
COMMUNICATING PUNISHMENT

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ABSTRACT

Does it matter whether convicted offenders understand why they are being punished? In the death penalty context, the Supreme Court has said yes; a prisoner who cannot understand the state's reasons for imposing a death sentence may not be executed. Outside of capital punishment, the answer is still open. This Article begins to fill that gap, focusing on why and how states should help all offenders make sense of their sanctions, whether imposed for retribution, for deterrence, for incapacitation, or for rehabilitation.

Judges today sometimes try to explain sentences to criminal offenders so that they know the purposes of their suffering. But judges are busy, defendants are not always interested, and the law often treats such explanations as unimportant or even unwise. Legislatures, moreover, rarely convey the purposes of statutory penalties, and plea bargaining can further obscure the reasons for punishment.

Scholars and critics of American criminal justice tend to pay little attention to these deficits. Perhaps explaining individual sentences seems unimportant compared to the larger effort to humanize and rationalize penal policy. In fact, however, the two are intertwined: communicating the purposes of punishment publicly affirms the dignity and humanity of offenders as reasoning moral beings whose suffering requires justification. While humanizing offenders, such explanation also opens a path to larger reforms. Furthermore, sentencing explanation may mitigate the risk of error, bias, or excess by focusing judges on legitimate considerations.

Current sentencing rules and policies undervalue punishment explanation, often in favor of efficiency. New norms and practices must be created to ensure that the reasons for punishment are clearly and publicly articulated to offenders. Judges, legislatures, prosecutors, defense attorneys, and corrections officials each have a part to play in making that a reality.

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INTRODUCTION

To some critics, American criminal justice is dysfunctional and inhumane, as illustrated by the mass incarceration of disproportionately poor and minority offenders and the draconian sentences meted out for some offenses.¹ Indeed, the United States leads the world in its use of incarceration.² Why are so many people being punished, often so harshly? Some blame thirst for retributive justice.³ Others allege racism or a desire to subjugate undesired populations.⁴ Some are unsure and demand greater transparency in the drivers of incarceration, especially prosecutorial charging decisions. Perhaps, they suspect, the dysfunction and inhumanity begin there.

Surely many offenders themselves are among those confounded by American punishments. Scholars have noted that in other developed countries, offenders would face much lesser penalties for the same crimes.⁵ Even offenders who

¹ Their voices resound in academia and public life. *See, e.g.*, PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 26 (2009) (arguing that "[t]he biggest threat to freedom in the United States comes . . . from our dysfunctional criminal justice system," and calling the "two million Americans in prison . . . the most urgent challenge to democratic values since the civil rights era"); James Q. Whitman, *Presumption of Innocence or Presumption of Mercy?: Weighing Two Western Modes of Justice*, 94 TEX. L. REV. 933, 982 (2016) ("Mass incarceration and other aspects of penal harshness are among the most depressing and frightening features of contemporary American life . . ."); Devan Cole, *Bernie Sanders Unveils Plan to Overhaul Country's 'Dysfunctional Criminal Justice System'*, CNN (Aug. 18, 2019, 3:55 PM), <https://www.cnn.com/2019/08/18/politics/bernie-sanders-criminal-justice-reform-plan/index.html> [<https://perma.cc/KL6A-NGTF>]; Russell Trenholme, *Our Dysfunctional Criminal Justice System: Jails Need Criminals to Stay in Business*, INDEPENDENT (Apr. 15, 2016, 12:00 AM), <https://www.independent.com/2016/04/15/our-dysfunctional-criminal-justice-system/> [<https://perma.cc/HZX4-2LD4>] (contending that elected officials exploit "working-class minority population to provide 'criminals' to justify our bloated criminal justice system").

² ROY WALMSLEY, INST. FOR CRIMINAL POLICY RESEARCH, WORLD PRISON POPULATION LIST 2 (12th ed. 2018), https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf [<https://perma.cc/NF69-WY6C>] (providing incarceration data as of September 2018).

³ *See, e.g.*, Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 850 (2002) ("Capital punishment has traditionally been supported by . . . retributivism."); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1303-04 (2001) (contending that "'three-strikes-and-you're-out' policies . . . seem to be fueled by concerns about retribution").

⁴ *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4 (2010) ("I came to see that mass incarceration in the United States had, in fact, emerged as a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.").

⁵ *See* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 3-4 (2003) (explaining that America has highest per capita rate of incarceration in world and implements "vastly harsher" punishments than most

plead guilty in exchange for prosecutorial leniency often end up imprisoned for decades.⁶

What social objectives are such sanctions meant to serve? Our society has embraced plural penal aims, and a sentence may reflect some or all of them.⁷ Judges usually have discretion to pursue varied goals of punishment—including retribution, deterrence, incapacitation, and rehabilitation, as well as a range of both carceral and noncarceral sanctions.⁸ Often, sentencing judges must make trade-offs among the purposes of punishment by, for example, prioritizing the incapacitation of a dangerous offender over his rehabilitation and restoration to the community. These are the types of choices that determine sentences.

Yet current law only rarely requires judges to explain these choices among sentencing aims. Some states never require judges to explain their sentencing goals or considerations.⁹ Some require explanation only in certain circumstances—such as when the parties cannot reach a plea deal¹⁰ or when a selected sanction falls outside applicable sentencing guidelines. And even jurisdictions like the federal government that require judges to give reasons for

western countries, as evidenced by application of death penalty (quoting Michael Tonry, *Preface* to *THE HANDBOOK OF CRIME AND PUNISHMENT*, at v, v (Michael Tonry ed., 1998)).

⁶ In death penalty cases, defendants often plead guilty and accept life sentences in exchange for the state's agreement not to seek the death penalty. Kent S. Scheidegger, *The Death Penalty and Plea Bargaining to Life Sentences* 1 (Criminal Justice Legal Found., Working Paper No. 09-01, 2009), <https://www.cjlf.org/publications/papers/wpaper09-01.pdf> [<https://perma.cc/QJ46-49G4>].

⁷ See *infra* Section III.B.

⁸ See, e.g., *What Is the PIC? What Is Abolition?*, CRITICAL RESISTANCE, <http://criticalresistance.org/about/not-so-common-language/> [<https://perma.cc/7ZQL-5ZZL>] (last visited Nov. 16, 2020) (espousing a “political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment”); see also John Washington, *What Is Prison Abolition?*, NATION (July 31, 2018), <https://www.thenation.com/article/what-is-prison-abolition/>.

⁹ This magnifies existing transparency problems. Even in the federal system, which usually has better resources and data, “[r]arely do judges reduce their sentencing decisions to written opinions,” and sentencing transcripts are cumbersome to obtain even if they are created. Brian Jacobs, *The Vanishing of Federal Sentencing Decisions*, FORBES: THE INSIDER (July 19, 2019, 5:38 PM), <https://www.forbes.com/sites/insider/2019/07/19/the-vanishing-of-federal-sentencing-decisions/#d19197a4c443> [<https://perma.cc/XE4N-DNX4>].

¹⁰ Judges, for their part, may see little reason to debate or explain sentences to which the parties have agreed. See, e.g., MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* 148-52 (1978) (arguing that “judges accept most plea bargaining outcomes” because “they are in fundamental agreement with both the process used to obtain these settlements and with the actual outcome”).

all sentences¹¹ allow judges to meet this duty with cursory factual explanation and vague mention of general penal aims.¹²

Some judges try to explain their sentencing rationales, but “[m]ost judges are so burdened with simply getting through the day and ‘disposing’ of the allotted quota of cases that they are usually too weary to undertake the painful examination of the justice, morality, or common sense of the sentences [that] they impose.”¹³ To explain sentencing objectives requires deliberation and time, which are both in scarce supply when “[s]entencing decisions are routinely delivered by trial judges in crowded lists, under great pressure of work, and in a context of human trauma.”¹⁴ For these reasons, “to a large extent, how a judge goes about th[e] process [of choosing a sentence] is invisible to the lawyers in a case, the public, and even to the criminal defendant being sentenced.”¹⁵

This Article argues that the failure to expressly connect punishment with its purposes has devastating moral and practical effects. Scholars and policy makers sometimes recognize the potential value of explanation for purposes of appellate sentencing review. Yet they tend to overlook other equally crucial reasons for explaining punishment.

Most importantly, the act of giving reasons for punishment humanizes and dignifies offenders as reasoning beings.¹⁶ Because punishment involves moral condemnation as well as suffering, it carries a special risk of demeaning and dehumanizing offenders.¹⁷ The explanation of punishment helps counteract that risk by affirming the dignity of the offender as a reasoning moral agent whose

¹¹ See, e.g., 18 U.S.C. § 3553(c)(2) (2018) (requiring the sentencing court to “state in open court the reasons for its imposition of the particular sentence” and to document “the specific reason” for any departure from an applicable sentencing guidelines range).

¹² An explanation adequate for appellate judges and lawyers may not suffice for defendants, because “[d]efendants are laymen.” STEPHANOS BIBAS, *THE MACHINERY OF CRIMINAL JUSTICE* 55 (2012).

¹³ PAUL BERGMAN & SARA J. BERMAN, *THE CRIMINAL LAW HANDBOOK* 487 (Micah Schwartzbach ed., 15th ed. 2018) (second alteration in original) (quoting LOIS G. FORER, *CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT* 4 (1980)); see also *id.* (emphasizing that presentence reports matter because “judges may have little time to exercise independent judgment”).

¹⁴ Grant Hammond, *Sentencing: Intuitive Synthesis or Structured Discretion?*, 2007 N.Z. L. REV. 211, 225. Judge Hammond served on the New Zealand Court of Appeal, as President of the New Zealand Law Commission, and as a law professor and Dean at the University of Auckland. Hon Sir Robert Grant Hammond KNZM, 1944-2019, <https://www.lawsociety.org.nz/news/people-in-the-law/obituaries/obituaries-list/hon-sir-robert-grant-hammond-knzm-1944-2019/> [https://perma.cc/YR7L-ZF8F] (last visited Nov. 18, 2020).

¹⁵ Erwin Chemerinsky, *Forward* to FREDERIC BLOCK, *CRIMES AND PUNISHMENTS: ENTERING THE MIND OF A SENTENCING JUDGE*, at vii, vii (2019). This description applies to many sentencing colloquies scrutinized in research for this Article (including live sentencings in several jurisdictions across the United States and court records of sentencings).

¹⁶ See Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 218 (2012).

¹⁷ See *infra* sources cited note 81.

suffering must be premised on legitimate goals.¹⁸ Offenders are not to be “herded like cattle or broken like horses or beaten like dumb animals.”¹⁹ Such affirmation of offender dignity may be especially crucial in a nation whose “harsh justice”²⁰ most heavily burdens historically demeaned racial minorities.

Though courts and scholars tend to undervalue punishment explanation, there are some exceptions. In capital cases, the Supreme Court has held that “it ‘offends humanity’ to execute a person so wracked by mental illness that he cannot comprehend the ‘meaning and purpose of [his] punishment.’”²¹ In the 2019 case *Madison v. Alabama*,²² the prisoner facing execution claimed that he could no longer understand the reasons for his execution due to memory loss and dementia.²³ According to the state court, the state’s reason for executing him was “retribution.”²⁴ The Supreme Court responded that “execution has no retributive value when a prisoner cannot appreciate the meaning of a

¹⁸ Judges sometimes treat offenders as monsters or animals rather than engaging with them as reasoning beings capable of moral reform. See, e.g., MLive, ‘I Think It’s Worth Every Penny to Lock You Up for the Rest of Your Life,’ Judge Tells Convicted Abu[ser], YOUTUBE (Apr. 9, 2015), <https://www.youtube.com/watch?v=6e7JV8LxnZ8> (“Mr. Tingley, you’ve been molesting children for the last forty to fifty years. . . . [B]asically, you’re a monster who has destroyed the innocence of numerous children. . . . I know a lot of people I’m sure think the only money we should waste on you, Mr. Tingley, is the cost of a bullet. But, I think it’s worth every penny to lock you up for the rest of your life. Therefore, on count one, twenty-five to fifty years. Counts two through four, twenty-five to fifty years. Counts five to six, twenty years to forty years.”).

¹⁹ Waldron, *supra* note 16, at 218 (arguing that such treatment violates human dignity).

²⁰ See generally WHITMAN, *supra* note 5.

²¹ *Madison v. Alabama*, 139 S. Ct. 718, 727 (2019) (first quoting *Ford v. Wainwright*, 477 U.S. 399, 407 (1986); and then quoting *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007)). The Court also emphasized that the offender must be able to understand “the State’s reasons for resorting to punishment,” not merely be able to *imagine* a reason for punishing him. *Madison*, 139 S. Ct. at 727 (emphasis added). Moreover, the Court suggested that the offender must understand why “the State is exacting death” in particular, as opposed to some other penalty. *Id.* at 728 (emphasis added).

²² 139 S. Ct. 718 (2019).

²³ *Id.* at 722. Aging death row prisoners often raise loss of mental capacity to understand the purpose of punishment as a defense to resist execution. For example, Wesley Purkey, who was executed on July 16, 2020, made this argument. Jess Bravin & Sadie Gurman, *U.S. Executes Second Federal Inmate After a 17-Year Hiatus*, WALL STREET J. (July 16, 2020, 9:28 AM), <https://www.wsj.com/articles/supreme-court-clears-the-way-for-second-federal-execution-this-week-11594885448> (recounting how Purkey’s attorney argued that Purkey “had accepted responsibility for the crime but had no rational understanding of why he was being executed”).

²⁴ *Madison*, 139 S. Ct. at 734 (Alito, J., dissenting) (citing the trial court’s findings that Madison had a “rationa[l] understanding . . . that he is going to be executed because of the murder he committed and a rationa[l] understanding that the State is seeking retribution and that he will die when he is executed” (first and third alterations in original) (quoting *Madison v. State*, No. 02-CC-1985-001385.80, 2016 WL 11081587, at *6 (Ala. Cir. Ct. Apr. 29, 2016))).

community's judgment."²⁵ It sent the case back to the state court to determine whether the prisoner's "'mental state [wa]s so distorted by a mental illness' that he lack[ed] a 'rational understanding' of 'the State's rationale for [his] execution.'"²⁶

The Court thus has recognized in capital cases the moral importance of offender understanding of punishment purposes. It has rightly described rationality as a prerequisite to such comprehension.²⁷ But rational capacity alone is not enough to ensure understanding. The state also must communicate its reasons for punishment to the offender.²⁸ Both rationality and communication are essential; punishing an uncomprehending wrongdoer "offends humanity,"²⁹ whether it results from cognitive impairment or the state's failure to offer cognizable reasons.

Moral concerns, however, are not the only reasons for communicating the purposes of criminal sanctions. The process of articulating punishment goals also has practical benefits. It increases deliberation and self-reflection by sentencing judges, enabling them to discern implicit biases and avoid the polar risks of thoughtless punitiveness and reckless mercy. Resulting sanctions are more likely to be rational, defensible, and legitimate.³⁰ Sentences may be more rehabilitative, too, if offenders are given reasons to see their sentences as fair and legitimate. In short, explaining punishment has concrete utility—as well as moral value.

Some may wonder whether such explanation would merely confirm the obvious. Don't offenders usually know why they are being punished? One might argue that the defendant in *Madison* was an exception, because mental illness compromised his understanding. In a typical case, the critic might argue, the defendant will know more. Suppose, for example, a drug dealer is arrested. He hears the charges against him at arraignment, and during plea negotiations, he also learns about the evidence, definition of the crime, and applicable penalty. Once convicted (likely by guilty plea), he receives a sentence. At this point, he is likely to interpret his sentence to mean that the state sees his drug dealing as bad and harmful and wants to make sure he doesn't do it again. What more does the defendant need to know? Quite a bit, this Article contends. It is not enough that the defendant can imagine why the state would want to exact *some*

²⁵ *Id.* at 727 (majority opinion).

²⁶ *Id.* at 723 (third alteration in original) (quoting *Panetti*, 551 U.S. at 959).

²⁷ *Id.*

²⁸ The Court has stated that retribution and deterrence are the primary social objectives for the death penalty. *Kennedy v. Louisiana*, 554 U.S. 407, 441 (2008); *see also* *Roper v. Simmons*, 543 U.S. 551, 571 (2005). Incapacitation is also a primary driver of death sentences under current law. *See Atkins v. Virginia*, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting) ("The Court conveniently ignores a third 'social purpose' of the death penalty—'incapacitation of dangerous criminals . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (plurality opinion))); Marah Stith McLeod, *The Death Penalty as Incapacitation*, 104 VA. L. REV. 1123, 1132 (2018).

²⁹ *Madison*, 139 S. Ct. at 727 (quoting *Ford v. Wainwright*, 477 U.S. 399, 407 (1986)).

³⁰ *See infra* Section I.B.

punishment. He should know why the judge has chosen his *particular* sentence, and how the judge has prioritized among competing sentencing considerations (for example, incapacitation versus rehabilitation).

If an offender is left to guess about the reasons for his particular sentence, he may make a costly misjudgment. As an illustration, consider a Black offender being sentenced by a White judge at a time when racial tensions are running high. The defendant might assume his sentence is at least in part due to racial animus, rather than legitimate social goals. In fact, however, the judge may have selected a particular sentence to reflect the moral gravity of the offense, which the offender does not fully appreciate. Rather than recognizing the retributive proportionality of his sentence, the defendant would attribute his suffering to injustice and animus. He would feel alienated and harmed by society, not more likely to respect its rule of law.

Judicial explanation, admittedly, might not always mitigate offender resentment. A defendant might not believe the judge's rationale. Or the defendant might simply ignore it. Nonetheless, explanation of a valid sentencing rationale would at least offer the defendant an opportunity to see a legitimate reason for his suffering.

Current laws and norms must change to make room for such communication. Judges should be expected to explain the social objectives of every sentence in terms comprehensible to the average lay defendant. Some states already have rules requiring judges to give clear and understandable reasons for sentences,³¹ but these states do little to enforce such rules.³² Mandates alone will likely be insufficient; judges must themselves recognize the value of fulsome explanation and commit to providing it of their own accord. A key goal of this Article is persuading judges to make this commitment.

Others also can support the communicative process. Prosecutors can illuminate the social objectives served by sentences proposed as part of plea deals.³³ After all, prosecutors tend to possess the most information about and

³¹ See, e.g., MONT. CODE ANN. § 46-18-101(3)(a) (2019) ("Sentencing and punishment must be certain, timely, consistent, and understandable."); *id.* § 46-18-102(3)(b) ("When the sentence is pronounced, the judge shall clearly state for the record the reasons for imposing the sentence."); *id.* § 46-18-202(2) (requiring the judge to record his reasons for restricting parole eligibility).

³² See, e.g., *State v. Krantz*, 788 P.2d 298, 301 (Mont. 1990) ("We have generally upheld minimal statements of sentencing reasons. In *State v. Petroff* we held that, '[t]he recommendations of the Pre-sentence Investigation [and] [t]he Defendant's prior criminal record' provided a sufficient statement. In *State v. Johnson*, we upheld a sentence based on the '[d]efendant's history of alcohol and driving offenses' coupled with the presentence report." (alterations in original) (citation omitted) (first quoting *State v. Petroff*, 757 P.2d 759, 760 (Mont. 1988); and then quoting *State v. Johnson*, 719 P.2d 1248, 1257 (Mont. 1986))).

³³ Judges are not obligated to accept plea deals proposed by the parties. See, e.g., FED. R. CRIM. P. 11(c)(3).

control over sentencing outcomes.³⁴ Such information from prosecutors can help judges meaningfully explain sentences in plea-bargained cases.

Legislatures, for their part, can do more to illuminate statutory punishment objectives. Current sentencing statutes tend to list the purposes of criminal sentencing only in vague terms, giving little guidance to judges on how to balance penal objectives.³⁵ They espouse goals such as “just and deserved punishment o[f] those whose conduct threatens the public peace,”³⁶ “[p]rotection of the public,[and] restitution to the crime victim and the crime victim’s family,”³⁷ without prioritizing among these aims. They emphasize considerations like the “gravity” or “seriousness” of an offense,³⁸ without explaining whether proportionality is a requirement, or one of many valid goals, not all of which must be achieved.

Legislatures can do better. They can specify the role of desert. They can explain the aims of particular penalties attached to particular offenses. A high minimum penalty could be expressly premised on a purpose to deter. The authorization of capital punishment could be expressly directed toward retribution. (Remarkably, the purpose for even this irreversible penalty is not always clear.³⁹) Such clarification by legislatures would help judges better understand and communicate the reasons for the sanctions they may or must impose.

Defense attorneys then can help offenders comprehend judicial sentencing rationales. Such explanation would not align the attorneys with the state and against their clients, but instead would demonstrate commitment to their clients as reasoning moral agents who deserve to know why they are made to suffer.

Probation and prison authorities, too, can help offenders understand the reasons for their sentences. In prison, corrections administrators may even involve prisoners in advisory rulemaking and prison disciplinary decisions so that by learning to help set rules with penalties, they can better understand the state’s reasons for their own punishments.

Communicating punishment in these ways will not come without costs—costs that may tempt legislatures, judges, and prosecutors to omit such explanation. Giving reasons for sentencing decisions can be practically and psychologically difficult. Some judges may struggle to explain their punishment decisions in

³⁴ See *infra* Section III.D.

³⁵ For example, the federal sentencing statute, 18 U.S.C. § 3553 (2018), lists sentencing factors but “does not attach weights to these factors, thus leaving the sentencing judge with enormous latitude, reinforced by the vagueness of some of the factors (what is ‘just punishment,’ for example?).” *United States v. Beier*, 490 F.3d 572, 574 (7th Cir. 2007).

³⁶ ARIZ. REV. STAT. ANN. § 13-101(6) (2020).

³⁷ MISS. CODE ANN. § 99-19-153(1)(a) (2020).

³⁸ See, e.g., CAL. PENAL CODE § 1170(a)(1) (West 2020); NEB. REV. STAT. § 29-2322(3)(c) (2020); TEX. PENAL CODE ANN. § 1.02(3) (West 2019); UTAH CODE ANN. § 76-1-104(3) (West 2020); VA. CODE ANN. § 17.1-801 (2020); WASH. REV. CODE § 9.94A.010(1) (2020); WIS. STAT. § 973.017(2)(ag) (2019).

³⁹ See *infra* notes 202-13 and accompanying text (discussing confusion as to purposes of execution).

words.⁴⁰ They may fear appellate court scrutiny if they provide their rationales. And explanation of sentencing rationales may take time and resources away from courts that are already overburdened.

Communicating punishment may require society to make hard choices. Explaining punishment decisions may come at the price of fewer prosecutions or increased reliance on plea bargaining. There may be real downsides to communication. While harm to productive efficiency is a legitimate concern, however, it must be balanced against the practical and moral value of increased rationality and respect for human dignity in the sentencing process. A more reasoned sentencing process, moreover, may avoid punishment excesses that are costly in both monetary and human terms.

This Article proceeds in three Parts, and its sequence is somewhat unconventional. Scholarly critiques of the law often begin with a description of current practice before turning to theoretical analysis. That approach makes sense when the flaws of the current system—such as wrongful convictions, racial disparities, or prosecutorial misconduct—are readily apparent. However, the price of unexplained punishment is less easy to appreciate. The Article therefore begins with the moral and practical value of punishment explanation in Part I. In Part II, it reveals how current sentencing law and policy fail to ensure that communication. Part III explores solutions.

I. THE PRICE OF UNEXPLAINED PUNISHMENT

A criminal penalty that “makes no measurable contribution to acceptable goals of punishment . . . is nothing more than the purposeless and needless imposition of pain and suffering.”⁴¹ The Supreme Court has recognized this as a constitutional principle—forbidding punishments that serve no legitimate purpose.⁴² And yet, judges frequently impose sentences without explaining the social objectives they are meant to serve, and scholars and appellate courts rarely object to the omissions. Judges often do explain the applicable law (such as the statutory penalty range) and relevant facts (such as aggravating and mitigating factors), to be sure. That shows why a sentence is legally permitted. But that explanation lacks something crucial: an account of the *purpose* for the penalty. A penalty without a purpose, after all, is no more than pointless suffering. Meaningful explanation of a penalty requires discussion of purpose, as well as facts and law.

This Part explains why meaningful explanation is essential. Scholars, legislatures, and appellate courts tend to overlook the moral and practical costs of sentencing without purposive explanation. These costs are steep: without an

⁴⁰ A long-time judge once observed: “There are experienced judges who have a wonderful faculty—whether it is called wisdom, [judgment], or something else—to reach a decision very quickly and very well. . . . They may not, however, have all that much of a capacity to explain the basis of their ultimate judgments, or their views about relevant similarities and differences.” Hammond, *supra* note 14, at 225.

⁴¹ *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

⁴² *Id.*

explicit connection to legitimate social goals, the sentencing process can easily become dehumanizing and unjust. Reason giving guards against dehumanization by affirming the offender as a reasoning moral agent whose suffering requires justification. The process of explanation also promotes ordered reasoning and careful deliberation on the part of the judge, reducing the risk of arbitrary or excessive sentences.

A. *Dehumanization of Offenders*

How can the state punish criminal offenders without denying their humanity and dignity? Some scholars believe that the state must avoid harsh punishments, such as execution, life imprisonment without parole, and even lengthy-terms-of-years. Others go further, arguing that prisons should be abolished.⁴³ But these are not the only answers. Punishment also can be humanized by intentional engagement with the criminal offender as a reasoning moral agent and as a continuing member of the community that he has harmed. A necessary and central aspect of that humanizing engagement lies in communicating to the offender the reasons for his suffering.

Respect for the reasoning and moral capacities of human beings is widely shared. The Universal Declaration of Human Rights describes “reason and conscience” as aspects of human nature that all governments must respect.⁴⁴ Scientists, too, highlight these attributes in discussing the special nature of human beings. Psychology expert Thomas Suddendorf, for example, describes human beings as uniquely capable of “foreseeing the consequences of [their] actions” and “imagin[ing] the thoughts of another individual.”⁴⁵ These capacities enable human beings to make “moral choices between different options” and to develop communal norms.⁴⁶ Legal philosophers and scientists alike have deemed the reasoning and moral capacities of human beings to be valuable and worthy of respect.⁴⁷

⁴³ See, e.g., *What is the PIC? What is Abolition?*, *supra* note 8 (espousing an abolitionist “political vision with the goal of eliminating imprisonment, policing, and surveillance and creating lasting alternatives to punishment and imprisonment”); see also Washington, *supra* note 8.

⁴⁴ G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 1 (Dec. 10, 1948); see also Brett G. Scharffs, *Why Religious Freedom? Why the Religiously Committed, the Religiously Indifferent, and Those Hostile to Religion Should Care*, 2017 BYU L. REV. 957, 968 (“Human rights are asserted to be things with which all people are born, endowments based upon our human characteristics of reason and conscience, as well as our capacity to have genuine regard for each other.”).

⁴⁵ Thomas Suddendorf, *Two Key Features Created the Human Mind*, SCI. AM., Sept. 2018, at 42, 46-47 [hereinafter Suddendorf, *Two Key Features*]; see also THOMAS SUDDENDORF, *THE GAP: THE SCIENCE OF WHAT SEPARATES US FROM OTHER ANIMALS* 8-9 (2013).

⁴⁶ Suddendorf, *Two Key Features*, *supra* note 45, at 47.

⁴⁷ This is not to suggest that human dignity depends on the active operation of these capacities.

Indeed, the rule of law itself is premised on “man’s dignity as a responsible agent.”⁴⁸ In the words of legal theorist Lon Fuller, “[t]o embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults.”⁴⁹ Legal philosopher Jeremy Waldron similarly explains that “law and legality rest upon . . . respect for the freedom and dignity of each person as an active intelligence”⁵⁰ and that government by laws is an “action-guiding rather than a purely behaviour-eliciting mode of social control.”⁵¹

Criminal punishment—society’s response to the proven violation of its moral norms—should be imposed in a manner consistent with reasoned human agency. When the state explains to a wrongdoer the reasons for his punishment, it acknowledges the offender’s enduring capacity to rationally consider society’s norms, to internalize those norms, to reflect on his own behavior, and to change his commitments and conduct in response.⁵² It confirms that not even the worst criminal offenders should be treated “as nonhumans, as objects to be toyed with and discarded.”⁵³ As Waldron notes, “Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with.”⁵⁴ For Waldron, this means treating other people “as beings capable of explaining themselves.”⁵⁵ Similarly, legal ethicists like David Luban contend that “human dignity requires litigants to be heard.”⁵⁶ But being heard is not enough. Human dignity also requires the state to explain itself to criminal offenders by communicating the purpose of their sanctions. Such explanation recognizes the offender as capable of relating to the concerns of his human community, of which he remains a part and to which he is likely to return.⁵⁷

⁴⁸ LON L. FULLER, *THE MORALITY OF LAW* 162 (1964).

⁴⁹ *Id.*

⁵⁰ Waldron, *supra* note 19, at 212.

⁵¹ *Id.* at 208.

⁵² Michael Tomasello has studied the evolution of human morality; he contends that “early human individuals understood that moral norms made them both judger and judged. The immediate concern for any individual was not just for what ‘they’ think of me but rather for what ‘we,’ including ‘I,’ think of me.” Michael Tomasello, *The Origins of Morality*, *SCI. AM.*, Sept. 2018, at 70, 75.

⁵³ *Furman v. Georgia*, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring); *see also* Waldron, *supra* note 16, at 218.

⁵⁴ Waldron, *supra* note 16, at 210.

⁵⁵ *Id.*

⁵⁶ David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 819.

⁵⁷ *Cf.* Michael M. O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 423-24 (2008) (noting that “people . . . derive much of their social identity from their standing as full-fledged members of their group or society,” and arguing that affirmation of social

Some may hear echoes of retributive theory in these contentions regarding human dignity. It is true that retributive theory emphasizes human rationality and agency in criminal law and punishment. Retributivist scholar Dan Markel, for example, argues that an offender should be treated as a moral “agent who can understand the point of her punishment, not merely as a body that can suffer pain in return for the harm she has wrongfully caused or threatened.”⁵⁸ Antony Duff contends that punishment “must address and respect the offender as a fellow member of the normative community” and argues that sanctions should “seek to persuade (but not to coerce or manipulate) him to repent [of] his crime and to accept his punishment as a penance for that crime, while leaving him free to remain unpersuaded and unrepentant.”⁵⁹ In the many U.S. jurisdictions that embrace retribution as a crucial goal of punishment, retributive norms provide an important reason to communicate punishment rationales.⁶⁰

But one need not be a retributivist to care about communicating punishment. Consider the perspective of a utilitarian who believes that punishment should be imposed only to prevent future harm. (In a world of limited resources, even a person sympathetic to retributive theory might prefer sometimes to divert the costs of punishment to building hospitals, schools, or parks.) A utilitarian may care deeply about the perceived humanity and dignity of offenders. The fact that he would distribute punishment based on its benefits to society does not mean that he would accept dehumanization as part of that process, for loss of rational self-esteem is itself a harm.

Importantly, reasoned explanation of punishment does more than just dignify the offender. It educates the rest of society. It teaches that the offender is a reasoning moral agent who may not be harmed without moral justification. Punishment and law are by their nature expressive. Criminal justice scholar David Garland writes that law can “create social meaning and thus shape social

standing supports perceptions of procedural fairness (quoting Tom R. Tyler & E. Allan Lind, *Procedural Justice*, in *HANDBOOK OF JUSTICE RESEARCH IN LAW* 65, 76 (Joseph Sanders & V. Lee Hamilton eds., 2001))).

⁵⁸ Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, in *RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY* 49, 61 (Mark D. White ed., 2011).

⁵⁹ R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY* 177 (2001).

⁶⁰ State criminal codes often make moral desert an explicit consideration in sentencing. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-101(6) (2020) (stating legislature’s aim “[t]o impose just and deserved punishment on those whose conduct threatens the public peace”); COLO. REV. STAT. § 18-1-102.5(1)(a) (2019) (stating a sentencing purpose “[t]o punish a convicted offender by assuring the imposition of a sentence he deserves in relation to the seriousness of his offense”); FLA. STAT. § 921.002(1)(b) (2020) (“The primary purpose of sentencing is to punish the offender.”); MASS. GEN. LAWS ch. 211E, § 2(3)(C) (2020) (stating that sentencing should “provide just punishment for the offense”); N.D. CENT. CODE § 12.1-01-02(4) (2019) (stating that one goal of the criminal law is “to condemn conduct that is with guilt as criminal”).

worlds.”⁶¹ Professor Cass Sunstein describes law as “making statements”⁶² and argues that “[f]or law to perform its expressive function well, it is important that law communicate well.”⁶³ This idea is echoed by restorative justice advocates, who see communication as a “medium by which the negotiation and construction of meaning takes place.”⁶⁴ By explaining the reasons for punishment, judges can teach the public about the enduring dignity of criminal offenders.

Criminal law philosopher Joshua Kleinfeld argues that just punishment must reconstruct the “embodied ethical life”⁶⁵ of a community by rejecting and negating the corrosive messages implied by crimes—such as the superiority of a perpetrator to his victim or the idea that crime pays.⁶⁶ In order to be “the communicative negation of the message of the crime,”⁶⁷ punishment must not make the opposite error. It must not demean the dignity of the offender in order to elevate the status of the victim. By explaining punishment goals, the state can

⁶¹ David Garland, *Punishment and Culture: The Symbolic Dimension of Criminal Justice*, 11 *STUD. L. POL. & SOC’Y* 191, 191 (1991).

⁶² Cass R. Sunstein, *On the Expressive Function of Law*, 144 *U. PA. L. REV.* 2021, 2024 (1996).

⁶³ *Id.* at 2050.

⁶⁴ Gregory D. Paul & Ian M. Borton, *Toward a Communication Perspective of Restorative Justice: Implications for Research, Facilitation, and Assessment*, 10 *NEGOT. & CONFLICT MGMT. RES.* 199, 200 (2017) (quoting Gail T. Fairhurst & David Grant, *The Social Construction of Leadership: A Sailing Guide*, 24 *MGMT. COMM. Q.* 171, 174 (2010)). For restorative justice advocates,

a central ambition is making amends for the offense—especially for the physical, emotional, and economic harm to the victim—not just imposing pain upon the offender. Accountability tends to be characterized as an offender acknowledging the wrongfulness of his behavior, communicating remorse for the damage he has caused, and taking actions to mend the breach in social relationships. Toward this end, substantive restorative justice envisions a collaborative sanctioning process that involves all stakeholders concerned with the offense and offender. The primary feature is largely uninhibited dialogue among the parties, allowing all present to express their emotions and ideas in an open forum. Through discussion and deliberation, this approach contemplates mutual agreement on the steps that must be taken to heal the victim and the community, resulting in the formation of a plan to confront the factors contributing to the offender’s conduct and to facilitate his development as a law-abiding citizen.

Erik Luna, *In Support of Restorative Justice*, in *CRIMINAL LAW CONVERSATIONS* 585, 587-88 (Paul H. Robinson, Stephen Garvey & Kimberly Kessler Ferzan eds., 2011).

⁶⁵ “Criminal law is . . . an enterprise in normative reconstruction, the protector of the shared normative ideas on which a society’s way of life is based — the society’s embodied ethical life.” Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 *HARV. L. REV.* 1485, 1486 (2016).

⁶⁶ *Id.* at 1521 (“[T]o the extent crimes make claims about norms and victims, we need in response not just to say those claims are false but to make and prove them false. Crime can’t pay or its message won’t be rebutted. The model of communication isn’t solely discursive, like countering a position in a debate, but a kind of communicative action, like showing that a badly engineered bridge falls down.”).

⁶⁷ *Id.* at 1513.

better affirm the social values marred by crime—including the equal dignity of victim and offender.

These expressive and social benefits of sentencing explanation do not depend on an offender's response. That response sometimes will be negative. Though communication of a punishment's purposes can help offenders understand and accept their sanctions, some offenders will remain "unrepentant; so self-centered and devoid of compassion as to lack all sense of guilt; so adept in transferring blame to others as to be considered, at least in the colloquial sense, to be out of touch with reality."⁶⁸ However, by explaining sanctions even when offenders scorn the message, the state amplifies the moral message that an offender's dignity does not depend on his behavior.⁶⁹

Public affirmation of offender dignity is especially crucial when criminal practices seem to call that dignity into question. The harms of incarceration in America have fallen disproportionately on Black Americans, and the racial skew of punishment has been seen by some as a byproduct of systemic racism.⁷⁰ Even if one does not believe that criminal justice practices reflect actual or intentional racism, the *appearance* of potential racism and indignity warrants a response. As Sunstein has pointed out, "[t]he meaning of legal statements is a function of social norms, not of the speaker's intentions," and may even be at odds with what the lawmaker intends to express.⁷¹ At a time when concerns of racism are widespread, it is imperative that the state confirm its commitment to the dignity of each person. That commitment can be affirmed by the reasoned engagement and explanation of punishment.⁷²

The expressive benefits of reasoned sentencing explanation can be considerable, even when the physical audience in a courtroom is limited, as Professor Jocelyn Simonson has shown it often is.⁷³ We live in a world of stunning technological advances and interconnectedness. Sentencing proceedings are recorded and many can be found on the Internet without any special knowledge, code, or fee. A basic Internet search reveals hundreds of video-recorded sentencing hearings, free for anyone to view. Some have been viewed *millions* of times.⁷⁴ And those who view sentencing hearings take notice:

⁶⁸ *Panetti v. Quarterman*, 551 U.S. 930, 960 (2007).

⁶⁹ *See Furman v. Georgia*, 408 U.S. 238, 273 (1972) (Brennan, J., concurring).

⁷⁰ *See, e.g., ALEXANDER, supra* note 4, at 2.

⁷¹ Sunstein, *supra* note 62, at 2050.

⁷² Maintaining a clear picture of the human nature and dignity of the condemned is essential to guard against the temptation to treat offenders as useful means to achieve social ends. It is not beyond the pale, for example, that states might wish to use prisoners for organ donation, a practice that some legislators have advocated and that has generated alarm among leading ethicists. *See, e.g., Arthur Caplan, The Use of Prisoners as Sources of Organs—An Ethically Dubious Practice*, AM. J. BIOETHICS, no. 10, 2011, at 1, 1.

⁷³ Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

⁷⁴ *See, e.g., Eyewitness News ABC7NY, Staten Island Baby Sitter Who Tortured, Murdered 17-Month-Old Boy Gets 23 Years to Life*, YOUTUBE (Apr. 24, 2018),

thousands of viewers have submitted public comments about the interactions between sentencing judges and criminal defendants.⁷⁵ The advances of technology have broadened the potential audience for sentencing proceedings, giving judges the chance to affirm the dignity of offenders in an increasingly public way.⁷⁶ Some judges have already taken advantage of the Internet audience by authorizing local news programs to record sentencing proceedings and upload the recordings online.⁷⁷ Judges also can post sentencing recordings on court websites. Through technology, judges can share the expressive message of sentencing communication well beyond courtroom walls.

Some critics of American criminal justice may feel impatient with punishment communication as a means of affirming offender dignity. They may demand more sweeping reforms—such as decriminalization of drug offenses, defunding of the police, or abolition of prisons. Communicating punishment admittedly will not eliminate the possibility of racism or of excessive or degrading punishments. But dramatic reforms of American criminal justice will be politically and practically complex. In the meantime, smaller improvements are possible. Punishment communication can dignify and humanize offenders without any need for a change in the law—judges only have to recognize that communication matters and commit to providing it.

Over time, punishment explanation also can pave the way for larger humanizing reforms by opening the eyes of the public to the humanity of

<https://www.youtube.com/watch?v=93yGKTXTrw> (2,960,253 views as of Nov. 18, 2020); MLive, *supra* note 18 (3,534,073 views as of Nov. 18, 2020) (sentencing defendant to several lengthy prison terms for child molestation); MLive, *Judge to Man Who Killed His Mother and Sister: 'This is One of the Most Egregious Cases I've Ever Ha[d']*, YOUTUBE (Jan. 21, 2015), https://www.youtube.com/watch?v=m_Klr5xdriw (2,665,194 views as of Nov. 18, 2020) (sentencing defendant to life in prison for killing his mother and sister); MPR News, *Beverly Burrell Delivers a Statement and Is Sentenced*, YOUTUBE (Sept. 28, 2017), <https://www.youtube.com/watch?v=zEajlgNXXmw> (4,102,194 views as of Nov. 18, 2020) (sentencing defendant to fourteen years in prison for overdose deaths of two men to whom defendant dealt drugs).

⁷⁵ See sources cited *supra* note 74.

⁷⁶ Consider the uproar, for example, following the publicized sentencing of a domestic abuse victim who failed to show up in court to testify against her abuser. The judge sentenced the crying and apologetic young mother to three days in jail for contempt without explaining the sentence. In response to the mother's entreaty to avoid jail and complaint of constant anxiety, the judge retorted: "You think you [have] anxiety now? You haven't even seen anxiety!" See ABC News, *Courtroom Confrontation: Judge Berates and Sentences Domestic Violence Victim*, YOUTUBE (Oct. 7, 2015), <https://www.youtube.com/watch?v=-ttmmFkFKbA>. Dozens of commenters expressed outrage, with comments such as, "I hold this judge in contempt of humanity." *Id.* (comment by Trent Matuszewski). Eventually, the judge was officially rebuked for her statements. Samantha Cooney, *Florida Judge Reprimanded for Jailing Domestic Abuse Victim*, TIME (Sept. 1, 2016, 3:03 PM), <https://time.com/4475778/florida-judge-domestic-abuse/> [<https://perma.cc/3Y7G-F3PA>].

⁷⁷ See, e.g., KOIN 6, *Outburst in Court: Day 1 of Jeremy Christian Sentencing*, YOUTUBE (June 23, 2020), https://www.youtube.com/watch?v=J9-PoPjYu2k&ab_channel=KOIN6 (provided by local Portland news station).

criminal offenders. Judge Richard Posner once warned that if the public sees offenders “as a type of vermin, devoid of human dignity and entitled to no respect,” then it may not have any problem with “the degrading or brutalizing treatment of prisoners.”⁷⁸ He urged that “[w]e must not exaggerate the distance between ‘us,’ the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.”⁷⁹ By sensitizing us to the humanity of offenders, punishment explanation can open a pathway to empathy and reform.

Does this imply that the state should explain every decision it makes that affects a human being? Not necessarily. Although many government decisions lead to restrictions on freedom or loss of property, not all government decisions cast doubt on human dignity. Criminal punishment presents a special threat to dignity because it carries “an ineradicable connotation of moral condemnation and personal guilt.”⁸⁰ Criminal penalties, unlike civil sanctions, are intentionally designed to condemn.⁸¹ As Judge Posner recognized, it can be easy for law-abiding citizens to view offenders as subhuman and inferior.⁸² The law sometimes seems to invite that perception; the U.S. Constitution, for example, prohibits slavery “except as a punishment for crime.”⁸³ Few civil sanctions, if any,⁸⁴ present a comparable moral threat.⁸⁵ The need for reasoned explanation for the sake of dignity is most essential in criminal sentencing because that is where dignity is most often at risk.

⁷⁸ *Johnson v. Phelan*, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, C.J., concurring and dissenting).

⁷⁹ *Id.* at 152.

⁸⁰ Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 424 (1958).

⁸¹ *Id.* at 403-05 (explaining that criminal punishment entails “the moral condemnation of the community” as well as “unpleasant physical consequences”); *see also In re Winship*, 397 U.S. 358, 363-64 (1970) (noting that criminal law has “moral force” and that convictions leave offenders “stigmatized”).

⁸² *See Johnson*, 69 F.3d at 151.

⁸³ U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).

⁸⁴ One might argue that some state actions, technically labeled “civil,” carry similar dangers. The civil commitment of convicted sex offenders, for example, carries stigma and is closely connected with criminal law. *See* 18 U.S.C. § 4248 (2018) (allowing federal authorities to civilly commit sexually dangerous prisoners at end of their sentences). Such exceptional civil proceedings may also warrant explanation to guard against indignity.

⁸⁵ Our law already recognizes this in at least one sense: it forbids criminal punishment in the absence of proof beyond a reasonable doubt, whereas it permits civil sanctions based on a preponderance of the evidence. *In re Winship*, 397 U.S. at 364 (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”). That heightened standard of proof applies in the criminal proceeding even if the criminal and civil cases result in identical fines.

B. *Mistaken, Biased, and Wasteful Sanctions*

For many, affirmation of human dignity will present a compelling and sufficient reason to communicate punishment rationales to offenders. Not everyone, however, will be persuaded that human dignity justifies the practical efforts needed to communicate punishment aims in every case. This Section therefore probes the further utility of sentencing communication. It reveals that sentencing explanation can function as a valuable antidote to bias, excess, and mistake.

Articulation of the social objectives of sentencing helps ensure that punishment decisions are based on legitimate aims. That is particularly important in discretionary sentencing. Trial court judges often have significant discretion to decide what sanctions are most appropriate under the circumstances of a particular case and in light of statutory sentencing objectives.⁸⁶ Even when a statute provides a list of valid sentencing objectives, judges often must decide how to prioritize among them and frequently “differ as to how best to reconcile the disparate ends of punishment.”⁸⁷ Balancing various goals can be complex, and judges can default to relying on instinct for a sentencing decision.⁸⁸ If judges were perfectly just and infallible, this might not be a concern. But judges can make mistakes, overlook important sentencing considerations, or rule based on unconscious biases.

Explicit consideration and explanation of the purposes of punishment can reduce the risk that such errors and unfairness will go unnoticed.⁸⁹ For example, a judge may forget to take into account certain factors or a particular social goal. He may assume that prison will be rehabilitative, even though the particular defendant’s family structure and home environment would be more likely to foster his reform.⁹⁰ When a judge must explain his sentencing decision, he may think through it more carefully. “An attempt by the sentencing judge to articulate

⁸⁶ That is true even in places like the European Union, where the urge for rationalization and uniformity is strong. *See, e.g.,* Petter Asp, *Harmonisation of Penalties and Sentencing Within the EU*, 1 BERGEN J. CRIM. L. & CRIM. JUST. 53, 61 (2013) (“Sentencing is an area where you cannot avoid discretion.”).

⁸⁷ *See Rita v. United States*, 551 U.S. 338, 349 (2007) (explaining that the U.S. Sentencing Commission recognized that judges often differ in how to balance sentencing aims).

⁸⁸ *See United States v. Elmore*, 743 F.3d 1068, 1075 (6th Cir. 2014) (rejecting a defendant’s claim that his sentence was arbitrary because the sentencing judge relied upon his “gut level of what a reasonable sentence ought to be”).

⁸⁹ R. Michael Cassidy & Robert L. Ullmann, *Sentencing Reform: The Power of Reasons*, 97 MASS. L. REV. 80, 82 (2016).

⁹⁰ The Federal Sentencing Guidelines do not rely on rehabilitation as a reason to impose a carceral term. *Cf.* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM’N 2018). *See generally, e.g.,* Mirko Bagaric, Gabrielle Wolf & William Rininger, *Mitigating America’s Mass Incarceration Crisis Without Compromising Community Protection: Expanding the Role of Rehabilitation in Sentencing*, 22 LEWIS & CLARK L. REV. 1 (2018). That reasoning does not apply in the inverse, of course—a sentence might be reduced for the purpose of rehabilitation, even if that diminishes its crime-precluding, deterrent, or retributive value.

his reasons for a sentence in each case should in itself contribute greatly to the rationality of sentences.”⁹¹

Explanation of sentencing rationales also can expose dubious empirical assumptions. Judge Alex Kozinski has argued that Americans “are committed to a system of harsh sentencing because we believe that long sentences deter crime and, in any event, incapacitate criminals”; however, we may be mistaken in these beliefs and “shattering countless lives and families[] for no good reason.”⁹² If judges explain their sentencing rationales, then it becomes easier to analyze whether the sentences are fulfilling their intended purposes. If judges often select high penalties for deterrence purposes, for example, research can be conducted to test whether those sentences are having a deterrent effect.⁹³ Likewise, if sentences are selected to achieve incapacitation, investigators later can test the accuracy of dangerousness predictions and whether those sanctions likely prevented further crimes. If judges are imposing sentences primarily for retributive reasons, in contrast, it might not matter whether sentences have deterrent or incapacitative effects. Punishment explanation thus can illuminate what empirical research is valuable.

The act of explaining punishment also can help judges ferret out bias in their sentencing decisions. Studies have discerned that implicit bias can be reduced through self-conscious reflection about one’s beliefs and through intentional efforts to consider how to justify these beliefs to others.⁹⁴ Communicating punishment requires judges to question and explain their intuitions about just punishment, to tether them to lawful sentencing objectives, and to convey their reasoning in words that offenders are able to understand. This process can temper implicit bias in criminal sentencing, which studies suggest is a significant problem.⁹⁵

One judge recently warned: “[S]entencing based solely on ‘intuition’ or ‘gut’ runs the risk of allowing implied bias a free reign and can be lawless in nature. . . . Undisciplined intuitive sentencing runs the risk of telling us more

⁹¹ *State v. Nield*, 682 P.2d 618, 619 (Idaho 1984) (Huntley, J., dissenting) (quoting A.B.A. PROJECT OF MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 2.3(c) cmt. e (1968)); see also Michael M. O’Hear, *Appellate Review of Sentence Explanations: Learning from the Wisconsin and Federal Experiences*, 93 MARQ. L. REV. 751, 754, 759-61 (2009).

⁹² Alex Kozinski, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., at iii, xiii (2015).

⁹³ See Deryck Beyleveld, *Deterrence Research and Deterrence Policies*, in PRINCIPLED SENTENCING 77, 91 (Andrew von Hirsch & Andrew Ashworth eds., 1992).

⁹⁴ CHERYL STAATS, KELLY CAPATOSTO, ROBIN A. WRIGHT & VICTORIA W. JACKSON, THE OHIO STATE UNIV. KIRWAN INST. FOR THE STUDY OF RACE & ETHNICITY, STATE OF THE SCIENCE: IMPLICIT BIAS REVIEW 15 (2016), <http://kirwaninstitute.osu.edu/wp-content/uploads/2016/07/implicit-bias-2016.pdf> [https://perma.cc/A664-X2N9] (“When confronted with bias, take the time to examine your actions or beliefs. Think of how you would explicitly justify them to other people.”).

⁹⁵ *Understanding Implicit Bias*, OHIO ST. U. KIRWAN INST. FOR STUDY RACE & ETHNICITY (2015), <http://kirwaninstitute.osu.edu/research/understanding-implicit-bias/> [https://perma.cc/U25Q-3BQ5].

about the judge than the person being sentenced.”⁹⁶ This risk cannot be counteracted simply by an effort to be fair and principled. “Research from the neuro-, social and cognitive sciences show that hidden biases are distressingly pervasive, that they operate largely under the scope of human consciousness, and that they influence the ways in which we see and treat others, even when we are determined to be fair and objective.”⁹⁷

Deliberate and explicit justification of sentencing decisions can help reveal biases that might otherwise remain unnoticed. Consider, for example, a fair-minded judge who must sentence a young Black man for an assault that involved a fistfight in a bar. Suppose a sentence of ten years falls in the middle of the statutory sentencing range, and the judge feels that sentence is appropriate. If asked to give reasons for his sentencing choice, the judge may take a moment and conclude that ten years seems appropriate both to reflect the gravity of the offense (retributive proportionality) and to protect society from a dangerous offender (incapacitation). Once he takes the time to articulate these goals, however, he may realize that some of his reasoning rests on unfounded assumptions. For example, he may realize that he has assumed the man is a danger, perhaps only because he is a Black man. He may then take a deeper look at the evidence to avoid making an important punishment decision based on an assumption. The judge may find out that the man recently adopted his wife’s child from a previous marriage and is devoted and loving toward him. He may have much more to lose by violence, and he may have a new desire for rehabilitation for the sake of his family. With this in mind, the judge may decide to punish him with a lesser sentence because he does not appear to be a significant threat to others and because he appears likely to reform for the sake of supporting his family. In other words, the judge might decide to prioritize rehabilitation and family welfare over the imposition of greater punishment simply for retribution’s sake.

Alternatively, perhaps the judge might remember, if asked to describe the purposes of the man’s sentence for assault, that he recently sentenced a woman convicted of assault under similar circumstances to only five years; he may realize that he has no immediate explanation for the difference other than her sex. Upon closer inspection of the evidence, he may find valid reasons for the difference (perhaps the man committed a more violent and injurious assault), or perhaps he will find no relevant differences and lessen the man’s sentence to be more consistent. In any event, articulating the reasons for punishment would have helped the judge to engage in self-conscious reevaluation of the facts and legitimate punishment goals.

Not only does reasoned explanation foster more careful and legitimate sentences, but it also guards against financial waste. A 2012 study of prison costs found that the average annual cost for incarcerating one person is \$31,286—

⁹⁶ *State v. Guise*, 921 N.W.2d 26, 35 (Iowa 2018) (Appel, J., specially concurring).

⁹⁷ *STAATS ET AL.*, *supra* note 94, at 6.

about \$85 per day.⁹⁸ Punishing more than necessary deprives society of resources that could be used for socially valuable purposes. Punishing less than necessary, of course, carries its own harms. Excessive leniency can breed disrespect for the law, reduce victims' sense of security and worth, and lead to additional crimes. By reducing the risk of sentencing error, communicating punishment guards against excesses in both directions.

Explanation of punishment objectives also may save costs by making sanctions more efficient. If punishments are intended to promote reform and rehabilitation and to teach offenders to connect their crimes with the burdens of punishment, then communicating punishment goals may achieve those ends more quickly. If an offender internalizes the reasons for his punishment, the state may not need to punish him as severely in order to change his behavior. "If the defendant is convinced that justice has been done in his case—that society has dealt with him fairly—the likelihood of his successful rehabilitation will surely be enhanced."⁹⁹

Reason giving may be especially important in cases involving plea agreements, because offenders tend to view bargained-for penalties with cynicism. Consider these remarks of a prisoner: "I've been copping out since the eighties to crimes I know I did. I love the system the way it is. I can get away with less time for crimes I committed."¹⁰⁰ Another offender stated: "The time you'll get if you go to [trial] is absolutely ridiculous, so you are forced to cop out [plea-bargain]."¹⁰¹ For many offenders, bargained justice garners little respect. Unfortunately, when judges impose sentences that have been agreed to by the parties, they often do not bother to explain the social goals these sentences will serve. This lack of explanation fuels the cynical view of negotiated outcomes as fundamentally arbitrary.¹⁰² By giving reasons for sanctions, judges can counteract this impression.

⁹⁸ See CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012), https://www.vera.org/downloads/Publications/price-of-prisons-what-incarceration-costs-taxpayers/legacy_downloads/price-of-prisons-updated-version-021914.pdf [<https://perma.cc/858F-74GM>] (assessing the costs of incarceration based on information obtained from state corrections departments from forty states (which together had custody of 1.2 million inmates of the total 1.4 million prisoners then held across all fifty states)).

⁹⁹ *Rita v. United States*, 551 U.S. 338, 367 (2007) (Stevens, J., concurring); accord Amy D. Ronner, *Songs of Validation, Voice, and Voluntary Participation: Therapeutic Jurisprudence, Miranda and Juveniles*, 71 U.CIN.L.REV. 89, 94 (2002) ("[W]hen individuals feel that the legal system has treated them with fairness, respect, and dignity, it has a therapeutic effect: the participants in the process do not just experience greater satisfaction, but tend to be more inclined to accept responsibility for their own conduct, take charge, and reform.").

¹⁰⁰ Mike Vuolo, Bradley R.E. Wright & Sadé L. Lindsay, *Inmate Responses to Experiences with Court System Procedural and Distributive Justice*, 99 PRISON J. 725, 734 (2019).

¹⁰¹ *Id.* (second alteration in original).

¹⁰² *Id.* at 733; see also *infra* Section III.D (exploring how prosecutors and judges can collaborate to ensure meaningful sentencing explanation in plea-bargained cases).

Sentencing explanation also can help align sanctions with developing social norms.¹⁰³ “By articulating reasons, even if brief, the sentencing judge . . . can provide relevant information to both the court of appeals and ultimately the Sentencing Commission.”¹⁰⁴ The reasons for sentences may reveal changing punishment perspectives—such as loss of faith in prison as a means of rehabilitating offenders.¹⁰⁵

Records of sentencing rationales also enable reasoned reconsideration of sentences over time. Changing attitudes toward punishment have spawned a movement to reduce lengthy sentences that no longer seem to serve valid purposes. Congress passed the First Step Act of 2018, which allowed thousands of prisoners to seek sentence reductions.¹⁰⁶ As a result, more than 2000 federal prisoners have had their sentences decreased by an average of six years.¹⁰⁷ When a judge must decide whether to reduce a sentence, the original reasons for a sentence may be relevant.¹⁰⁸ A sentence may have been imposed based on social objectives that society no longer supports; a sentencing reduction may then be appropriate. The opposite is true if the reasons for the sentence are ones that society continues to embrace. Explanation of sentencing decisions thus promotes more reasoned reconsideration.

Similar benefits will follow from sentencing explanation if jurisdictions adopt the Model Penal Code’s new “Second Look” resentencing provision. That provision allows prisoners to request sentence modifications after serving fifteen years of any sentence of incarceration.¹⁰⁹ One scholar has critiqued the resentencing provision on the ground that the original sentencing court is best situated to assess retributive proportionality.¹¹⁰ This critique is strong. Even so,

¹⁰³ *Rita*, 551 U.S. at 382 (Scalia, J., concurring in part and concurring in the judgment) (“By ensuring that district courts give reasons for their sentences, and more specific reasons when they decline to follow the advisory Guidelines range, appellate courts will enable the Sentencing Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of the district courts.” (citation omitted)).

¹⁰⁴ *Id.* at 357-58 (majority opinion).

¹⁰⁵ Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 148 (1978) (“Within the space of a single decade, perhaps less, there has been a precipitous falling off of support for the rehabilitative ideal in almost all segments of public opinion.”).

¹⁰⁶ First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194; *see also* Nicholas Fandos, *Senate Approves Prison Overhaul*, N.Y. TIMES, Dec. 19, 2018, at A1.

¹⁰⁷ KARA GOTSCH, THE SENTENCING PROJECT, ONE YEAR AFTER THE FIRST STEP ACT: MIXED OUTCOMES 1 (2019), <https://www.sentencingproject.org/wp-content/uploads/2019/12/One-Year-After-the-First-Step-Act.pdf> [<https://perma.cc/32BL-FA2S>].

¹⁰⁸ *See, e.g.,* United States v. Simons, 375 F. Supp. 3d 379, 388 (E.D.N.Y. 2019) (“[The defendant] has taken substantial steps during his period of incarceration to achieve the rehabilitative goals sought by the original sentence imposed . . . [by] attending prison courses.”).

¹⁰⁹ MODEL PENAL CODE: SENTENCING § 305.6 (AM. LAW INST., Proposed Final Draft 2017).

¹¹⁰ Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 151-52 (2015) (“[T]he original sentencers are likely in a better position to determine an

resentencing on prudential grounds may be appropriate. A trial court may have selected a sentence primarily for utilitarian reasons, not as retribution. Utilitarian goals, such as incapacitation, may be more accurately assessed after passage of time. It may become clear, for example, that a supposedly dangerous offender has become a compliant and model prisoner. Knowing trial court sentencing rationales thus can enable later courts to determine when reevaluation and resentencing is appropriate.

Not all effects of sentencing explanation are positive, however. Legal scholar Mathilde Cohen points out that reason giving may “inflamm[e] people’s disagreement with judicial dispositions” in contexts where “different individuals are more likely to agree on outcomes than on the reasons justifying those outcomes.”¹¹¹ This harm could occur, for example, in hierarchical situations. When great trust or respect for authority has previously been inculcated, such as in the military, the addition of reasons to commands may well undermine discipline precisely because reason giving constructs an egalitarian bridge between superiors and inferiors. However, when such trust and respect is lacking, as is often the case in criminal courts, reasons can reveal important purposes for sanctions and can foster acceptance and cooperation. At a minimum, reason giving may show offenders that judges have not acted without concern for the equities at stake.¹¹²

Recent analysis reveals that “[m]istrust of the courts runs high with African American voters, who are least likely to agree the courts are unbiased in their case decision[s] (37% agree, 59% disagree) and are taking the needs of people into account (41% agree, 56% disagree).”¹¹³ Given that Black adults are imprisoned at a 5.9 times higher rate than White adults,¹¹⁴ increasing Black communities’ trust in courts appears an especially urgent issue. When judges

offender’s desert, as they can often better assess the offender’s culpability and the harm caused to the original public—the public against which the crime was actually committed. Although the new sentencer may be in a better position to assess whether, as time has passed, the offender has been rehabilitated or whether he still poses a danger to society, these are questions rooted in utilitarianism rather than in the retributive concern of offense seriousness.”).

¹¹¹ Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 514 (2015).

¹¹² Cohen believes that federal law recognizes the value of reason giving in sentencing because district courts are required to give reasons for their sentences. *Id.* at 556. But not all states have a similar requirement, and the federal reason-giving requirement has been watered down by the Supreme Court. *See Rita v. United States*, 551 U.S. 338, 349 (2007).

¹¹³ Memorandum from GBA Strategies to Nat’l Ctr. for State Courts, 2018 State of the State Courts – Survey Analysis 3 (Dec. 3, 2018) (emphases omitted), https://www.ncsc.org/_data/assets/pdf_file/0020/16157/sosc_2018_survey_analysis.pdf [<https://perma.cc/28HZ-CT8L>].

¹¹⁴ THE SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/04/UN-Report-on-Racial-Disparities.pdf> [<https://perma.cc/M4NH-ZQGD>].

take the time to explain the rationales for criminal sentences, they demonstrate respect for the offenders they sentence and may inspire greater trust in their fairness. Indeed, procedural justice scholars have shown that perceived fairness stems from respectful treatment as much as from favorable dispositions.¹¹⁵

Some defendants may be angered by the rationales given for their sentences, to be sure. Imagine a defendant who is sentenced, at least in part, to deter others. The defendant may be disheartened or angry to learn that he has been sentenced to influence others rather than solely based on his own culpability. Members of the public might find that troubling as well. They may come to conclude that the deterrence rationale, though appealing in the abstract, leads to disturbing results in individual cases. Although general deterrence is generally assumed to be a legitimate reason for criminal sanctions, negative reactions to deterrence-based sentencing decisions might prompt rethinking of this traditional goal.

In sum, there are strong practical reasons to communicate the reasons for punishment. Such explanation can foster more reasoned, fair, effective, and legitimate punishment choices and may serve as a catalyst to reform—both of the offender and of the law itself. For utilitarian reasons, if not moral ones, punishment choices should be explained.

Despite the moral and practical power of punishment explanation, however, such communication is often neglected in law and in practice. As Part II will reveal, current sentencing laws and norms sometimes allow judges to impose sentences with no indication of the social objectives they are meant to serve.

II. COMMUNICATIVE SHORTFALLS

Many trial court judges face crushing workloads and pressures to quickly resolve criminal cases. Because sentencing explanation can take time and effort, they have an incentive to save time by omitting reasons. Sentencing rules can help motivate judges to explain sentences despite the practical pressures of their dockets. Current sentencing rules, however, rarely require meaningful explanation—and sometimes even discourage it. Furthermore, judges who want to explain their dispositions often find it difficult to do so in cases involving mandatory statutory penalties and party plea deals. The resulting lack of explanation deprives offenders and society of a key safeguard against dehumanization and punishment excess.

¹¹⁵ See, e.g., M. SOMJEN FRAZER, CTR. FOR COURT INNOVATION, *THE IMPACT OF THE COMMUNITY COURT MODEL ON DEFENDANT PERCEPTIONS OF FAIRNESS*, 14, 20, 25, 29 (2006), http://www.communitycourts.org/sites/default/files/Procedural_Fairness.pdf [<https://perma.cc/W3TV-JZPD>] (“Effective communication is . . . crucial in ensuring that defendants perceive their experiences as fair. Courts, whether traditional or community-based, that work to improve communication can enhance defendant perceptions and, indirectly, increase compliance. . . . Good treatment can even overcome the effects of an objectively negative court outcome (such as having to return to court or facing a conviction).”).

A. *Lack of Reason-Giving Rules and Norms*

State and federal sentencing laws differ in the degree of explanation they require. At one end of the spectrum, some states do not require judges to provide any reasons for particular criminal sentences. At the other, some jurisdictions require judges to give reasons for every sentence and authorize appellate judges to review those reasons. Yet not even the latter rules ensure meaningful sentencing explanation, as this Article soon will reveal.

At the most problematic end of the spectrum, some states absolve judges of any duty to explain their sentencing decisions. In Missouri, “[n]o rule or court decision requires the sentencing judge to justify, explain or detail to the defendant the elements taken into account at sentencing.”¹¹⁶ In Utah, sentencing judges are not required to “articulate or acknowledge the factors they consider in imposing sentences.”¹¹⁷ In Texas, “[a] trial court is not required to explain its decision to impose a sentence that is within the statutory guidelines and is supported by the evidence.”¹¹⁸ Such rules indicate to judges that reason giving is unnecessary and unimportant. Appellate courts sometimes add to this negative impression. The Missouri Court of Appeals, for example, has cautioned trial judges: “When the sentencing judge chooses to explain or justify their reasoning, the result is often confusion among our appellate courts as to what the sentencing judge considered in determining the sentence.”¹¹⁹ Such warnings encourage trial judges to remain silent.

In other jurisdictions, the law and courts are not as hostile to reason giving, yet still allow many sentences to be imposed without explanation. In Nevada, a judge need not explain a noncustodial sentence,¹²⁰ even if it entails severe constraints, such as GPS monitoring or sex offender registration. In Arkansas, judges can order offenders to serve multiple sentences consecutively—rather than concurrently—without explaining that choice,¹²¹ even when it adds decades to the prison penalty.¹²²

Jurisdictions with sentencing guidelines sometimes have rules that seem more favorable to sentencing explanation. Many of the nineteen jurisdictions that currently have sentencing guidelines¹²³ require judges to justify any deviation

¹¹⁶ Greer v. State, 406 S.W.3d 100, 108 (Mo. Ct. App. 2013).

¹¹⁷ State v. Moa, 282 P.3d 985, 996 (Utah 2012).

¹¹⁸ Hernandez v. State, No. 11-12-00293-CR, 2014 WL 5470480, at *2, *6 (Tex. App. Oct. 9, 2014) (affirming trial court’s order sentencing defendant to life in prison for “driving while intoxicated, third or more offense”).

¹¹⁹ Greer, 406 S.W.3d at 108-09. Reviewing the sentencing transcript in the case before it, the Court of Appeals found that it “offer[ed] no exception to the confusion caused by a sentencing court’s comments.” *Id.* at 109.

¹²⁰ Campbell v. Eighth Judicial Dist. Court, 957 P.2d 1141, 1143 (Nev. 1998).

¹²¹ Pyle v. State, 8 S.W.3d 491, 496 (Ark. 2000).

¹²² See, e.g., Smallwood v. State, 935 S.W.2d 530, 533 (Ark. 1996).

¹²³ Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, U. OF MINN. ROBINA INST. CRIM. L. & CRIM. JUST. (Mar. 21, 2018), <https://sentencing.umn.edu/content/what-are-sentencing-guidelines> [https://perma.cc/G4W3-PRWA]. The Robina Institute counts nineteen guidelines jurisdictions (including the federal government). *Id.*

from an applicable guidelines range.¹²⁴ Judicial reasons facilitate appellate review of nonconforming sentences and encourage trial judges to take the guidelines seriously. But giving reasons for a guidelines deviation may not clarify the sentence as a whole. To the contrary, “the whole guideline process . . . inhibit[s] a global consideration of the resultant sentence.”¹²⁵

Such jurisdictions, moreover, do not require judges to explain sentences that fall within guidelines ranges.¹²⁶ Such explanation might be unnecessary if the calculation process already clarified the penological rationale for the ultimate sanction. The process of calculating a guidelines sentence focuses not on overarching sentencing objectives, however, but on “mechanical” and technical application of specific factors in aggravation and mitigation.¹²⁷ Even when these specific factors relate to purposes of punishment (such as prior offenses that suggest a need for incapacitation), the process often is complex and technical—not an explanation of punishment, but “mathematical gobbledygook.”¹²⁸

Trial courts also have an incentive *not* to explain sentences that fall within sentencing guidelines. Many appellate courts apply a legal presumption that within-guidelines sentences are reasonable and uphold the vast majority of within-guidelines sentences without requiring any rationale. In such jurisdictions, a gratuitous sentencing explanation could invite needless appellate

¹²⁴ See, e.g., KAN. STAT. ANN. § 21-6815(a) (2020); MASS. GEN. LAWS ch. 211E, § 3(a)(2) (2020); MICH. COMP. LAWS § 769.34(3) (2020); 42 PA. CONS. STAT. § 9721(b) (2020); VA. CODE ANN. § 19.2-298.01(B) (2020); FLA. R. CRIM. P. 3.701(b)(6); MINN. R. CRIM. P. 27.03(4)(C).

¹²⁵ Hammond, *supra* note 14, at 231.

¹²⁶ The guidelines themselves are not always clear as to the reasons for punishment. Sentencing commissions often decline to prioritize any particular punishment objective. For example, when Congress established the U.S. Sentencing Commission to prescribe sentences for federal crimes, the Commission encountered a “philosophical problem” when it “attempted to reconcile the differing perceptions of the purposes of criminal punishment.” U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, at 4 (U.S. SENTENCING COMM’N 2018). To resolve the problem of differing punishment priorities, the Commission opted for an “empirical approach” focused on the factors that had informed “pre-guidelines sentencing practice,” as revealed in historical presentence reports, the elements of statutory criminal offenses, parole commission statistics, and other materials. *Id.* at 5-6. The Commission felt that this approach would reveal the considerations that “the community believes, or has found over time, to be important from either a just deserts or crime control perspective,” *id.* at 5, without having to articulate a philosophical justification for resulting punishment ranges. The Commission has issued informative policy statements and commentary to explain certain guidelines specifications. But since such statements and information are rarely conveyed to criminal offenders, they do little to communicate the reasons for guidelines punishments.

¹²⁷ KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 169 (1998); see also Erik Luna, *Gridland: An Allegorical Critique of Federal Sentencing*, 96 J. CRIM. L. & CRIMINOLOGY 25, 27 (2005).

¹²⁸ BIBAS, *supra* note 12, at 158.

scrutiny. Trial judges in such states not only lack a duty to explain guidelines sentences but also have an incentive to remain silent.¹²⁹

Some jurisdictions do more to clarify the purposes of criminal sanctions. The federal government,¹³⁰ as well as California¹³¹ and several other states, require judges to provide reasons for sentences. Yet even these jurisdictions make large exceptions. In California, for example, “[i]t is an adequate reason for a sentence . . . that the defendant, personally and by counsel, has expressed agreement that it be imposed and the prosecuting attorney has not expressed an objection to it.”¹³² In a system dominated by guilty pleas, this exception is significant. Defendants often plead guilty simply to avoid greater punishment, not because they know or accept any larger social purpose for their penalty.¹³³ And prosecutors may agree to a plea deal for reasons independent of the goals of criminal sentencing (such as to limit the visibility of an unpopular prosecution, or to avoid a drawn-out trial that could pain the victim’s family). The mere fact that the parties have agreed to a sentence gives little assurance that the purpose of the sanction is clear.

Allowing judges to impose agreed-upon sentences without explanation also creates a perverse incentive for judges to accept such sentences. If a judge accepts such a sentence, he need not justify his choice. If the judge selects his own sentence, however, he must give reasons for it, which takes time. Judges thus have a reason to sentence according to prosecutorial priorities, which may not coincide with statutory sentencing goals. While prosecutors often have legitimate public interests in mind, such as obtaining valuable information against another offender or saving taxpayer money on a trial, their motivations are sometimes more base, such as currying favor from special interests in a campaign for reelection.

Lack of comprehensive reason-giving rules thus contributes to confusion as to sentencing purposes and may create perverse incentives for judges not to

¹²⁹ See, e.g., *United States v. Dorvee*, 616 F.3d 174, 176, 178 (2d Cir. 2010) (vacating sentence and criticizing the district court for imposing the applicable guidelines term—the statutory maximum—based on the district judge’s expressed concern that the defendant would victimize children again).

¹³⁰ 18 U.S.C. § 3553(c) (2018).

¹³¹ CAL. PENAL CODE § 1170(c) (West 2020).

¹³² CAL. CT. R. 4.412(a), https://www.courts.ca.gov/cms/rules/index.cfm?title=four&linkid=rule4_412 [<https://perma.cc/V828-258G>] (last visited Nov. 16, 2020); see also *id.* advisory committee’s cmt. (a) (“[Subdivision (a)] is intended to relieve the court of an obligation to give reasons if the sentence or other disposition is one that the defendant has accepted and to which the prosecutor expresses no objection.”).

¹³³ See, e.g., ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* 40 (1981) (noting that “[t]he defendant may well understand . . . that the prosecutor used improper pressures. But he may not care. His only concern may be to get the charge and/or sentence reduced to tolerable levels And what he regards as tolerable may have little to do with the public interest in accuracy, deterrence, [or] correction” (footnote omitted)); see also *id.* at 34 (noting the reality that “bargains were struck which served the interests of prosecutor and defendant but which did not necessarily serve the ‘public’ interest”).

exercise independent sentencing judgement. Requiring reasons for all sentences would reduce these harms, but that is not enough. The law also must spell out what kind of “reasons” are required. Must judges convey only the key facts impacting a sentencing decision, or also the penological purposes (social goals) for a sanction? The difference can be significant, for facts that bear on a sentence may not explain why the judge has chosen to punish the defendant in a particular way. Consider as an example the situation in *Commonwealth v. Hill*.¹³⁴ In that case, the sentencing court “stated on the record that the court’s basis for sentencing as it did was the fact that the crime was committed with a deadly weapon, in addition to a consideration of the presentence report.”¹³⁵ The appellate court found these “reasons” adequate to explain the sentence.¹³⁶ But what did the sentencing judge communicate to Hill, the defendant? Why did the weapon justify more punishment? Did it make Hill more culpable and deserving of punishment (retribution)? Did the judge see a greater need to deter armed crimes (deterrence)? Or did the gun reveal Hill to be a danger to society in need of restraint (incapacitation)? The judge did not answer these questions; he merely mentioned the weapon without connecting it to any aim of punishment.¹³⁷ Meaningful explanation requires not only discussion of facts but also of the social goals of punishment.¹³⁸

Appellate courts currently do little to encourage fulsome explanation. The Colorado Supreme Court, for example, advises that a sentencing “statement of reasons need not be lengthy, but should include the primary factual considerations bearing on the judge’s sentencing decision.”¹³⁹ Similarly, the U.S. Supreme Court has stated that “the sentencing judge need only ‘set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking

¹³⁴ 629 A.2d 949, 953 (Pa. Super. Ct. 1993).

¹³⁵ *Id.* at 953.

¹³⁶ *Id.*

¹³⁷ His mention of the presentence report did not ensure that he had duly considered the legitimate goals of punishment. As the writers of a criminal law handbook have noted, “Judges typically don’t have time to investigate the circumstances of individual cases, so they usually rely heavily on—and often rubber-stamp—sentencing recommendations in presentence reports.” BERGMAN & BERMAN, *supra* note 13, at 487.

¹³⁸ Facts can suffice for a finding of guilt where the only issue is whether someone committed the crime. Facts do not suffice to explain a sentence, however, for sentencing requires moral judgments. Even the consequentialist reasons for punishment—incapacitation, deterrence, and rehabilitation—require moral judgments as well as prediction. Sentences based on incapacitation implicate normative choices about how much risk of harm society is willing to tolerate. Sentences based on general deterrence require moral judgments about what to do when the precise amount of punishment needed to deter is incalculable (even if a precise amount exists in theory). Sentences based on rehabilitation require judgments about what kind of future change is worth making an offender suffer for.

¹³⁹ *People v. Watkins*, 613 P.2d 633, 637 (Colo. 1980) (en banc). For this reason, even jurisdictions with reasoning requirements often fall short. *See, e.g., id.* (requiring only that a judge reiterate the relevant factual issues he took into account, rather than requiring that he give a detailed explanation including policy considerations).

authority.”¹⁴⁰ Even when the sentencing judge simply says that the sentence is “appropriate,” that can be enough for appellate review.¹⁴¹

Perhaps appellate courts condone such limited explanation because they consider it sufficient for purposes of appellate review. That would be unfortunate and myopic. While appellate review is a valid reason to explain sanctions, it is not the only one. Reasoned explanation of sentences also affirms human dignity and fosters reasoned punishment choices. The amount of explanation needed for appellate review may be insufficient to reveal to an offender the purpose of his suffering or to ensure that his sentence is based on fair and deliberate pursuit of social goals.

B. *Legislative Silence as to Penalty Purposes*

In some cases, confusion as to sentencing purposes arises from a nonjudicial source. While judges bear the official duty to select and impose most sentences, legislatures sometimes dictate sentencing outcomes by attaching mandatory penalties to crimes. Such mandatory punishments can be difficult for judges to explain. After all, judges have no discretion to avoid fixed penalties and have little reason to deliberate about the social objectives that such penalties are meant to serve. Their reason for imposing mandatory sentences is simply that the law requires them.

Knowing that a penalty is mandatory, however, gives an offender no insight into the point of his suffering. That is not because mandatory penalties are necessarily pointless. A legislature might enact a mandatory penalty to deter the commission of a particular type of offense.¹⁴² Or it might set a fixed penalty for offenders who seem particularly dangerous and in need of lengthy incapacitation. Legislatures might have other reasons for mandatory laws as well. Unless legislatures state those aims, however, such sentences may seem needlessly and aimlessly cruel.¹⁴³

C. *Plea Bargains that Influence Sentencing Outcomes*

Plea bargains now account for more than 95% of criminal convictions and heavily influence sentencing outcomes.¹⁴⁴ Under a plea bargain, a defendant

¹⁴⁰ *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1964 (2018) (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)).

¹⁴¹ *Id.* at 1969 (quoting *Rita*, 551 U.S. at 357-58); *accord id.* at 1963-64.

¹⁴² *See, e.g., United States v. Kupa*, 976 F. Supp. 2d 417, 425 (E.D.N.Y. 2013) (“It was thought at the time that requiring lenient judges to impose jail terms would ‘dry up the traffic’ in narcotics.” (quoting 97 CONG. REC. 8198 (1951) (statement of Harry J. Anslinger, Comm’r, Federal Bureau of Narcotics))).

¹⁴³ Sometimes, judges go further and decry the sentences they must impose. While sentencing several defendants, then-Judge John Gleeson condemned the “ultra-harsh, enhanced mandatory sentences” he imposed and stated that “*no one*—not even the prosecutors” thought they were appropriate or deserved. *Id.* at 420. Such judicial comments may offer useful feedback to the legislature but increase the likelihood that a defendant will see no legitimate purpose in his penalty.

¹⁴⁴ RICHARD L. LIPPKE, *THE ETHICS OF PLEA BARGAINING* 1 (2011).

usually pleads guilty to obtain some concession by the state, such as dismissal or reduction of charges (“charge bargaining”), recommendation of a particular sentence (“sentence bargaining”), or negotiated description of the relevant facts (“fact bargaining”).¹⁴⁵ For decades, critics of plea bargaining have argued that plea deals deplete the adjudication process of moral valence, cede too much power over punishment to prosecutors, and coerce innocent defendants into accepting guilt and punishment.¹⁴⁶ Plea bargaining advocates defend it on grounds of greater efficiency, better decision-making, and more lenient punishment outcomes. Neither side of the debate has focused on how plea bargaining affects the explanation of sanctions. A closer look reveals that plea bargaining significantly contributes to confusion as to sentencing purposes.

Plea bargaining shifts scrutiny of a crime and the criminal out of an open courtroom and into a back room of a prosecutor’s office. Prosecutors, not judges, enjoy the primary power to decide what charges and sentences are appropriate. Judges can find it difficult to fully evaluate the reasons for and against punishment in cases where the presentation of facts and law has been preordained or limited by party negotiation. They can ask the parties for additional information, but facing their own time constraints, and perhaps trusting prosecutorial judgment, many judges simply accept and impose party-proposed sentences.

Consider as a typical example a sentencing proceeding in which a Florida county judge faced three defendants who had pleaded guilty under plea agreements. The judge imposed the sentences proposed in the plea deals without any explanation of their propriety or purpose.¹⁴⁷ One could not tell if she lacked information to say more, did not want to take time to say more, or had simply deferred to the prosecutor. In many jurisdictions, sentencing law allows judges

¹⁴⁵ For simplicity’s sake, this description describes three common types of concessions. As a practical matter, “all manner of things are sometimes made the subject of plea agreements.” *Id.* at 8. Prosecutors may, for example, agree not to charge a defendant’s relative if he pleads guilty. *See, e.g.,* *United States v. Pollard*, 959 F.2d 1011, 1015 (D.C. Cir. 1992) (affirming the district court’s rejection of a constitutional challenge to a guilty plea obtained after “the government refused to enter into a plea agreement with [Pollard’s wife] unless he pleaded guilty as well”).

¹⁴⁶ Most importantly, plea bargaining supplants the criminal trial, which the late Harvard Law professor Bill Stuntz famously described as an expressive “morality play[] . . . designed for sending messages, both about the system’s care not to punish the undeserving and about the deserved nature of the punishment the system imposes.” William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1882 (2000); *accord* BIBAS, *supra* note 12, at 70 (describing, and lauding, trials as “morality plays”). A defendant who is sentenced after a negotiated guilty plea has not been forced to meditate in this public and methodical way on society’s interest in responding to the harm he has done and in seeing him held responsible for it.

¹⁴⁷ These sentencings took place on the morning of August 8, 2019, in the Thirteenth Judicial District in Hillsborough County, Florida. The judge simply noted that the sentences were agreed to by the parties. Notes from this hearing, compiled in person by research assistant Katie Takeuchi, are on file with the author. The author has kept the sentencing judge anonymous in order to avoid the impression that this judge deserves criticism more than the many others who omit sentencing explanation.

to enter agreed-upon sentences without explaining them—perhaps because appellate courts rarely review negotiated sentences.¹⁴⁸ This approach leaves offenders and observers without assurance that the penalties serve legitimate punishment aims.

The entire bargaining process, moreover, may call into question the state's commitment to any particular punishment objectives. For example, a prosecutor might state that a negotiated sentence that involves a substantial sentencing reduction reflects the seriousness of the defendant's crime and his danger to society. Does this mean that the prosecutor was ready, if the deal were rejected, to pursue what he himself saw as an excessive punishment?¹⁴⁹ Of course, if the state has a weak case, it may simply prefer some punishment over no punishment. That approach does not mean that the government has sacrificed legitimate penal objectives. If the state has a strong case, however, it is harder to see how a plea deal advances goals of punishment. Such a deal is more likely designed to save time and costs¹⁵⁰—"to avoid trial," as a Department of Justice website explains.¹⁵¹ At least some purposes of punishment may be compromised to obtain those practical benefits, though the resulting punishment may still serve legitimate objectives.

Sometimes, plea bargaining creates the impression of arbitrariness, even if the resulting sentence is well reasoned. Pragmatic considerations like saving costs may lead a prosecutor to shift his focus from certain punishment goals to other valid objectives. For example, in an assault case, a relatively short sentence might be sufficient for the purpose of retribution, but a longer sentence might be needed to incapacitate. Or the opposite could be true. Imagine the case of a woman who murdered her mother after years of family enmity but who bore no belligerence or risk of violence toward anyone else. If convicted of murder, a judge might impose a life sentence after trial as a reflection of the gravity of her offense, but a prosecutor might agree to a plea bargain for manslaughter with a maximum sentence of ten years in prison on the theory that she could be rehabilitated. The outcomes would be different, but each would serve a legitimate punishment purpose—retribution, on the one hand; rehabilitation, on

¹⁴⁸ Many plea bargains entail explicit waiver of most sentencing challenges. *See, e.g.*, Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C.L. REV. 871, 878-79 (2010).

¹⁴⁹ *See* Norman L. Reimer & Martín Antonio Sabelli, *The Tyranny of the Trial Penalty: The Consensus that Coercive Plea Practices Must End*, 31 FED. SENT'G REP. 215, 215 (2019) ("The process is simple . . . : the prosecutor conveys a settlement offer to the defense attorney . . . threatening a post-trial sentence much greater than the pre-trial offer.").

¹⁵⁰ *See, e.g.*, *United States v. Walker*, 423 F. Supp. 3d 281, 297 (S.D.W. Va. 2017) ("Here, the [proposed plea] agreement trades a grand jury indictment charging three counts of distributing heroin, two counts of distributing fentanyl, and one count of being a felon in possession of a firearm for an information charging one count of distributing heroin. The principal motivation appears to be convenience."), *aff'd*, 922 F.3d 239, 251 (4th Cir. 2019).

¹⁵¹ *Plea Bargaining*, U.S. DEP'T JUST., <https://www.justice.gov/usao/justice-101/pleabargaining> [<https://perma.cc/JCN8-P7XM>] (last visited Nov. 16, 2020).

the other.¹⁵² This suggests that the disparity between plea-bargained outcomes and trial outcomes may sometimes be defensible.

All of this reveals that explaining sentences in plea-bargained cases may be *especially* crucial to avoid the perception of arbitrary or aimless sanctions. Negotiated sentences can serve legitimate purposes, even if they are also influenced by pragmatic and budgetary concerns. It is ironic and perverse that current sentencing rules often permit judges to impose party-proposed sentences without giving any reasons—even in jurisdictions that generally require reasons for punishment choices.¹⁵³

III. COMMUNICATIVE REFORMS

This Article now proposes reforms to make explanation a core part of criminal sentencing. While some changes must be carried out by sentencing judges, legislatures, prosecutors, defense attorneys, and corrections officials also have key roles to play. Three types of reform hold particular promise. The first is to require judges to explain the social purposes for every sentence and to do so in lay terms. This rule should extend even to sentencing decisions based on plea deals and sentences that may not be appealed. The second is to require prosecutors to describe how sentences resulting from plea deals advance specific statutory sentencing objectives. Judges can refuse to consider plea deals unless prosecutors provide a meaningful explanation. The third is for legislatures to clarify their punishment objectives. Lawmakers can include statements of purpose for mandatory penalties, for example, which would help judges explain such sentences.¹⁵⁴ Later on, defense attorneys and corrections officials can help offenders understand the rationales that sentencing judges have provided.

A. *Cultivating Norms of Judicial Explanation*

The law tasks judges with the duty to formulate sentences and impose them in person upon criminal offenders. What, then, should judges say? Meaningful sentencing explanation requires communication in lay terms directly to the

¹⁵² This approach cannot be taken if one must prioritize one particular punishment goal. Considering the situation in retributive terms, for example, Professor Christopher Slobogin has explained: “Perhaps the sentence proffered by the bargaining prosecutor is retributively appropriate, perhaps the sentence that can be imposed at trial is, or perhaps neither is. The important point is that, at best, only one of these sentences can reflect a defendant’s true desert.” Christopher Slobogin, *Plea Bargaining and the Substantive and Procedural Goals of Criminal Justice: From Retribution and Adversarialism to Preventive Justice and Hybrid-Inquisitorialism*, 57 WM. & MARY L. REV. 1505, 1510 (2016).

¹⁵³ See *supra* notes 131-33 and accompanying text.

¹⁵⁴ In the absence of such statement, some judges at least emphasize that the penalty was enacted by the legislature and therefore is democratically legitimate. A judge on Eighteenth Judicial Circuit in DuPage County, Illinois, for example, advised the author that he takes this approach. E-mail from Judge, Eighteenth Judicial Circuit Court, to author (Aug. 29, 2019, 9:27 PM) (on file with author) (relaying that, when giving the defendant a statutorily mandated sentence, he explains that the sentence comes from “others who have a legitimate source of power derived ultimately from the people”).

criminal defendant who will suffer the sanction. The explanation should address three interrelated subjects: (1) the relevant legal rules (including applicable penalties and sentencing purposes), (2) the key facts considered in sentencing, and (3) the social objectives a sentence is meant to serve. Part II described how current law often permits judges to address only perfunctorily the first two subjects (relevant law and facts) and to omit entirely the third subject (social objectives of a sentence). Sentencing rules should be changed to require judges—or at least strongly encourage them—to explain the relevant law and facts that they have taken into account in sentencing defendants.

A real difficulty, however, lies in getting judges to do this in terms that defendants can understand. Particularly when a judge is calculating a sentence under complex sentencing guidelines, an offender can become easily confused (as can members of the public and sometimes even the judge himself).¹⁵⁵ Nonetheless, judges must try, and many judges already do try,¹⁵⁶ to make even guidelines sentences understandable. In this regard, a judge's tone and manner of addressing a defendant can have a powerful effect on an offender's understanding and willingness to listen. In particular, offenders are more likely to listen and respect the judge's decision if the judge makes clear that he has considered the defendant's perspective. "Social psychology studies have found the perception that the decision maker has given 'due consideration' to the 'respondent's views and arguments' is crucial to individuals' acceptance of both the decision and the authority of the institution that imposes the decision."¹⁵⁷ When a judge acknowledges the defendant's concerns and arguments—such as his evidence of mitigating factors—it opens a communication pathway and encourages the defendant to trust, or at least listen to, the judge's sentencing explanation.¹⁵⁸ Many judges naturally do this. For others, it may not come so easily. Basic training in psychology and communication may help. If communication matters, and such skills can be learned, then judges should be selected with an eye to such skills and should be helped to acquire and hone these skills upon joining the bench.

The third aspect of meaningful sentencing explanation—discussion of sentencing objectives—may be the most complicated. Balancing competing punishment objectives can be difficult. Indeed, trial judges often describe sentencing as their most difficult task. The point here is not to demand that judges conduct some new, complex kind of inquiry. Rather, the goal is to persuade judges to articulate and describe what they already must consider and evaluate when sentencing defendants.

Admittedly, clarifying the connection between a given sentence and the goals of punishment can be difficult, even when a judge thinks through all relevant

¹⁵⁵ See BIBAS, *supra* note 12, at 158 (criticizing the "mathematical gobbledygook" of the federal guidelines sentencing process).

¹⁵⁶ See E-mail from Judge, *supra* note 154.

¹⁵⁷ Cohen, *supra* note 111, at 506 (citing E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 80-81, 104-06 (Melvin J. Lerner ed., 1988)).

¹⁵⁸ See *id.*

considerations and believes he has chosen a just sentence. There is no perfect formula to explaining a criminal sentence, given the breadth of circumstances and moral considerations across cases. That said, this Section offers some general guideposts that may help.

Most importantly, judges should explain sentencing in terms of the social objectives approved by the legislature. Under the principle of legality, the legislature has sole power to authorize punishment for crimes, and virtually all legislatures have used that authority not only to set forth criminal penalties but also to prescribe certain purposes of punishment.¹⁵⁹ These often include retribution, deterrence, rehabilitation, and incapacitation, though legislatures often describe other goals as well.¹⁶⁰

For example, consider a jurisdiction that requires punishment to serve a retributive purpose and be proportioned to culpability. Sentencing judges then should explain sentences in terms of the culpability of offenders and the gravity of their crimes. Often, however, legislatures instruct judges to consider conflicting sentencing purposes.¹⁶¹ In such situations, judges should explain how they balanced the conflicting objectives. Suppose, for example, that a convicted offender is mentally ill but not sick enough to have been excused for his crime. In a jurisdiction that embraces the four primary purposes of punishment (retribution, deterrence, incapacitation, and rehabilitation), the sentencing judge must decide whether the defendant's mental illness should affect his sentence. The judge may decide to focus on retribution and may conclude that the defendant's mental illness reduces his culpability and desert. Alternatively, the judge may choose to focus on protecting public safety and may select a lengthy sentence to incapacitate the mentally unstable defendant. Whatever the judge decides, he should explain how the sanction serves statutory sentencing goals.

Facts can be critical to sentencing explanation. Sometimes, a single fact justifies a longer sentence to serve one aim of punishment but warrants a shorter sentence to serve a different goal. For example, consider a man convicted of child molestation who was himself sexually abused as a child. Since "evidence

¹⁵⁹ Under U.S. law,

traditional deference to legislative policy choices finds a corollary in the principle that the Constitution 'does not mandate adoption of any one penological theory.' A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation. Some or all of these justifications may play a role in a State's sentencing scheme. Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.

Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) (citation omitted) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

¹⁶⁰ See, e.g., CAL. PENAL CODE § 1170(a)(1) (West 2020) (describing "the purpose of sentencing" as "public safety achieved through punishment, rehabilitation, and restorative justice"); MONT. CODE ANN. § 46-18-101(2)(c) (2019) (describing the correctional and sentencing policy of Montana to include "provid[ing] restitution, reparation, and restoration to the victim of the offense"); OKLA. STAT. tit. 22, § 1514(4) (2020) (describing also "[r]estitution and reparation" as goals of the state's criminal justice and corrections systems).

¹⁶¹ See, e.g., *supra* note 126.

that being a victim of child molestation is highly correlated with becoming a child molester,”¹⁶² a judge might decide to impose a steep punishment to protect children in the future. As Judge Posner once wrote:

The more difficult it is for a person to resist a desire for sexual contact with children, the more likely he is to recidivate, and this is an argument for a longer prison sentence. And on grounds of deterrence as well as incapacitation, for the stronger the impulse to commit a criminal act, the greater must be the threat of punishment in order to deter it.¹⁶³

Yet the judge might also feel that the offender is not entirely to blame for his crime; after all, his own victimization predisposed him to molest others. The judge might therefore decide to impose a more lenient sentence.¹⁶⁴ Because the facts and law rarely dictate a single, best answer, the judge’s reasoned explanation will be critical to understanding his ultimate decision.

Sometimes, desert and utilitarian considerations are not the primary focus of a sentencing court. Specialized courts, such as drug courts, often aim to heal and restore the offender, victim, and community.¹⁶⁵ In Canada, the court system has special sentencing rules for Aboriginal offenders that focus on the cultural history of Aboriginal communities and the overrepresentation of Aboriginal offenders in Canadian prisons.¹⁶⁶ Canadian law requires judges to give reasons for their sentencing decisions,¹⁶⁷ and in Aboriginal cases, these reasons are focused on the main goal of reintegrating the offender within his community.¹⁶⁸

¹⁶² *United States v. Beier*, 490 F.3d 572, 574 (7th Cir. 2007).

¹⁶³ *Id.*

¹⁶⁴ These considerations suggest that legislatures might be wise to craft any threshold requirements of retribution or desert to be read only as statements that punishment may not exceed what the actus reus and mens rea objectively merit and not to suggest that punishment not exceed what the individual defendant merits based on his intelligence, tendencies, circumstances, or the like—unless, of course, the defendant successfully pleads the equivalent of an insanity defense. This may be necessary to solve the problem noted by Judge Posner—that those who most need deterrence or incapacitation may not be punished enough if their culpability is deemed to be limited by their personality structure. *See id.*

¹⁶⁵ *See, e.g., What Are Drug Courts?*, NAT’L DRUG CT. RES. CTR., <https://ndcrc.org/what-are-drug-courts/> [<https://perma.cc/4H3C-GNYH>] (last visited Nov. 16, 2020). For a description of the goals of restorative justice, see generally Luna, *supra* note 64.

¹⁶⁶ Canada Criminal Code, R.S.C. 1985, c C-46 § 718.2(e). *See generally* Wayne K. Gorman, *The Sentencing of Indigenous Offenders in Canada*, 54 CT. REV. 52 (2018).

¹⁶⁷ Canada Criminal Code, R.S.C. 1985, c C-46 § 726.2 (“When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.”).

¹⁶⁸ *See* Canada Criminal Code, R.S.C. 1985, c C-46 § 718.2(e) (“[A]ll available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”); *R. v. Gladue*, [1999] 1 S.C.R. 688, 690 (Can.) (“Section 718.2(e) directs judges to undertake the sentencing of such offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider: (a) the unique

In such cases, a judge may explain a lenient sentence in terms of its restorative value while expressly subordinating traditional punishment objectives, such as incapacitation or deterrence. Consider, for example, these excerpts from a judge's sentencing explanation in such a case:

One important thing I must consider is the past injustices done to the Aboriginal peoples in this country. How that has affected the present. How that has affected [the defendant,] Mr. Armitage. I must also consider the present problem of the over-incarceration of Aboriginal offenders.

I emphasize that being Aboriginal does not mean that jail can be avoided when jail is required. It does mean that I must consider all other reasonable options before imposing it.

Given the pre-trial custody, Mr. Armitage has done jail for these offences. I have concluded that further real jail is not required. I decided this not because he should be treated with mercy. I cannot give him mercy given his past criminal record and how he has behaved while out of custody. A sentence must deter Mr. Armitage. More custody is required for that although he has pleaded guilty to all these charges.

I have come to this conclusion but also have come to the conclusion that this jail can be served in the community. There will be a conditional sentence order. . . . I know there will be some who will say that given all the times he has failed to respect court orders, that this conditional sentence is wrong. The people who say this might well be right. However, while I cannot give this Aboriginal offender mercy or leniency, I can give Mr. Armitage a chance. Some will also criticize that Mr. Armitage has had many chances. And that he has failed each time. I agree with such criticism. But I believe what we must do in order to be a part of the solution rather than the problem, is to not stop offering a chance to an offender when it is the right thing to do. This is the best way to be a part of the solution. This is also the best way to protect the community and maintain respect for our criminal justice system.

. . . .

I have given serious thought to restorative justice principles. I had thought that Mr. Armitage may be the right case for a sentencing circle [i.e., an effort to use dialogue among the victim, defendant, and affected community parties to reach an agreed-upon sentence]. He does not seem to understand the harm of his actions. He does not seem to care how his actions affect others or the community. He does not seem to want to

systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.”). This identity-specific approach to sentencing contrasts with sentencing rules applicable in many American courts. *See, e.g.*, MONT. CODE ANN. § 46-18-101(3)(c) (2019) (stating that the state’s “[s]entencing practices must be neutral with respect to the offender’s race, gender, religion, national origin, or social or economic status”). This could conflict with U.S. constitutional norms. *See, e.g.*, U.S. CONST. amend. XIV, § 1.

connect to the Aboriginal community, the Dokis nation, that defines a part of his identity. I felt that maybe this type of circle sentencing, if done right, could reach him. Could touch him in the right way. Put him on the path to health. But . . . such a process could not be put in place for Mr. Armitage in a timely way.

Like everyone else, Aboriginal offenders have a right to justice in their sentence. But justice does not always have to be delivered with a hard sharp edge. Too often in the past, Aboriginal offenders have only felt the steel when something softer could achieve the goals of sentencing. It is with this in mind that I have decided to order a jail sentence but one that can be served in the community.

. . . .

There is a post-script to my decision. Mr. Armitage did not make it to his first attendance with me after his sentence. Within days he was again arrested for doing very much the same thing he has always done.

. . . .

. . . [W]hen he came back before me on his conditional sentence breach[,] Mr. Armitage asked that 9 months of the remainder of his conditional sentence order be served in jail. . . . He asked for this because he wanted to be sure he had enough time in custody to fully make use of the [treatment] available. This was not something that came from me or the Crown. . . . This will be by far the longest jail term he will have done to date. To be frank, I would have considered something less.¹⁶⁹

One notable aspect of this sentencing explanation was its candor and clarity. Indeed, the judge self-consciously avoided “legalese.” He explained: “As lawyers first and then judges, we get used to using words that are long and complicated. This only muddies the message we are trying to say. That message is very important when it comes to passing a sentence on an offender.”¹⁷⁰ Such clarity of explanation is essential for a lay defendant to gain meaningful insight into the purpose of his sanction, whether its aim is restorative justice, or a more traditional aim of punishment, such as retribution or deterrence.

Admittedly, judges sometimes may find it difficult to explain punishment objectives in ways defendants will understand. They may struggle to translate theoretical aims of punishment, such as retribution, into lay terms. Yet judges are already required to consider punishment theories in sentencing. If judges cannot explain how they address these considerations, society gains no assurance that the sentencing process is legitimate and rational. If judges lack philosophical education, states can provide them with enough philosophical and practical training in how to address the various sentencing rationales.¹⁷¹ Some

¹⁶⁹ *R. v. Armitage*, 2015 CanLII 64, para. 58-70 (Can. Ont. C.J.).

¹⁷⁰ *Id.*, at para 2.

¹⁷¹ Capable sentencing requires familiarity with penal philosophy as well as prudence and experience. See Luther W. Youngdahl, *Remarks Opening the Sentencing Institute Program*,

jurisdictions currently allow judges to begin sentencing defendants before receiving any formal education in sentencing procedures or the substantive goals of the law.¹⁷² Judges will find it easier to clearly explain punishment purposes if they are versed in punishment theory and familiar with the kinds of evidence relevant to assessing sentencing objectives (such as clinical and actuarial methods of predicting dangerousness).¹⁷³

Some may argue that philosophical and practical training still will not be enough to enable judges to explain sentencing decisions to offenders. This is a particular concern for retributive punishments. How can one explain what punishment is “deserved”? Only the rigid equivalence of eye-for-an-eye justice would suppose a fixed answer—one too debasing to accept today, for it would require rape of a rapist and torture of a torturer. All other punishments are at best inexact and even incommensurate approximations of desert: prison time for rape, probation for theft, criminal fines for unlawful hunting. No retributive scholar contends that the precise measure of retributive punishment is easy to determine or easy to explain. Some see this as an intrinsic flaw in retributive theory. German legal scholar Thomas Weigend argues that a retributive sentencing system is therefore “anchored in irrationality.”¹⁷⁴

And yet retributive punishments can be explained, at least in relative terms. Criminal law scholar Paul Robinson discovered remarkable agreement among members of the public regarding the relative severity of offenses.¹⁷⁵ His empirical studies suggest that an *ordinal* ranking of desert according to the severity of various crimes is feasible once one sets a particular starting point.

35 F.R.D. 387, 391 (1964) (“The experienced judge is already aware that he needs all the help he can get in carrying out his sentencing responsibilities. The new judge develops the same awareness within a short time. Some of the new judges I have known have admitted frankly that they were badly confused when it came time to take up their sentencing duties. Others seemed to be pretty cocksure that they knew what to do in each case, but this sureness didn’t last long.”); *id.* (advocating for training for new judges to give them “the opportunity and the time [they] need[] to make a concentrated study of sentencing philosophy and practice”).

¹⁷² A county judge chosen to fill a vacancy on the bench in 2019 recounted to the author that he had been sentencing defendants for months and had not yet attended the mandatory sentencing training for new judges because it is scheduled only once a year. E-mail from Judge, Eighteenth Judicial Circuit Court, to author (Aug. 29, 2019, 7:11 PM) (on file with author).

¹⁷³ Judge Kozinski once warned, “Woe be us when . . . trust in the judiciary is lost. If the public should become convinced—as many academicians apparently are—that judges are reaching results not based on principle but to serve a political agenda, unpopular decisions will become not merely points of dissatisfaction but the impetus for far-reaching changes that will affect our way of life for years to come, perhaps permanently.”

Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 998 (1993).

¹⁷⁴ Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37, 72 (1983).

¹⁷⁵ See generally Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

Weigend concedes that “[o]nce that inevitably arbitrary choice has been made . . . setting commensurate sentences can be done with some accuracy.”¹⁷⁶

Under current law, moreover, statutory or guidelines sentencing maxima and minima might be understood to represent the potential range of retributive desert. (Legislatures and sentencing commissions should try to make such considerations explicit.) Within a sentencing range, then, a judge would assess the culpability of an offender in comparison to other perpetrators of the same crime to determine the appropriate sentence within the spectrum of potential retributive punishment. Judges could discuss and debate their comparative assessments of desert with one another—as some already do.¹⁷⁷ (Indeed, they could also discuss whether their sentences serve other sentencing purposes.¹⁷⁸) Such evaluation and discussion could make it easier for judges to explain even retributive sentences.

Some may object that judicial explanation of sentencing purposes will be inefficient. It is true that explaining punishment choices by reference to social goals may take time, both on the front end (in deciding what sanction is appropriate in light of the competing social goals) and on the back end (in finding words that will convey the decision clearly to the criminal offender). But the time required for this deliberative and communicative process will humanize offenders and foster more reasoned, more balanced, and fairer sentences. It will help judges acknowledge all relevant social concerns and avoid the taint of implicit bias. A central goal of this Article has been to leave little doubt that reason giving in this context normally outweighs its costs.

In other contexts, efficiency often gives way to higher goals of the law. Courts must give reasons, for example, when they order a defendant to be held without bail.¹⁷⁹ Society already has decided that the choice to take away liberty is too serious, the harms of error too great, and the cost of confusion too high to allow judges to remain silent.¹⁸⁰ Explanation of criminal sentences—particularly those

¹⁷⁶ See Weigend, *supra* note 174, at 72.

¹⁷⁷ A county judge in Illinois has explained to the author that judges on his state court meet frequently to discuss their cases and the sentences they plan to impose in them. These discussions provide judges with feedback and help in crafting appropriate punishments, particularly when judges are new to the bench.

¹⁷⁸ This problem is not quite as severe in solely retributive regimes. In such regimes, a sentence necessarily reflects desert, and one could take the mean or median sentence to establish an anchor based on prevailing attitudes among judges. (This is not to suggest this anchor point reflects any reasoned analysis.) When judges sentence for not only retributive reasons but also utilitarian ones, it is more difficult to establish an “anchor” apart from the sentencing minimum or maximum.

¹⁷⁹ See, e.g., Cassidy & Ullmann, *supra* note 89, at 82 (“Massachusetts judges are required to give reasons on the record for many of their most significant decisions, including holding a defendant without bail based on dangerousness grounds . . .”).

¹⁸⁰ It bears mention that some jurisdictions do a better job requiring and providing reasons than others. A federal judge sometimes will provide “extensive explanation of his reasoning,” e.g., *United States v. Pena*, 767 F. App’x 48, 50 n.3 (2d Cir. 2019), but not always. The Supreme Court has ruled that “when it comes to how detailed that statement of reasons must

requiring prison—would seem to present even greater dangers. The importance of mitigating those dangers would seem to outweigh the value of efficiency gains.

Appellate courts, moreover, can provide supervisory guidance to facilitate efficient sentencing explanation by trial courts. They might decide to publish sentencing-rationale forms (federal courts have an official statement-of-reasons form, for example¹⁸¹) or checklists describing the purposes of punishment, with space for judges to describe in their own words the reasons for sentences. These are just some of the possibilities. Determining the best method for communicating punishment rationales will require practice and study and will be context dependent. At this point, it is most crucial that courts simply take some reasoned first step toward meaningful communication.

This still leaves at least two potential objections. One relates to sentencing disparities. Communicating punishment rationales may expose variations in the ways that judges think about the purposes of punishment. One judge might prioritize retribution; another might focus on utilitarian concerns of deterrence and incapacitation. Judges might be affected in different ways by the mitigating and aggravating factors in individual cases, and their explanations might reveal inconsistencies in their responses. In a liberal democracy where people hold vastly different conceptions of what punishments are deserved and sensible, one cannot expect consensus on the appropriate quantum of punishment or purpose for a criminal sanction. It is better to ensure that judges choose sentences deliberately and carefully, with express connection to legitimate goals, than to have judges punish uniformly for reasons they may not fully understand or be able to explain.¹⁸²

The other objection relates to incentives. Trial courts may be unwilling to explain their sentencing rationales if they worry that thorough and candid reason giving will draw appellate scrutiny.¹⁸³ Indeed, the Utah Supreme Court has explained that “when the district court provides detailed explanations for the sentence it imposes,” an appellate court will “analyze whether the district court

be, ‘[t]he law leaves much . . . to the judge’s own professional judgment.’ The explanation need not be lengthy, especially where ‘a matter is . . . conceptually simple . . . and the record makes clear that the sentencing judge considered the evidence and arguments.’” *Chavez-Meza v. United States*, 138 S. Ct. 1959, 1961 (2018) (alterations in original) (citation omitted) (quoting *Rita v. United States*, 551 U.S. 338, 356, 359 (2007)).

¹⁸¹ That statement of reasons probably would not be sufficient to provide the kind of communication argued for in this Article, but with certain amendments, it could provide a useful model.

¹⁸² *Cf.* STITH & CABRANES, *supra* note 127, at 172 (“This should be our foremost goal—the avoidance of sentences that are arbitrary, unreasonable, or inexplicable *in context*, not the achievement of national uniformities devised by persons deliberately alien to the case at hand.”).

¹⁸³ Cassidy & Ullmann, *supra* note 89, at 82 (noting that one “reason frequently offered by judges for not publicly announcing the reasons for their sentences is that the net effect of this process will be wasted judicial resources on meritless appeals in which the failure to mention one valid reason for sentencing, or taking out of context one phrase uttered by the judge, will invalidate the sentence”).

appropriately weighed certain factors”; on the other hand, “[i]f the district court does not give detailed explanations for its sentence,”¹⁸⁴ an appellate court will “presume that the district court made all the necessary considerations when making a sentencing decision.”¹⁸⁵ In other words, if a judge remains silent, the appellate court will “presume that the judge gave those factors the appropriate weight.”¹⁸⁶ If the judge explains himself, he will be scrutinized.

The disincentive to provide explanation caused by appellate review can be mitigated in several ways. A highly deferential standard of review is one option. The reasons given by the trial judge could be accepted as long as they fall within the range of rational or reasonable approaches in light of legitimate sentencing purposes. Factual errors affecting the sentence could be subject to correction in the event of clear error, while judgments about how much, and which, penal goals should influence a sentence would be accepted unless clearly unreasonable or in direct conflict with statutory sentencing purposes. (Thus, for example, if a jurisdiction makes deserved retribution an upper limit in sentencing, then a judge who states that he would have imposed a lower sentence based on the gravity of the crime but has concluded that he needs to impose a higher sentence to protect the community from the offender’s likely recidivism would face reversal on appeal.) In other words, sentencing determinations could stand as long as they are reasonable and consistent with statutory punishment purposes, even if appellate judges would choose otherwise.¹⁸⁷

A different way to encourage reason giving despite appellate review would be for the reviewing court to consider only the ultimate sentence but not to review the reasons given by the trial judge (except as relevant to a claim such as unconstitutional racial discrimination¹⁸⁸). This would make the trial court’s reasons virtually irrelevant to appellate review, quite the opposite of many rules in place today (which use reasons to facilitate appellate review). Appellate courts could still protect against extreme leniency or severity in the ultimate sentence itself while removing the incentive for trial courts to remain silent to avoid reversal. And trial courts would still have cause to carefully consider and explain the purposes of sentences in order to avoid actual or apparent inconsistency or arbitrariness. The downside to this approach would be that legally invalid considerations by a trial court (except race and other protected factors) could not be challenged as long as the ultimate sentence was substantively reasonable. In

¹⁸⁴ *State v. Moa*, 282 P.3d 985, 996 n.65 (Utah 2012).

¹⁸⁵ *Id.* at 995.

¹⁸⁶ *Id.* at 996 n.65.

¹⁸⁷ Such a deferential approach arguably should not extend to factual errors affecting a sentence. However, exacting scrutiny of factual errors might lead judges to keep such facts hidden; on balance, it may be better to set a high standard for correction of factual errors as well (such as a clear error standard), so as to promote communication while allowing for the correction of the most egregious and obvious factual mistakes.

¹⁸⁸ Evidence of racial bias is now a basis to challenge the fairness of jury deliberations. *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 871 (2017) (remanding case to determine whether racial bias tainted verdict).

the end, this approach would be an imperfect, but not unreasonable, compromise between the value of communication and the protections of appellate review.¹⁸⁹

A third approach would be for appellate courts to conduct only procedural review. Procedural review would focus on whether the sentencing judge considered improper evidence, made factual errors, or failed to explain how mandatory sentencing considerations affected the outcome. The sentence would be procedurally acceptable as long as the sentencing judge did not consider prohibited goals, inadmissible evidence, or erroneous assertions of facts, and did not rely on judge-found facts in conflict with the defendant's jury right under *Apprendi v. New Jersey*¹⁹⁰ and its progeny. Substantive review could be denied altogether or at most used to rectify extreme injustices—such as violations of the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁹¹

On balance, it may be best to limit appellate courts to procedural review of sentencing explanations, reserving substantive review only for violations of the Eighth Amendment. The downside would be that appellate courts could not correct sentencing excesses that fell short of such constitutional violations. The benefit would be that trial judges could explain their sentencing rationales clearly, candidly, and meaningfully, without thereby inviting reversal. Punishment communication may be worth that trade.

B. *Clarifying Legislative Sentencing Goals*

Clarity of punishment goals should extend to statutory law as well. Legislatures can clarify the purposes of punishment in several important ways. They can give clearer guidance as to the goals of sentencing that judges must consider. They can incorporate express statements of purpose into particular penalty provisions, including statutes establishing mandatory minimums and statutes governing capital punishment.

Judges rely on legislatures to articulate the goals of sentencing. All state legislatures have codified factors that they want judges to consider in sentencing. But most of these statutes do not indicate which purposes legislatures consider most essential. For example, a typical provision, drawn from the Arkansas criminal code, states that the "primary purposes of sentencing a person convicted of a crime are: (1) To punish . . . ; (2) To protect the public by restraining offenders; (3) To provide restitution or restoration to victims . . . ; (4) To assist the offender toward rehabilitation . . . ; and (5) To deter criminal behavior and

¹⁸⁹ States might, however, decide against this compromise in favor of even more circumscribed appellate review. A jurisdiction might forbid sentencing reversals entirely, except where the substantive result violates the Eighth Amendment. It might reestablish the broad and nearly unreviewable sentencing discretion that judges enjoyed for much of the history of America.

¹⁹⁰ 530 U.S. 466, 490 (2000) (requiring the jury, not the judge, to find facts needed to increase punishment).

¹⁹¹ Other scholars have urged "highly deferential" appellate review in order to encourage trial court sentencing explanation. *See, e.g.,* Cassidy & Ullmann, *supra* note 89, at 82.

foster respect for the law.”¹⁹² Such a varied list of punishment purposes gives little insight into legislative priorities.

It may be difficult for legislatures to agree on the relative importance of all sentencing objectives. However, perhaps majority agreement is possible at least as to one core concern: the relevance of desert or the importance of matching a punishment to the heinousness of an offense.¹⁹³ According to many sentencing scholars, most people view retributive desert as an upper limit on punishment.¹⁹⁴ That is, we have a consensus in our society that retributive desert imposes a limit on the amount of punishment for a particular sort of crime.¹⁹⁵ If that is correct, then most lawmakers should agree to enact a statutory provision making retribution a limit on punishment, not simply one of many valid considerations that may be subordinated to other goals. This would prevent sentences that exceed desert. (Current law does not make this clear. The Supreme Court has never made desert a general sentencing limitation,¹⁹⁶ and judges sometimes impose sentences that exceed desert in order to protect the public.)

Establishing desert as a limit on punishment could help judges choose and explain appropriate sentences. A legislature might further require judges to choose sentences that serve a utilitarian objective such as public protection. Some jurisdictions already specify such requirements for particular crimes. Texas’s death penalty statute, for example, authorizes a death sentence only if a person has committed a capital crime (usually, an aggravated murder) *and* presents a future danger to society (justifying his lethal incapacitation).¹⁹⁷ Such dual purposes could be required for other sentences as well, with one or both of those purposes specified by statute. Judges would then explain sentences in terms of those goals.

¹⁹² ARK. CODE ANN. § 16-90-801(a) (2020).

¹⁹³ See, e.g., NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 78 (1974) (describing retributive floor to punishment as well as retributive ceiling).

¹⁹⁴ E.g., Russell L. Christopher, *Time and Punishment*, 66 OHIO ST. L.J. 269, 277-78 (2005) (contending that retributivism as a limit is “widely recognized as the ‘consensus’ model of state and federal sentencing codes and guidelines as well as the newly proposed revised Model Penal Code Sentencing provisions of the American Law Institute” (footnote omitted)); Richard S. Frase, *Limiting Retributivism*, in *THE FUTURE OF IMPRISONMENT* 83, 92-93 (Michael Tonry ed., 2004).

¹⁹⁵ Some people may also believe that retributive desert also imposes a minimum amount of punishment, at least in the case of egregious offenses, though this is not typically seen as a type of limiting retributivism.

¹⁹⁶ The Supreme Court has not prohibited punishments that exceed desert in favor of utilitarian ends such as deterrence or incapacitation, except in rare cases of grossly disproportionate punishment or when sanctions are deemed “cruel and unusual” and thus a violation of the Eighth Amendment. See, e.g., *Ewing v. California*, 538 U.S. 11, 20, 24 (2003) (upholding sentence of twenty-five years to life in prison, imposed under California’s three-strikes law for offense of stealing three golf clubs, and emphasizing Court’s longstanding “tradition of deferring to state legislatures in making and implementing such important policy decisions” as whether to isolate repeat offenders “from society in order to protect the public safety”).

¹⁹⁷ TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2 (West 2019).

Legislatures also can clarify the comparative weight of particular punishment purposes, especially if the purposes are likely to conflict. Florida is one of a few states that already specify their sentencing priorities. In Florida, “[t]he primary purpose of sentencing is to punish the offender. Rehabilitation is a desired goal of the criminal justice system but is subordinate to the goal of punishment.”¹⁹⁸ Other states may have different priorities, such as offender rehabilitation (at least to an extent consistent with public safety¹⁹⁹). Sometimes, legislatures have special goals for certain types of sentencing proceedings. In Canada, cases involving Aboriginal offenders are subject to norms of restorative justice, as described above.²⁰⁰ In such cases, Canadian judges must subordinate goals such as deterrence and retribution to aims of community restoration.²⁰¹

Legislatures also can shine more light on their selection of particular statutory penalties. Consider again the Texas death penalty statute, mentioned above, which allows a death sentence only if an offender is a future danger to society. Virginia’s death penalty statute has a similar provision.²⁰² Both state laws imply a goal of incapacitation. Yet Texas and Virginia have executed offenders who turned out to be nonviolent and compliant prisoners. James Vernon Allridge, executed by Texas in 2004,²⁰³ was a model inmate for seventeen years before his execution. Texas executed him anyway, without explaining what social goals his death achieved.²⁰⁴ Wilbert Evans met a similar fate in Virginia in 1990, even though he too had become a model prisoner and despite the fact that Justice Marshall described his execution as “indefensible” in light of his good behavior.²⁰⁵ Virginia executed him without explaining its objective.²⁰⁶ Allridge and Evans went to their deaths without knowing why they had to die.

Confusion about the reasons for execution is a particularly complex problem due to execution delays. Even if a judge clearly explains the original reasons for a death sentence at sentencing, long delays between sentencing and execution can undercut that original rationale. Death-sentenced prisoners typically wait

¹⁹⁸ FLA. STAT. § 921.002(1)(b) (2020).

¹⁹⁹ If general deterrence is a relevant public safety consideration, state law should clarify whether courts should assume general deterrence effects or consider general deterrence only if the prosecution presents adequate empirical support for such deterrent effect.

²⁰⁰ See *supra* note 168 and accompanying text.

²⁰¹ See, e.g., *R. v. Gladue*, [1999] 1 S.C.R. 688, 725-26 (Can.) (holding that restorative justice applies to all offenders—including Aboriginal offenders, whose cultural heritage includes traditions focused on restorative justice).

²⁰² VA. CODE ANN. § 19.2-264.2 (2020).

²⁰³ McLeod, *supra* note 28, at 1160-61.

²⁰⁴ *Id.*

²⁰⁵ *Evans v. Muncy*, 498 U.S. 927, 927 (1990) (Marshall, J., dissenting from denial of certiorari) (“Evans today faces an imminent execution that even the State of Virginia appears to concede is indefensible in light of the undisputed facts proffered by Evans.”).

²⁰⁶ Robert F. Howe, *Va. Killer Is Electrocuted After Last-Minute Pleas Fail*, WASH. POST, Oct. 18, 1990, at A1.

more than twenty years before execution.²⁰⁷ As those years go by, the apparent value of the death penalty for purposes of retribution, deterrence, and especially incapacitation gradually ebbs.²⁰⁸ Justice Stevens once contended that “death after significant delay is ‘so totally without penological justification that it results in the gratuitous infliction of suffering.’”²⁰⁹

Legislatures can address this problem by revising their capital punishment statutes to clarify any enduring reasons for execution. Texas, for example, could revise its death penalty statute to allow executions of death row prisoners only after confirmation that the offenders remain dangerous to society. Alternatively, Texas could revise its death penalty statute to focus on objectives that would not be as affected by delays. Oregon—which until recently had the same death penalty provision as Texas—eliminated future dangerousness as a statutory basis for execution and now allows the death penalty only for highly aggravated (and culpable) murders involving terrorism, serial killings, and the murder of children.²¹⁰

Most legislatures in states that allow capital punishment have yet to address the problem of delay and its impact on execution purposes.²¹¹ Some states still require sentencing courts to schedule executions within months of sentencing, though executions never take place so soon. Recent execution data shows that as of 2017, the average time between sentencing and execution was 20.25 years.²¹² Legislatures should amend their laws to confront the reality of decades-long delays and their impact on punishment rationales.²¹³ Just as legislatures and

²⁰⁷ *Time on Death Row*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/death-row/death-row-time-on-death-row> [<https://perma.cc/CV36-J8J6>] (lasted visited Nov. 16, 2020).

²⁰⁸ *Kennedy v. Louisiana*, 554 U.S. 407, 441 (citing retribution and deterrence as the “social purposes” served by the death penalty”), *modified on denial of reh’g*, 554 U.S. 945 (2008); *Atkins v. Virginia*, 536 U.S. 304, 350 (2002) (Scalia, J., dissenting) (noting “a third ‘social purpose’ of the death penalty—‘incapacitation of dangerous criminals’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 183 n.28 (1976) (plurality opinion))).

²⁰⁹ *Thompson v. McNeil*, 556 U.S. 1114, 1115 (2009) (statement of Stevens, J., respecting denial of certiorari) (quoting *Gregg*, 428 U.S. at 183). Justice Breyer too believes that “lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale.” *Glossip v. Gross*, 576 U.S. 863, 933 (2015) (Breyer, J., dissenting).

²¹⁰ *See* S. 1013, 80th Leg. Assemb., Reg. Sess. (Or. 2019).

²¹¹ The Supreme Court requires that a death sentence serve *some* penological purpose in order to be constitutional. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion) (“[A] punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.” (citing *Gregg*, 428 U.S. 153)). But the Court usually considers a range of penological purposes to determine whether a statute fails this test without asking whether the statute itself indicates these purposes. The Court might promote clarity by considering only the purposes expressed or implied by the statute in question.

²¹² *Time on Death Row*, *supra* note 207.

²¹³ Justice Stevens has attributed the death penalty’s survival in America to “habit and

reformers have invited reconsideration of lengthy noncapital sentences, so too they should create a path for reconsidering death sentences that, due to execution delays, no longer serve their original aims.

C. *Making Sense of Jury Sentences*

Some may object that the confusion about sentencing purposes is inevitable when juries, not judges, choose sentences—as they do in death penalty cases and in other cases in states that authorize jury sentencing. Juries, after all, typically do not explain their verdicts; in fact, they cannot be required to reveal virtually anything from their deliberations. Explanation of punishment purposes may still be possible with jury sentencing, however.

Where juries are involved in sentencing, two approaches can be taken to explain punishment choices. One option is ask juries to justify their sentencing decisions. This would not be so different from the requirement that capital juries find any aggravating factors necessary for imposition of a death sentence. Under Supreme Court doctrine, those findings are constitutionally required and usually must be unanimous. But if the jury's punishment reasons are not constitutionally required—and there is no reason to think that every juror is now expected to agree not only as to the punishment but also as to the penological rationale—then jurors could provide personal reasons, not unanimous collective ones. This would reveal the reasons for sanctions and reduce the danger of unreasoned, discriminatory, and arbitrary jury decisions.

Interestingly, judges occasionally will poll a jury regarding sentencing preferences even in jurisdictions where juries lack power to sentence.²¹⁴ A jury's views may be quite informative. To obtain such useful information, the judge need not ask complex questions. Instead, the judge could ask questions based on simple terms, such as one sees in public opinion polls regarding the death penalty (including justifications for criminal sentences such as “[a]n eye for an eye,” “[d]eterrent for potential crimes,” “[t]hey deserve it,” and “[r]elieves prison overcrowding”).²¹⁵ Judges even could ask jurors to list the purposes of punishment in order of their importance to the ultimate sentence (with space for optional narrative explanation).²¹⁶

inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits.” *Baze v. Rees*, 553 U.S. 35, 78 (2008) (Stevens, J., concurring in the judgment).

²¹⁴ See James S. Gwin, *Juror Sentiment on Just Punishment: Do the Federal Sentencing Guidelines Reflect Community Values?*, 4 HARV. L. & POL’Y REV. 173, 186 n.71 (2010); see also Eli Hager, *When Juries Help Judge*, MARSHALL PROJECT (Mar. 13, 2015, 12:18 PM), <https://www.themarshallproject.org/2015/02/13/when-juries-help-judge> [<https://perma.cc/U4DT-VZTQ>].

²¹⁵ *Death Penalty*, GALLUP, <https://news.gallup.com/poll/1606/death-penalty.aspx> [<https://perma.cc/6G9E-6DYN>] (last visited Nov. 16, 2020).

²¹⁶ Most jurors would not have the kind of formal education regarding punishment purposes that this Article has advocated for judges to have. That is a downside, but it is not resolved by allowing jurors to keep their reasoning secret. Jury instructions could be developed that would help jurors thoughtfully consider the statutory purposes of punishment.

Alternatively, one might simply tolerate the opacity of jury sentences. Jury sentencing might be so valuable, as a matter of democratic legitimacy and evidence of social norms, that having a plebiscitary decision is more important than knowing its rationale. This was an especially strong argument in past ages. In early America, communities tended to share basic moral norms; a jury's reasoning was more likely to be self-evident. In our pluralistic society today, citizens often disagree strongly as to the key purposes of punishment. Sentencing explanation by juries may be critical to reveal whether a sentence is based on legitimate goals. Where retained, jury sentencing can and probably should be humanized and rationalized by asking juries to give reasons for their sentencing decisions.²¹⁷

The frequency of jury sentencing will affect whether reason giving in jury sentencing is feasible. It may not be a great burden if juries are only used in capital sentencing, which is relatively uncommon. But several jurisdictions use juries for noncapital felony sentencings as well.²¹⁸ Requiring explanations from all such cases could impose a substantial burden on state resources.²¹⁹ States that use juries for noncapital sentencing would have to decide whether the value of communicating punishment justifies that burden.

D. *Obtaining Insight from Prosecutors*

In most cases, prosecutors obtain convictions through plea bargains, many of which involve party agreements as to the ultimate sentence.²²⁰ Because plea bargaining is driven by prosecutors, they can play important roles in making sense of resulting sentences.

Defendants usually plea bargain in order to reduce their sentencing exposure. Sometimes, a plea bargain contains an express sentencing provision, which the parties ask the judge to adopt. In other cases, the plea agreement involves dismissal of certain charges, reducing sentencing exposure and sometimes fixing it (if the crime carries a single, mandatory penalty). In still other cases, the parties stipulate to facts that limit the penalty—such as the amount of narcotics involved in a drug offense. In each case, the prosecutor will have formed an idea of what penalty seems appropriate. Given that the judge may know much less than the prosecutor about the facts and equities of the case at the time of a proposed plea

²¹⁷ These reasons may not be susceptible to empirical verification, of course. A jury may decide a sentence is appropriate for reasons of desert. The point here is not that jury explanations can be tested or verified but that they may give insight into the purpose of a sentence—just as judicial explanations do.

²¹⁸ See Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 314 & n.16 (2003).

²¹⁹ See Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 195 n.2 (2004) (noting that annual number of jury sentencing proceedings in capital cases is “much smaller” than number of jury sentencing proceedings in noncapital cases).

²²⁰ *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), <https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> [https://perma.cc/9DNX-3GCX].

deal (and resulting sentencing constraints), the prosecutor may be able to offer valuable insight into why a particular sentence would be appropriate. Prosecutors should therefore recount not only the facts and law supporting a proposed plea deal but also the social objectives that would be served by the proposed or resulting punishment.

Prosecutors often provide much of this information in the course of persuading a judge to approve a plea deal, but not always.²²¹ Sometimes judges, swamped with casework and pleased that the parties agree on a disposition, approve plea deals without asking or learning what goals the prosecutor believes the resulting sentence will serve. Judges should avoid such unreasoned plea acceptance. If judges are unsure of the purpose for a proposed penalty, they should ask the prosecutor to explain his rationale.

To give judges insight into their sentencing goals, prosecutors need not discuss why they forewent alternative charges (or dropped certain charges originally filed); they need only to explain the social goals that will be advanced by a sentence resulting from a plea deal.

Some judges already require prosecutors to explain their reasons for plea deals. For example, Judge Joseph R. Goodwin of the Southern District of West Virginia has required prosecutors to give reasons for plea bargains and has refused to approve deals for which prosecutors' "principal motivation appears to be convenience."²²² Moreover, some prosecutors volunteer reasons for their sentence recommendations, especially when proposing prison time. Philadelphia District Attorney Larry Krasner requires his line prosecutors to state on the record the benefits and costs of the sentences that they recommend (including a realistic calculation of the "actual cost" to taxpayers of any potential prison sentence).²²³ Though these efforts do not ensure clarity as to the social objectives of negotiated sentences, they do suggest that greater explanation from prosecutors is feasible.²²⁴

Skeptics may worry that prosecutors will hide or fabricate their true reasons for negotiated sentences, particularly if they think that the judge would not approve. For example, a prosecutor might agree to a mild penalty for a firearms offense, even though the offender remains dangerous, in order to convince the offender to testify against other gang members in a separate case. The prosecutor may not want to admit that the negotiated sentence is inadequate to protect the

²²¹ See *supra* Part II.

²²² *United States v. Walker*, 423 F. Supp. 3d 281, 297 (S.D.W. Va. 2017), *aff'd*, 922 F.3d 239, 251 (4th Cir. 2019) (affirming defendant's conviction on the grounds that the district court properly rejected a plea deal because the court adequately considered the circumstances of the particular case rather than relying solely on general policy objections to plea bargaining).

²²³ See PHILA. DIST. ATTORNEY'S OFFICE, NEW POLICIES ANNOUNCED FEBRUARY 15, 2018, at 3 (2018) https://cdn.muckrock.com/outbound_composer_attachments/Lucasgsl/62919/Philadelphia-DA-Larry-Krasner-s-Memo.pdf [<https://perma.cc/WHR8-ETJQ>].

²²⁴ One effect of this quantification requirement—and perhaps Krasner's main goal—is to disincentivize prison sentences because of the extra work their pursuit requires and costs that they entail.

public, given that protection of the public is often a key statutory factor judges must consider in sentencing. Ideally, however, the prosecutor will be forthright and the judge will acknowledge and appreciate the prosecutor's broader concerns. The prosecutor's explanation then will enable the judge to give a fuller account of the sentence. In the case of a defendant who receives leniency in exchange for cooperation, the judge can explain that the sentence does not reflect the full measure of the offender's desert but instead a balance of competing interests. Had the offender not had information against others, he would have faced additional time. That kind of sentencing explanation would help make sense of his lighter sentence when compared to other defendants who may have committed the same crime but lacked such valuable information.²²⁵

Prosecutors have incentives, moreover, to be honest. They may appear again before the same judge and may want to appear thoughtful and consistent. If they fabricate sentencing rationales, they may find themselves pressed by defense attorneys and judges to follow those false rationales in later cases.

A risk still remains, of course, that prosecutors may not think fully through sentencing goals until after they complete plea negotiations. A prosecutor may propose a plea deal based simply on instinct, experience regarding the "going rate," or standard office policy, without thinking through the social objectives that the resulting sentence might serve. That prosecutor may give reasons only to rationalize a preexisting choice. This might be a common occurrence. Indeed, psychologist Jonathan Haidt contends that most moral judgments are made by intuition (remember that sentencing decisions entail moral judgments as well as practical ones), and people look for reasons to defend them only after the fact.²²⁶ "[I]ntuitions come first, strategic thinking second."²²⁷

Still, even post hoc explanation of sentencing goals is valuable. In considering how to explain its penological value, the prosecutor may decide the resulting sentence is inappropriate. If he begins to justify a fairly high sentence for a defendant of color for the purpose of incapacitation, he may recall that he recently justified a much lower sentence of a White defendant for the purpose of rehabilitation. This may lead him to realize that he has implicitly assumed that defendants of color tend to be more dangerous. He may then reevaluate his plea bargaining policies and consciously alter his mindset to root out such bias.

²²⁵ Such discussions might, for security reasons, need to be sealed from public view. That secrecy should be limited, however, as it would preclude public understanding of sentencing rationales.

²²⁶ In his book, *The Righteous Mind*, Haidt describes various experiments in which he and a fellow researcher presented subjects with scenarios involving the violation of "harmless" taboos. JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* 44-45 (2012). If subjects morally objected to violation of the taboos, they were pressed to explain why. Most continued to object even if they could not articulate reasons why. This, Haidt and his fellow investigator concluded, showed that "[m]oral reasoning was mostly just a post hoc search for reasons to justify the judgments people had already made." *Id.* at 47.

²²⁷ *Id.* at 59.

In any event, even belated explanation of the social purposes of a sentence will confirm that there is a *conceivable* legitimate purpose for the penalty, which the judge can convey to the defendant. Even if the prosecutor did not consciously focus on that goal when accepting the plea agreement, such later explanation confirms that the offender's suffering is not pointless. Post hoc reason giving may not always reflect the true motivations for negotiated sentences, but it still guards against dehumanizing and aimless penalties.

E. *Encouraging Explanation by Defense Attorneys*

Defense attorneys also can serve their clients by helping them understand the reasons for their sentences. If the defendant does not understand a judge's explanation, his defense attorney may be able to rephrase it in simpler or more familiar terms. In plea-bargained cases, the defense attorney may be able to convey crucial information about the prosecutor's reasons for agreeing to particular sanctions. Prosecutors often explain their reasoning to defense attorneys during the process of negotiation, but that does not ensure that the reasoning is conveyed to the criminal defendant. Defendants are unlikely to be directly privy to plea bargaining discussions. Defense attorneys have constitutional obligations to tell their clients about any formal written plea offers by the state but currently have no duty to convey accompanying explanations prosecutors provide.²²⁸

Part of serving criminal clients should be ensuring that they understand what the system has done to them and why. It is true that defense attorneys, particularly public defenders, may struggle to overcome client distrust and should vigorously defend their clients against state sanctions. But defending a client against punishment does not mean saying to a defendant that whatever punishment he receives is arbitrary or unjust. To the contrary, serving a client may mean helping him see his punishment as justified, at least from society's perspective. Existing ethics rules permit defense attorneys to offer moral advice if they deem it relevant to a client's situation.²²⁹ Under these rules, defense attorneys may offer moral perspectives on defendants' crimes, helping defendants understand why society deemed sanctions to be necessary.²³⁰ In this

²²⁸ See *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

²²⁹ E.g., MODEL RULES OF PROF'L CONDUCT r. 2.1 (AM. BAR ASS'N 2018).

²³⁰ Victim testimony also may help illuminate the rationale for a particular sanction if it helps the defendant see why society takes the offense so seriously. Every U.S. jurisdiction gives a victim the right to explain, prior to sentencing, how he was impacted by the offender's crime. In theory, victim testimony may help a defendant realize the seriousness of his offense. In practice, however, victims may be angry and vengeful. Defendants may see them as adversaries at sentencing. Victim testimony may be more helpful to offender understanding if defendants hear it at a later time. To this end, the law could provide victims a right to address defendants not only at sentencing, when defendants may be hostile and defensive, but also after sentencing, when defendants may be more willing to listen because they have nothing more to lose. In any event, the law could require defense attorneys to provide a record of victim remarks to their clients and to open a discussion of the remarks with their clients.

way, defense attorneys can respect offenders as reasoning moral agents and lead them to find purpose for their suffering.

F. *Communicating Penal Rationales During Punishment*

We have now seen how judges, legislators, prosecutors, and defense attorneys can help clarify punishment objectives at sentencing. Some offenders, however, may be too overwhelmed, confused, distracted, or defensive during sentencing to listen or internalize the reasons for their sanctions. They may feel hostile and interested only in challenging whatever sanctions the judge imposes.

More can be done to help such offenders make sense of their punishments after sentencing. Judges can create and provide offenders with records of their sentencing hearings—ideally in video format. The offenders can then watch those recordings in a later, nonadversarial, less stressful context. Under current law, defendants have a right to the transcript of their sentencing hearing, but usually only upon request.²³¹ Defense lawyers tend to be most interested in sentencing transcripts, which can be used in appeals. But audio or video recordings, which are routinely created, may be even more valuable for communicative purposes. Courts should provide offenders with the audio or video records without requiring payment.

Furthermore, judges should inform probation, parole, and prison authorities of their sentencing rationales and provide them copies of the sentencing recordings. Those who will oversee the offender during his punishment should know not only the offender's crime and sentence but also the purposes his sentence is to serve. In the federal system, the law requires judges to share with corrections authorities a "statement of reasons" for every sentence.²³² The form, however, includes only limited information. To provide meaningful insight into sentencing rationales, judges should give corrections authorities a full record of their sentencing explanation.²³³

²³¹ See, e.g., 18 U.S.C. § 3553(c) (2018).

²³² *Id.* ("The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons." (footnote omitted)).

²³³ Courts and scholars occasionally suggest other ways to bring home the reasons for an offender's sentence. Law professor Robert Blecker would have corrections authorities post "[p]hotographs of their victims . . . in their cells, out of reach, in visibly conspicuous places." ROBERT BLECKER, *THE DEATH OF PUNISHMENT: SEARCHING FOR JUSTICE AMONG THE WORST OF THE WORST* app. B, at 282 (2013). A state court did just that in a recent capital case: when Lam Luong was condemned to death for drowning his four young children, the judge ordered that he be shown photos of the children every day until his execution. Alexa Knowles, *Hearing for Notorious Killer, Lam Luong, Gets Heated over Interpreter*, FOX10 (Jan. 25, 2018), <http://www.fox10tv.com/story/37354220/hearing-for-notorious-killer-lam-luong-gets-heated-over-interpreter> [https://perma.cc/3PQP-MX39]. This Article, however, does not mean to suggest that those particular methods of conveying the retributive purpose of punishment are particularly wise or good.

Corrections authorities can then help offenders understand judges' reasons for their sentences. Social workers, corrections psychologists, parole officers, prison chaplains, and other corrections officials can meet with offenders to aid them in understanding the rationales. Programs that help offenders realize the suffering of victims can also help offenders appreciate society's outrage at their crimes and desire to prevent their recurrence. "Victim impact education" is already offered in many prisons on a voluntary and limited basis;²³⁴ states should consider expanding these programs and making them mandatory. Such continued engagement with offenders regarding the reasons for their sanctions will confirm society's commitment to offenders as reasoning, moral beings and help them see purpose in their suffering.

States also could take more dramatic steps to help prisoners understand the reasons for their sanctions. It may not be enough for judges to explain sentencing rationales in lay terms if prisoners do not relate to the concerns. One way to help incarcerated offenders relate to the objectives of retribution, deterrence, incapacitation, and rehabilitation would be to involve them personally in the process of deciding rules and sanctions within the prison. Prisoners could be given a right or duty to vote on select prison rules and could be involved on advisory councils recommending punishments for prison infractions. Two scholars, Amy Lehrman and Vesla Weaver, have noted that such programs have been employed in America successfully before²³⁵ and argue that there are "compelling reasons to believe that [prison] self-governance organizations might . . . have the capacity to shape individual and institutional outcomes in important ways."²³⁶

Prisoners could be asked to state their views on the proper sanctions for offenses like theft from a prison canteen or assault on a fellow prisoner. In deciding the punishment, prisoners would have to consider the same kinds of penological purposes that the judges who sentenced them had to consider,

²³⁴ See, e.g., MONT. DEP'T CORR. VICTIM PROGRAMS, VICTIM IMPACT PANELS (2015), <https://cor.mt.gov/Portals/104/Victims/VIP%20brochure2015.pdf> [<https://perma.cc/7GZK-45DF>]; Sally Hilander, *Victim Programs at the Montana Department of Corrections*, CORRECTIONS.COM, (May 10, 2010), <http://www.corrections.com/news/article/24138-victim-programs-at-the-montana-department-of-corrections> [<https://perma.cc/9SXP-BXJW>]; *Impact of Crime Program*, S.C. DEP'T CORRECTIONS, http://www.doc.sc.gov/victim_services/impact.html#:~:text=The%20Impact%20of%20Crime%20Program,and%20suffering%20caused%20by%20crime [perma.cc/5Aq9-AW9N] (last visited Nov. 16, 2020); *Victim Impact: Listen and Learn*, KAN. DEP'T CORRECTIONS (Jan. 16, 2018, 11:29 AM), <https://www.doc.ks.gov/victim-services/training-education/the-office-of-victim-services-victim-impact-program> [<https://perma.cc/EV5V-4L8W>].

²³⁵ See Amy E. Lerman & Vesla Mae Weaver, *A Trade-Off Between Safety and Democracy?*, in *DEMOCRATIC THEORY AND MASS INCARCERATION* 238, 242 (Albert Dzur, Ian Loader & Richard Sparks eds., 2016) (describing programs in American prisons "where a representative body of elected inmates had the power to decide institutional rules and to guide outcomes in response to inmate grievances of major offenses against inmates," which were shut down later for political reasons).

²³⁶ *Id.* at 240, 262 ("[W]e find a significant and negative association between higher participation in inmate self-governance and the incidence of violence.").

including retribution, deterrence, incapacitation, and rehabilitation. This process would evoke their own thoughts and intuitions about justice and social order. It would not be too different from how citizens in a democracy learn about many important aspects of their government. As Alexis de Tocqueville once observed: “It is from participating in legislation that the American learns to know the laws, from governing that he instructs himself in the forms of government.”²³⁷ By learning to make punishment choices, offenders may gain insight into the state’s reasons for their own sanctions.

Some may find this proposal too risky. What if prisoners make irrational or immoral decisions? This Article has argued that offenders should be treated as reasoning beings capable of moral choice and moral change. Yet it acknowledges that not all offenders are trustworthy, rational, or good. Less drastic reforms are also possible. Prisoners could be asked to choose sentences in hypothetical criminal scenarios, not real cases. Some prisoners might not take this exercise seriously. But it could have at least some benefit in helping prisoners relate to and internalize the basic reasons for punishment, including any reasons expressly given for their own.

Not all corrections officials will see a reason to engage with offenders in this way. Many prison administrators view their role simply as keeping order and security within prison walls.²³⁸ They do not see their task as punishing offenders or making sense of punishment.²³⁹ Corrections officials may need a clearer practical incentive for helping prisoners see meaning and purpose in their sanctions. Empirical scholars may be able to provide it. Research might reveal, for example, that prisoners who understand the reasons for their sanctions become more compliant in prison. Such findings could help persuade prison administrators to spend the resources and time to help offenders understand the reasons for their incarceration. Even without financial or practical incentives, moreover, some progressive prison administrators may decide that reasoned engagement with offenders is morally important—particularly if they see judges and lawmakers making that same commitment.

²³⁷ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 291 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000) (1835).

²³⁸ See, e.g., KAN. DEP’T OF CORR., *INTERNAL MANAGEMENT POLICY AND PROCEDURE* 1 (2014), <https://www.doc.ks.gov/kdoc-policies/AdultIMPP/Chapter1/01-000d/view> [<https://perma.cc/RS87-ATL7>].

²³⁹ See BLECKER, *supra* note 233, at 178 (describing and criticizing prison administrators’ focus on security rather than punishment). This focus on security rather than the purposes of punishment may be especially true for the administrators of for-profit private prisons. Such prisons now have custody of more than 100,000 U.S. offenders. KARA GOTSCH & VINAY BASTI WITH NICOLE D. PORTER, *THE SENTENCING PROJECT, CAPITALIZING ON MASS INCARCERATION: U.S. GROWTH IN PRIVATE PRISONS* 5 (2018), <https://www.sentencingproject.org/wp-content/uploads/2018/07/Capitalizing-on-Mass-Incarceration.pdf> [<https://perma.cc/5DCE-TBBA>] (“The United States has the world’s largest private prison population. Of the 1.5 million people in state and federal prisons in 2016, 8.5 percent, or 128,063, were incarcerated in private prisons.”).

In these many ways, lawmakers, prosecutors, judges, defense attorneys, and corrections officials can convey the objectives of criminal sanctions to offenders and the public. By doing so, they will humanize and rationalize the process of criminal punishment.

CONCLUSION

Communicating punishment purposes can be difficult. Explaining the reasons for individual sentences may require agonizing over the right choices and may generate controversy. Those are not reasons to reject communication. In fact, they are reasons to embrace it. Where sentencing laws are easy to enact, legislatures likely have stopped trying to reconcile the many legitimate and conflicting social goals at stake. Where sentencing offenders is easy, judges likely have become inured to suffering or irresponsible in dispensing mercy. Authorizing and imposing punishment of another human being—which almost always leads to suffering—should not be easy. Legislatures and judges should agonize over and debate which punishments are just. Such dialogue and deliberation are needed to ensure that punishments reflect society's moral norms and take seriously the human lives at stake.

Communicating punishment fosters vital moral and prudential deliberation by forcing legislatures, prosecutors, and judges to confront competing interests and justify punishments in straightforward terms. Unless the purposes of sanctions are clarified by the law, considered by prosecutors and judges, and communicated to criminal offenders throughout their experience of punishment, they may be imposed without purpose and without humanity.