of criminal sentencing from the legislature, via generalized pronouncements, to individualized conclusions by a jury.<sup>138</sup> Since *Apprendi*, sentence enhancements can be imposed only when accompanied by individualized jury determinations.<sup>139</sup> *Jones*, *Apprendi*, and the line of cases that followed signaled a victory for individualization over the structured, determinate sentencing that had previously been paramount.<sup>140</sup> Notably, the arguments on either side of the *Apprendi* debate mirror the tension seen in capital sentencing between individualized sentences and uniformity.<sup>141</sup>

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135. See *id.* at 479 (focusing on legal history and concluding that the criminal law tended to be sanction-specific, giving the judge little discretion).

136. *Id.* at 477 (“[O]ur recognition of these principles extends down centuries into the common law. ‘[T]o guard against a spirit of oppression and tyranny on the part of rulers,’ and ‘as the great bulwark of [our] civil and political liberties.’”) (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

137. See, e.g., *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976); see also *supra* Part I.B.

138. See *Bierschbach & Bibas, supra* note 50, at 414.

139. For a brilliant article addressing *Apprendi*, *Miller*, and individualized determinations of culpability, see *id.* (“Individualization and moral appropriateness figured critically in the *Apprendi* line as well, although it takes some work to see how.”).

140. See *United States v. Booker*, 543 U.S. 220, 226–27, 244 (2005) (applying the Sixth Amendment right to a jury trial to the federal sentencing guidelines and invalidating the mandatory nature of the guidelines’ sentencing enhancements); *Blakely v. Washington*, 542 U.S. 296, 303–05 (2004) (holding that a state trial court’s sentencing of defendant to a sentence above the statutory maximum on the basis of the judge’s finding violated the defendant’s Sixth Amendment right to trial by jury); see also Vikram David Amar, *Implementing an Historical Vision of the Jury in an Age of Administrative Factfinding and Sentencing Guidelines*, 47 S. TEX. L. REV. 291, 293 (2005) (“The basic constitutional vision underlying the *Booker/Blakely/Apprendi* line of cases focuses on the centrality of the institution of the jury in our system of government of the people, by the people, and for the people.”).

141. See, e.g., *Apprendi*, 530 U.S. at 556–57, (Breyer, J., dissenting) (arguing the practical aspects of the shift from general legislative determinations to individualized jury determinations, Justice Breyer notes that “[t]here are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even many) of them to a jury”); see also *Bierschbach & Bibas, supra* note 50, at 415.

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As with the shift in Eighth Amendment jurisprudence, discussion has been robust as scholars, courts, and practitioners grapple with the implications of the changing Sixth Amendment jurisprudence. Areas that some scholars have suggested will need to significantly change in order to accommodate the newfound power of the jury include restitution hearings,<sup>142</sup> parole violation proceedings,<sup>143</sup> and all criminal sentencing proceedings.<sup>144</sup>

Death penalty jurisprudence, once an island unto itself, is evolving, and its reach is expanding as the partition between capital and non-capital offenses erodes. Though the jurisprudential shifts discussed above resonate in a number of legal contexts, the shifts are especially important for criminal trials of protesters, and it is to the topic of civil disobedience where the article turns next.

### III. CIVILLY DISOBEDIENT PROTEST IS DIFFERENT

This section examines civilly disobedient protest, including its societal values and disruptive costs as well as the tension between these competing values when a civilly disobedient protester is charged with an offense. The first subsection summarizes the legal and social underpinnings of protest, focusing on the tension between protest and the rule of law and discussing the arguments both in favor of permitting robust civil disobedience and for limiting the role of protest. The second subsection explores the implications of these fundamental tensions, including how community norms and values play a role in determining the criminal culpability of civilly disobedient protesters.

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142. See James Barta, *Guarding the Rights of the Accused and Accuser: The Jury's Role in Awarding Criminal Restitution Under the Sixth Amendment*, 51 AM. CRIM. L. REV. 463, 464 (2014) (arguing for reexamination, in light of the expansion of Sixth Amendment jurisprudence, of the determination that a restitution determination does not require a jury).

143. Scott H. Ikeda, *Probation Revocations As Delayed Dispositional Departures: Why Blakely v. Washington Requires Jury Trials at Probation Violation Hearings*, 24 L. & INEQ. 157, 158 (2006) (arguing that “the next logical step” in emerging case law is the right to a jury at probation revocation hearings).

144. See Iontcheva, *supra* note 71, 314–15 (making the case for jury sentencing in all criminal cases).

### A. Protest's Tension with the Rule of Law

*Merriam-Webster* defines the term “civil disobedience” as the “refusal to obey governmental demands or commands esp[ecially] as a nonviolent and usu[ally] collective means of forcing concessions from the government.”<sup>145</sup> Though definitions of civil disobedience vary, this article adopts a narrow definition, confining civil disobedience to a violation of law that is open, public, non-violent, intended to effectuate social or political change, and directed at the government.<sup>146</sup> Though a number of characteristics distinguish civil disobedience and non-protest criminal actions, perhaps no difference is more important than the motivation underlying the action. An act of civil disobedience is one “of conscience,” motivated by a desire to communicate a need for social or political change; it is this social benefit that is distinct from the motivation behind general criminal acts.<sup>147</sup>

Though civil disobedience and law have coexisted for as long as the law has been around, their relationship is tense.<sup>148</sup> This ten-

145. MERRIAM-WEBSTER'S COLLEGiate DICTIONARY 226 (11th ed. 2003); *see also* United States v. Schoon, 971 F.2d 193, 195–96 (9th Cir. 1991) (“As used in this opinion, ‘civil disobedience’ is the willful violation of a law, undertaken for the purpose of social or political protest.”).

146. *See* Jessica L. West, *Is Injustice Relevant? Narrative and Blameworthiness in Protester Trials*, 86 TEMP. L. REV. 107, 114–15 (2013) (defining civil disobedience); *see also* ROBERT T. HALL, THE MORALITY OF CIVIL DISOBEDIENCE 50 (1971); Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2087–89 (2007) [hereinafter Hall, *Guilty but Civilly Disobedient*]; Loesch, *supra* note 11, at 1095.

147. Hall, *Guilty but Civilly Disobedient*, *supra* note 146, at 2087–89; Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1898 (2005) (“[Civil] disobedience is not guided by greed or self-dealing but by principle, and it is therefore not criminal in any ordinary sense . . .”). There are non-protest criminal actions that may be classified as socially valuable, for example, if a stranded survivor of Hurricane Katrina takes provisions from a market. Such situations of justification are often covered by the necessity defense, which, though sometimes available thirty or forty years ago, is rarely permitted in contemporary civil disobedience trials. *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 5 (2003); Luke Shulman-Ryan, *Evidence—The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State’s Civilly Disobedient*, 27 W. NEW ENG. L. REV. 299, 314–15, 317–18 (2005).

148. *See* Frances Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 934 (1984) (relaying Professor A.D. Woozley’s assertion that, in the *Apology*, Socrates “both expresses some pride in his own defiance [of the law] and maintains that there can be a higher call than the call of human law”); *see also* A. John Simmons, *Disobedience and its Objects*, 90 B.U. L. REV. 1805, 1809 n.23 (2010) (“[C]ivil disobedience is as old as Antigone and Socrates . . .”) (quoting HUGO ADAM BEDAU, *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* 15 (1960)).

sion between speech and resistance on the one hand and the necessary law-abidingness of an orderly populace on the other has been challenging to navigate. Despite these concerns, civil disobedience in the United States enjoys a long history; one of the founding principles of the republic was the right of citizens to defy the laws of an oppressive political regime.<sup>149</sup> Though rule of law principles may be dominant in other countries, “Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community.”<sup>150</sup>

Though embodied in our social discourse, civil disobedience is not a recognized right in the U.S. Constitution.<sup>151</sup> Despite the absence of express constitutional protection, however, where protest is engaged in for an expressive purpose, the act is protected under the First Amendment.<sup>152</sup> The relationship between protest and the First Amendment has been described as one of complementary effects, with protest impacting the First Amendment, and the First Amendment impacting protest.<sup>153</sup>

The need for a developed democratic system to tolerate some protest may be clear, but the question of whether civil disobe-

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149. Loesch, *supra* note 11, at 1071–75.

150. RONALD DWORKIN, A MATTER OF PRINCIPLE 105 (1985); see Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 68 (1990) [hereinafter Ledewitz, *Civil Disobedience, Injunctions*] (“[C]ivil disobedience . . . has become an established part of American political life.”); see also Loesch, *supra* note 11, at 1071–84 (discussing significant periods of civil disobedience in the United States including the revolutionary period, slavery, women’s suffrage, and civil rights).

151. See, e.g., *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”). But see *Adderly v. Florida*, 385 U.S. 39, 48 (1966) (rejecting the argument “that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please”).

152. The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. 1. Protest qualifies as speech under the First Amendment when the action constitutes symbolic conduct with a communicative element. See *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968); see also, Joshua Waldfman, *Symbolic Speech and Social Meaning*, 97 COLUM. L. REV. 1844, 1846–47 (1997).

153. See Randall Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999, 1001 (1989) (“The disciplined peacefulness of the civil rights activists and the underlying decency of their demands helped to create an atmosphere conducive to judicial liberality. The result was not only a beneficial transformation in the substantive law of race relations, but also a blossoming of libertarian themes in First Amendment jurisprudence. In the context of the First Amendment, as in many other areas, the struggle for racial justice produced ramifications that extended far beyond its point of origin. Once loosed, liberty, like equality, was an idea not easily cabined.”).

ence plays a positive role is another issue altogether. Some scholars argue that protest operates not merely as a counterbalance to democratic society and its limitations, but enhances democratic principles by correcting deficits that threaten the system.<sup>154</sup> Professor Daniel Markovits analogizes the role of civil disobedience to that of judicial review in that each, though fundamentally undemocratic, enforces fundamental rights and protects minorities within the majoritarian political system.<sup>155</sup> According to Markovits, even more than judicial review, civil disobedience is essential to offset democratic deficits by increasing citizen engagement and popular dialogue.<sup>156</sup> Civil disobedience increases democratic engagement by triggering reevaluation of issues that have been given inadequate attention.<sup>157</sup> Thus, Markovits sees civil disobedience as essential not just in societies with significant rights violations, but also in advanced democratic societies like the United States where “democratic disobedience [is] an unavoidable, even integral, part of a well-functioning democratic process.”<sup>158</sup>

Protest serves a variety of functions important to a healthy democracy. Protest operates as a mechanism to circumvent political and legal barriers to marginalized perspectives and to inject dissenting perspectives into the public dialogue.<sup>159</sup> In this way, it serves to allow issues that have been overlooked by the dominant discourse to find their way onto the public agenda. In addition, by providing a vehicle to raise dissenting opinions, civil disobedience operates as a “firebreak,” allowing marginalized political minorities to express their dissent before that unrest boils over in more

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154. Markovits, *supra* note 147, at 1900. Markovits distinguishes between types of protest, separating those that enhance democratic dialogue about options from those that stifle it. *Id.* at 1939–44.

155. *Id.* at 1929 (“In the one case, self-appointed protesters disobey democratically enacted laws; in the other, unelected and unaccountable judges strike them down.”). Markovits is not the only scholar to recognize that civil disobedience serves important values including free speech, protest, public debate, and the ability of citizens to challenge the government.

156. *Id.* at 1904, 1940.

157. *Id.* at 1933.

158. *Id.* at 1936. According to Markovits, civil disobedience may be especially important in an established democracy since the power of the state is great, the ability to change the laws is limited, and laws can easily become ossified. *Id.* at 1921–22, 1937.

159. See e.g., Loesch, *supra* note 11, at 1094 (“Civil disobedience speaks . . . past the bureaucracy . . .”); Kevin H. Smith, *Therapeutic Civil Disobedience: A Preliminary Exploration*, 31 U. MEM. L. REV. 99, 130 (2000) (“[T]he civil disobedient has become pro-active by taking steps designed to change her circumstances and destiny instead of passively being at the mercies of others.”).

socially dangerous actions.<sup>160</sup> Further, an expression of conviction by a group of individuals can capture public attention, promote debate, increase democratic engagement, and contribute to the exchange of ideas.<sup>161</sup> That civil disobedience serves these socially beneficial functions is the reason a number of scholars consider actions of protest to be an affirmative virtue in an established democracy.<sup>162</sup>

Not all of the impacts of civil disobedience are positive, however. Critics of civil disobedience point out that it exacts a social toll, the cost of which is felt especially upon order and the rule of law.<sup>163</sup> Perhaps most familiar to scholars, two former Supreme Court Justices have publicly affirmed the primacy of the rule of law over any benefits to be achieved by disobedience to criminal proscriptions enacted lawfully.<sup>164</sup> Justice Powell described the civ-

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160. See Smith, *supra* note 159, at 131. (“Participation in an act of civil disobedience may provide a vehicle by which the civil disobedient can release the frustration and similar emotions that arise from the situation which is the object of the protest. The act of civil disobedience may provide the civil disobedient with the opportunity to communicate her feelings, through signs, chanting, or singing; it permits the civil disobedient to ‘tell off’ the oppressors in an environment that is relatively safe.”).

161. See Ledewitz, *Civil Disobedience, Injunctions*, *supra* note 150, at 122–23 (1990); Alicia A. D’Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 103 (2006) (“Much of the progress toward social justice made over the past century has been associated with protest movements.”).

162. See RICHARD DAGGER, *CIVIC VIRTUES: RIGHTS, CITIZENSHIP, AND REPUBLICAN LIBERALISM* 14 (1997) (“To be virtuous . . . is to perform well a socially necessary or important role. This does not mean that the virtuous person must always go along with the prevailing views or attitudes. On the contrary, Socrates and John Stuart Mill have persuaded many people to believe that questioning and challenging the prevailing views are among the highest forms of virtue.”); HOWARD ZINN, *DECLARATIONS OF INDEPENDENCE: CROSS-EXAMINING AMERICAN IDEOLOGY* 123 (1990) (“Protest beyond the law is not a departure from democracy; it is absolutely essential to it. It is a corrective to the sluggishness of ‘the proper channels,’ a way of breaking through passages blocked by tradition and prejudice. It is disruptive and troublesome, but it is a necessary disruption, a healthy Troublesomeness.”); Phillip Lynch, *Juries as Communities of Resistance: Eureka and the Power of the Rabble*, 27 ALTERNATIVE L.J. 83, 85 (2002) (“In forming a community of resistance and achieving justice rather than following the law, [those who engage in civil disobedience] . . . contribute[] to our advance towards civilisation.”).

163. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 312 (rev. ed. 1999) (“[I]n a state of near justice . . . there is normally a duty (and for some also the obligation) to comply with unjust laws. . . .”); see also Hall, *Guilty but Civilly Disobedient*, *supra* note 146, at 2131.

164. ABE FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 19 (1968); Lewis F. Powell, Jr., *A Lawyer Looks at Civil Disobedience*, 23 WASH. & LEE L. REV. 205, 208, 225 (1966). Powell wrote the article while serving as President of the American Bar Association and before President Nixon appointed him to the United States Supreme Court. *Id.* For a Supreme Court Justice with a very different opinion on protest, see WILLIAM O. DOUGLAS, *POINTS OF REBELLION* 3 (1969) (“All dissenters are protected by the First

il disobedience of the 1960s as “heresy which could weaken the foundations of our system of government.”<sup>165</sup> His primary concerns rested with the potential for violence and civil unrest and the erosion of the rule of law.<sup>166</sup> Similarly, in 1968 Justice Fortas published a book on the role of civil disobedience in which he set forth his belief that “[e]ach of us owes a duty of obedience to law” as a “moral as well as a legal imperative.”<sup>167</sup> Granting any legal leniency or recognition to protesters would establish a jurisprudential paradigm that permits “legal illegality” and incentivize a practice that disrupts societal order.<sup>168</sup>

In sum, civilly disobedient protest holds a complex place in the social and legal structures of the United States. The positive value of dissent and protest exists in deep tension with the rule of law and the social contract that demands obedience even in the face of individual disagreement. In trials of civilly disobedient protesters, these tensions are paramount. The next section explores the importance of a jury determination of culpability in light of the complex and competing values underlying protester trials.

### B. *The Role of the Community in Evaluating Civil Disobedience*

The tensions between protest and obedience are particularly acute when a civilly disobedient protester is facing criminal prosecution. By definition, an act of civil disobedience is the intentional violation of a properly promulgated and presumptively valid law.<sup>169</sup> Equally inherent, however, is both that the motivation of the civilly disobedient protester is societal rather than personal gain and that the action itself, and the right to engage in the act, provide a public benefit. During proceedings in which a civilly

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Amendment.”).

165. Powell, *supra* note 164, at 205.

166. *Id.* at 229, 231 (raising concerns about “street mob[s] and massive civil disobedience” and noting that “[t]he ultimate danger is to the rule of law and the framework of government which sustains it”).

167. FORTAS, *supra* note 164, at 231. See Bruce Ledewitz, *Perspectives on the Law of the American Sit-In*, 16 WHITTIER L. REV. 499, 505 (1995).

168. See Hall, *Guilty but Civilly Disobedient*, *supra* note 146, at 2083–84, 2131; Powell, *supra* note 164, at 231.

169. The definition of civil disobedience adopted here is confined to action that is open, public, non-violent, intended to effectuate social or political change, and directed at the government. See *supra* Part III.A.

disobedient protester is criminally prosecuted, these competing values collide. This section discusses the role that community norms and values should play in resolving these fundamental conflicts.

Despite the debate over the appropriate place of morality in the law generally,<sup>170</sup> it is widely accepted that criminal verdicts operate as moral statements of community opprobrium. Standing on the cusp of legal realism, Oliver Wendell Holmes noted that “[t]he law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.”<sup>171</sup> Concepts of moral condemnation and blame run throughout criminal jurisprudence and, as some scholars have noted, societal condemnation is what distinguishes criminal from civil liability.<sup>172</sup> Noted legal scholar Henry Hart acknowledged that imposition of a criminal sanction involves a determination “that the violation was blameworthy and, hence, deserving of the moral condemna-

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170. The debate is illustrated in recent Supreme Court opinions which address the constitutionality of the legislation of morality and the propriety of judicial judgments of morality. *Compare* Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O’Connor, J., concurring) (“Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’”), *with* Graham v. Collins, 506 U.S. 461, 494 (1993) (Thomas, J., concurring) (“[B]eware the word ‘moral’ when used in an opinion of this Court. This word is a vessel of nearly infinite capacity—just as it may allow the sentencer to express benevolence, it may allow him to cloak latent animus. A judgment that some will consider a ‘moral response’ may secretly be based on caprice or even outright prejudice.”).

171. Holmes, *supra* note 31, at 992. The quote is from an address delivered by Holmes at Boston University School of Law in 1897. *Id.* at 991. For a discussion of Holmes’s impact on challenging natural law theories, see Robert P. George, *Natural Law*, 31 HARV. J. L. & PUB. POL’Y 171 (2008).

172. See Hart, *supra* note 10, at 404; Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 352–53 (1996) (“Because criminal law expresses condemnation, what a political community punishes, and how severely, tell a story about whose interests are valued and how much.”); Kim, *supra* note 31, at 216 (“The moral judgment of the community is reflected in the culpability assigned to the crime.”); Myers, *supra* note 70, at 140 n.10 (identifying multiple sources discussing the criminal law’s moral underpinnings); Paul H. Robinson, *Supreme Court Review—Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders*, 83 J. CRIM. L. & CRIMINOLOGY 693, 694 (1993) (“Conventional lay wisdom holds that criminal liability and criminal commitment are different from civil liability and civil commitment in that the former generally are thought to reflect moral blameworthiness deserving condemnation and punishment.”). *But see* John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991) (discussing the encroachment of criminal law into areas traditionally viewed as civil).

tion of the community.”<sup>173</sup> Hart’s position echoed that of sociologist Émile Durkheim, who believed that attaching blame for a crime performs the necessary social functions of allowing members of society to affirm the society’s collective values, to express their disapproval of acts that offend these values, and to foster social cohesion.<sup>174</sup> In fact, blameworthiness is so critical that courts will infer the requirement even where a criminal statute does not expressly provide for it.<sup>175</sup>

Though civil disobedience necessarily involves the violation of laws, society’s response is not always to impose the same sanctions that would be imposed upon a non-civilly disobedient criminal defendant. The individual’s motivation is one area of inquiry that is critical to a determination of the extent of an actor’s blameworthiness, an area in which civilly disobedient protesters distinguish themselves from non-protester defendants.<sup>176</sup> Motivation is critical because, as studies have shown, judgments of blame vary depending on the reason for the action. We are more inclined to blame a transgressor with a bad motive than we are one with an altruistic motive.<sup>177</sup> Also important to determinations of blameworthiness are perceptions as to whether an individual has a good or bad character and the motivation underlying an action.<sup>178</sup> Accounting for this social science, civilly disobedient pro-

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173. Hart, *supra* note 10, at 412. “What distinguishes a criminal from a civil sanction and all that distinguishes it, it is ventured, is the judgment of community condemnation which accompanies and justifies its imposition.” *Id.* at 404; see *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (“Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”); Binder Guyora, *The Rhetorical Motive and Intent* 6 BUFFALO CRIM. L. REV. 1, 9–10 (2002) (discussing the historical and theoretical importance of “moral wrongfulness” in criminal law); Myers, *supra* note 70, at 138–39 (“[T]he defining characteristic of the criminal law is moral condemnation.”).

174. ÉMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 105, 108–09 (George Simpson trans. 1960) (1933).

175. See John Shephard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1053 (1999) (noting that the Supreme Court “will interpret a statute to require the government to prove moral blameworthiness . . . . [T]he Court has been taking it for granted that Congress means to reserve criminal blame for the blameworthy.”).

176. Kahan & Nussbaum, *supra* note 172, at 352–53 (referring to this inquiry as one into “what a person’s actions mean”). I discuss concepts of motivation and their relation to blameworthiness in West, *supra* note 146, at 114–15, 137–40.

177. See, e.g., Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 376–77 (1992); see also Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 263 (2012).

178. Nadler & McDonnell, *supra* note 177, at 273 (“[B]ad moral character influences

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testers are likely to be viewed as more or less blameworthy and criminally culpable depending how one views their underlying motivation, as well as the related implications of their action.<sup>179</sup>

In addition, consideration of the place of protest may impact one's perspective as to the culpability of a protester. The recent example of civilly disobedient protester Tim DeChristopher—the subject of a feature length film, *Bidder 70*—is illustrative of a protester viewed as more culpable than a non-protesting defendant who committed the same action.<sup>180</sup> DeChristopher is an activist who in 2008 almost accidentally found himself inside a federal auction for oil and gas leases; he subsequently bid on and won nine auctioned oil and gas leases.<sup>181</sup> However, DeChristopher never intended to pay for the leases, which constituted a federal offense.<sup>182</sup> In sentencing him to a shockingly long two years imprisonment, the federal judge found support in both DeChristopher's lack of remorse and his public statements in support of civil disobedience.<sup>183</sup> The judge indicated that DeChristopher's statements in support of protest and civil disobedience, far more than his actions, justified his prosecution and the harsh sentence.<sup>184</sup> The federal appellate court affirmed the propriety of aggravating DeChristopher's sentence by relying on the same justification.<sup>185</sup>

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perceptions of blame, responsibility, causation, and the like . . .").

179. See *id.* at 292 ("[O]ur experiments [imply] . . . that an actor's motive (along with its implicit suggestions about moral character) can strongly influence inferences about causation, intent, and blame.").

180. BIDDER 70 (GAGE & GAGE PRODUCTIONS 2012).

181. See Frederick M. MacDonald, *Utah*, 18 TEX. WESLEYAN L. REV. 661, 664 (2012).

182. *Id.* at 666–67. The trial judge refused to allow DeChristopher to present evidence that by the time of DeChristopher's conviction and owing to a change in President, all of the leases sold at the auction had been invalidated. *Id.* at 665.

183. Brandon Loomis, *DeChristopher Sentenced to Prison, 26 Protesters Arrested*, SALT LAKE TRIB. (July 27, 2011, 2:47 PM), <http://archive.sltrib.com/printfriendly.php?id=52263987&itype=cmsid>; see MacDonald, *supra* note 181, at 665. DeChristopher's judgment of conviction and sentence can be found at Judgment in a Criminal Case, United States v. DeChristopher, No. 2:09-cr-000183-001, 2011 WL 3269197 (D. Utah July 28, 2011).

184. Loomis, *supra* note 183 (according to the presiding Judge, "[t]he offense itself, with all apologies to people actually in the auction itself, wasn't that bad"); see MacDonald, *supra* note 181, at 667.

185. United States v. DeChristopher, 695 F.3d 1082, 1098 (10th Cir. 2012) (dismissing DeChristopher's argument that the district court violated the First Amendment by considering his public statements when imposing sentencing). But see United States v. Rosenberg, 806 F.2d 1169, 1179 (3d Cir. 1986) ("[T]he imposition of a sentence on the basis of a defendant's beliefs would violate the [F]irst [A]mendment's guarantees."); United States v. Lemon, 723 F.2d 922, 938 (D.C. Cir. 1983) (finding a court may not constitutionally impose a criminal sentence "based to any degree on activity or beliefs protected by the [F]irst

When a civilly disobedient protester is criminally prosecuted, a balancing of competing values can happen at many stages and can lead to either over-enforcement or under-enforcement of the law as compared with non-protest related crimes. Under-enforcement of criminal violations, on behalf of protesters or others, is neither uncommon nor inappropriate.<sup>186</sup> In all criminal cases, police and prosecutors use their discretion to decide whether to fully and vigorously enforce violations.<sup>187</sup> Conferring significant discretion on police and prosecutors recognizes that not all violations of law implicate the requisite culpability for criminal conviction.<sup>188</sup> Under-enforcement of criminal laws may reflect the recognition that “principles of democratic accountability sometimes require law enforcement to make room for public deviance.”<sup>189</sup> While police sometimes under-enforce against civilly disobedient protesters, police may also develop harsh strategies, including over-enforcement, to discourage or minimize the potential for protest.<sup>190</sup> Prosecutors may also use their discretionary power to over-enforce.<sup>191</sup> Once made, these enforcement decisions are difficult to monitor, hidden from public view, and thus employed without significant accountability.<sup>192</sup>

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[A]mendment”).

186. For a discussion of the area in which the government under-enforces criminal laws, see Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1743 (2006) (“[U]nderenforcement [may be] a sign of truly responsive government, one that recognizes that not all laws deserve to be enforced all of the time and that principles of democratic accountability sometimes require law enforcement to make room for public deviance.”).

187. *See id.* at 1743.

188. *Id.*

189. *Id.*; see Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 355 (2011) (“[T]hese actions can be understood as efforts to trigger dormant institutional hydraulics that help limited government acknowledge and address areas of social harm and discontent.”).

190. See Robin Lipp, *Protest Policing in New York City: Balancing Safety and Expression*, 9 HARV. L. & POL’Y REV. 275, 276 (2015) (“Current policing strategies focus on minimizing suspected harms [of protest] but think little of facilitating [its] benefits.”); Joshua Rissman, *Put It on Ice: Chilling Free Speech at National Conventions*, 27 L. & INEQ. 413, 413–14 (2009) (explaining that some police “have taken extreme measures to curtail dissent”). *See generally* Alafair Burke, *Policing Protestors and Discretion*, 40 FORDHAM URB. L.J. 999, 999–1002, 1021 (2013) (discussing a number of examples of police treating individuals harshly in retaliation for their engagement in protests).

191. For criticism of the way in which prosecutorial discretion is utilized generally, see Bierschbach & Bibas, *supra* note 50, at 409, 424.

192. *See id.* at 424; Stuntz, *supra* note 63, at 522 (“[N]o one knows how any given criminal statute is enforced in any given state. Even in a single locality, only a few cops and a handful of prosecutors may know.”).

Notably missing from the discretion in enforcing protest law violations, however, is a voice that articulates community values and norms.<sup>193</sup> In the death penalty arena, juries must undertake, individually in each case, to determine the moral culpability of the defendant and to balance the culpability with all of the other factors mitigating the sentence.<sup>194</sup> The foundational pillars underlying the requirement of a moral balancing were recently reaffirmed, strengthened, and expanded outside of the capital arena, as discussed previously. These pillars affirm the importance of the community voice as essential to weighing complex values.<sup>195</sup> Criminal prosecutions of civilly disobedient protesters, where the acts of political conscience are grounded in a desire for societal improvement, represent an area in which it may be especially appropriate to apply the recently endorsed expansive concepts of community input. The next section explores the implications of recognizing civilly disobedient protest as different and permitting jury involvement in determinations as to the culpability of protesters.

### C. *The Implications of Recognizing Protest as Different*

In light of the expanding jurisprudence recognizing the role of the jury as community conscience, this article posits that society, represented by the jury, should be able to assess the criminal culpability of the civil disobedient protester.<sup>196</sup> This section addresses the nuts and bolts of what that evaluation would look like as well as some of the likely implications of implementing an explicit community determination of culpability into protester trials.

As with the weighing required in a capital case, an ultimate finding of moral culpability should underlie a determination of culpability in a protest case. Similar to the mechanisms employed in capital cases, juries should be permitted to consider an array of evidence that might tend to mitigate culpability when evaluating

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193. See *supra* Part I.C.

194. See, e.g., California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant . . .").

195. See *supra* Part II.C.

196. See Cahill, *supra* note 70, at 95 ("[T]he basic justifications for having a right to a jury trial always have relied in part on a sense that the jury is a proper and fair arbiter of a criminal defendant's moral blameworthiness.").

the conduct of civilly disobedient protesters.<sup>197</sup> In order to make a determination of blameworthiness, the jury would need to consider both the social costs and any social benefits of the action. Important to this consideration might be evidence as to the protester's goals, other unsuccessful legal attempts made by the protester establishing need for the action, the communicative value of the action, the social costs of the action, and the extent to which the costs could have been mitigated but were not. Ultimately, the jury would make a determination as to whether the social value of the action outweighs the costs such that the protester is insufficiently blameworthy to be held criminally liable.<sup>198</sup> If the jury finds that the protester's actions are insufficiently culpable and that the moral balance belongs on the side of the protester, the jury should be permitted to operate as a veto to a criminal conviction.<sup>199</sup>

Implementation of this new evaluative framework would have a number of positive benefits. Perhaps chief among these would be an increase in democratic participation by society, with the jury as society's proxy. Not only does peaceful protest increase social dialogue, but the participation of the jury in the process of evaluating the value of the protest-as-speech also creates its own form of democratic speech.<sup>200</sup> The jury would be empowered to participate in a vigorous debate as to the important values and norms at issue in the trial. A related benefit would be to increase dialogue between protestors, the government, and the community.<sup>201</sup> For example, if a jury determined that a civilly disobedient

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197. This article proposes that this evaluation is imperative only where the action meets the narrow definition of civil disobedience, meaning that the action must be open, public, nonviolent, intended to effectuate social or political change, and directed at the government. *See supra* Part III.A.

198. This standard is similar to that of a necessity or choice of evils defense in criminal law. *See* Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1260–61 (2008). Generally, courts do not allow either defenses in civil disobedience cases. *See* Loesch, *supra* note 11, at 1098.

199. *See* Bierschbach & Bibas, *supra* note 50, at 408–09 (discussing juries as critical “vetogates” to criminal prosecution). For an article proposing that a verdict of censure should be required in all criminal trials, see Myers, *supra* note 70, at 138 (2009).

200. The concept of “ideal speech situations” as promoting democracy comes from Professor Jenia Iontcheva. *See* Iontcheva, *supra* note 71, at 340–41 (discussing jury deliberations as the epitome of an ideal speech situation).

201. *See* Kahan & Nussbaum, *supra* note 172, at 352 (stating that what society chooses to punish “tell[s] a story about whose interests are valued and how much”); *see also* Myers, *supra* note 70, at 148.

protester was not culpable, the signal to the government would be that the community believed the issue important and the value of the action high. Such a verdict might indicate broad popular belief that the government action was worth protesting. Similarly, a verdict of conviction would indicate to protesters that the message or tactics were too socially costly or that they were not finding broad support. In addition, protesters planning actions would be incentivized to structure their action so as to appeal to the community and to promote public benefit. Since social cost will also be part of the ultimate evaluation, the test will nudge protesters to consider and reduce the social cost of their actions. Finally, given that the social balancing test would only be available to protesters who engage in the actions that meet a narrow definition of civil disobedience, the action would also encourage protesters toward non-violence in all actions.

Not all of the implications of the incorporation of community-focused procedures would be positive. Indeed, proposing the adoption of a test from capital jurisprudence is in itself a red flag signaling the potential for procedural difficulties.<sup>202</sup> Trials in which the jury is permitted to consider the social costs and benefits of a protester action would look quite different from current proceedings; notably, the change would increase the length and complexity of these trials, burdening trial court, and reducing the efficiency of judicial administration. In light of current burdens on trial courts, this might be a significant cost.<sup>203</sup> In addition, some commentators will have concerns that juries are unprepared for such a complex balancing of emotionally charged material and that we should discourage verdicts based on moral determinations rather than strict legal standards.<sup>204</sup> Another critique might be that legal

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202. See *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) ("[T]here is no perfect procedure . . .").

203. See Thomas H. Douthat, *A Comparative Analysis of Efforts to Improve Judicial Efficiency and Reduce Delay at the Local and State Level*, 77 REV. JUR. U.P.R. 931, 931 (2008); Micheal Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 814, 818 (2000); Margo Schalanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35, 40–41 (2006).

204. See, e.g., Kenworthey Bilz, *We Don't Want to Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 486 (2010) (presenting a case against inclusionary narrative in trials in lieu of "procedural and substantive legal rules" that function to "filter out narratives" that should be "rightly banished"); see also Kahan & Nussbaum, *supra* note 172, at 273–74 (discussing the struggle with the role of emotion in criminal law).

procedures should strictly control the narratives permitted to be presented at trial precisely because juries can and will be persuaded by the moral power of some arguments.<sup>205</sup> Finally, an acquittal under these standards might look similar to jury nullification, which, though a structural right belonging to the jury, is quite disfavored by courts.<sup>206</sup>

Though the concerns are significant, they can be rebutted. Studies tend to indicate that juries can effectively grapple with multiple emotional perspectives.<sup>207</sup> In a similar vein, despite instructions tailored to ensure that jurors follow legal precepts instead of emotional impulses, jurors already attempt to conform their verdicts less to legal formulae than to their own sense of justice.<sup>208</sup> Likewise, jury nullification may be less of a concern than courts fear.<sup>209</sup> Finally, as for efficiency, despite the likelihood that these trials will be significantly more cumbersome than current trials of protesters, “solicitude for efficient judicial administration must sometimes give way to the need to protect the rights of defendants.”<sup>210</sup> In sum, the potential benefits of importing into trials of civilly disobedient protesters the concepts of community input emerging from the capital arena outweigh those costs. Expansion of developments in the Sixth and Eighth Amendments into the context proposed here is a natural jurisprudential development that has the benefit of recognizing the distinction between civilly disobedient protesters and non-protester criminal defendants.

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205. Bilz, *supra* note 204, at 430 (“[T]he narrative model demands that we *refuse* to hear the stories of those being judged when doing so might lead us to exonerate, or even just empathize, when we ought not.”).

206. Andrew J. Parmenter, *Nullifying the Jury: “The Judicial Oligarchy” Declares War on Jury Nullification*, 46 WASHBURN L.J. 379, 417 (2007).

207. See Kahan & Nussbaum, *supra* note 172, at 273; Myers, *supra* note 70, at 172 (addressing, and refuting, potential claims of jury confusion in the case of jury determinations of censure).

208. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 165 (Little, Brown & Co. 1971) (1966) (noting that jurors often surrender to their sentiments regarding the case); Dan Simon, *More Problems with Criminal Trials: The Limited Effectiveness of Legal Mechanisms*, 75 L. & CONTEMP. PROBS. 167, 174 (2012) (“Jury instructions are often complex, couched in alien terminology, and demanding of unfamiliar and even improbable mental exercises.”).

209. KALVEN & ZEISEL, *supra* note 208, at 165.

210. United States v. Jackson, 562 F.2d 789, 799 (D.C. Cir. 1977).

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PROTEST IS DIFFERENT

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## CONCLUSION

Capital jurisprudence is no longer a silo. The recent expansion of two foundational jurisprudential pillars underlying death penalty procedures affirm the role of the jury and the importance of a community voice in moral determinations of culpability. Though the interests that compete in the capital arena are unique, the values underlying acts of civil disobedience are similar in depth and complexity to the values underlying the individualization and community conscience requirements in capital proceedings. The principles and procedures employed in the capital arena thus offer important guidance for criminal prosecutions involving civilly disobedient protesters. Within the vortex of competing values that exist when a civilly disobedient protester is criminally prosecuted for an act of protest, the voice of the community has a critical and irreplaceable role, and only the jury can adequately give voice to community norms and values. Thus, in criminal prosecutions of protesters, society, represented by the jury, should evaluate on a case-by-case basis whether the individual action offends collective values sufficiently to warrant the community condemnation implicit in a criminal conviction.