

Winter 2021

## Meaningless Guarantees: Comment on Mitchell E. McCloy's "Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial"

Alexandra L. Klein

Washington and Lee University School of Law, [aklein@wlu.edu](mailto:aklein@wlu.edu)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Courts Commons](#), [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

### Recommended Citation

Alexandra L. Klein, *Meaningless Guarantees: Comment on Mitchell E. McCloy's "Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial"*, 78 Wash. & Lee L. Rev. 585 (), <https://scholarlycommons.law.wlu.edu/wlulr/vol78/iss1/12>

This Student Notes Colloquium is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Meaningless Guarantees: Comment on Mitchell E. McCloy's "Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial"

Alexandra L. Klein\*

*If the criminal justice system believes that it can formulate coherent rules to achieve moral accuracy, the legislature and courts need to write those rules and allow them to be explained to juries in ways that make certain that juries are not being forced to "fill in the blanks" for the legal system.<sup>1</sup>*

## INTRODUCTION

Despite the important role that jurors play in the American criminal justice system, jurors are often deprived of critical information that might help them make sense of the law their oaths require them to follow. Such information with regard to sentencing might include the unavailability of parole, geriatric release, sentencing guidelines, or other information that is relevant to determining a defendant's penalty. Withholding

---

\* Visiting Assistant Professor, Washington & Lee University School of Law. My sincere thanks to Mitch McCloy, for the opportunity to discuss his excellent Note, and to Brandon Hasbrouck for his comments and suggestions on drafts.

1. SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 184 (2005).

information from juries, particularly in sentencing,<sup>2</sup> risks unjust and inequitable sentences. Keeping jurors in the dark perpetuates injustices and undermines public confidence and trust in the justice system.

Mitch McCloy's excellent Note provides a compelling illustration of this problem in jury sentencing in Virginia.<sup>3</sup> Until very recently, when criminal defendants in Virginia exercised their Sixth Amendment right to a jury trial, they had been sentenced by that jury in a bifurcated trial system.<sup>4</sup> Although the trial judge provides the jury with information about the statutory minimum and maximum sentences, Virginia law provides that juries are not allowed to receive *any* information about Virginia's sentencing guidelines.<sup>5</sup> The jury may not offer recommendations about whether sentences should be suspended or run concurrently or consecutively.<sup>6</sup>

These sentencing practices led, unsurprisingly, to inequitable results: defendants who exercised their Sixth Amendment right to a jury trial tended to receive far harsher sentences than defendants who waived that right and selected a bench trial. Mr. McCloy's Note thoroughly evaluates the statutory and constitutional dimensions of this problem. Mr. McCloy's Note is an exceptional piece of scholarship as well as a useful tool for academics, legislators, practitioners, and judges to understand the complexities of Virginia's sentencing scheme.

---

2. See *Lynch v. Arizona*, 136 S. Ct. 1818, 1820 (2016) (per curiam) (holding that the defendant was entitled to inform the jury that he was ineligible for parole where the only type of release available under state law was executive clemency); *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) ("Because truthful information of parole ineligibility allows the defendant to 'deny or explain' the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention . . ."); *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000).

3. See generally Mitchell E. McCloy, Note, *Blind Justice: Virginia's Jury Sentencing Scheme and Impermissible Burdens on a Defendant's Right to a Jury Trial*, 78 WASH. & LEE L. REV. 519 (2021).

4. VA. CODE ANN. § 19.2-295.1 (2020).

5. See *id.* § 19-2-298.01(A) ("In cases tried by a jury, the jury shall not be presented any information regarding sentencing guidelines.").

6. *Id.* § 19.2-303.

It is a compelling demonstration of inequity in Virginia's criminal justice system that offers several practical solutions.

Part I of this Comment discusses Mr. McCloy's findings, analysis, and ultimate conclusions. Part II briefly explores two significant questions that arise from Mr. McCloy's Note: the consequences of recognizing rights without meaningful enforcement and the problem of jurors' preference for harsher sentences. This Comment concludes by offering some final thoughts on the necessary work to make our justice system live up to the promise of "Equal Justice Under Law."

## I. THE ABSENCE OF SENTENCING GUIDELINES

The Sixth Amendment guarantees the right to a jury trial in criminal prosecutions.<sup>7</sup> Courts have lauded the important role juries serve in the criminal justice system.<sup>8</sup> Jury participation serves key democratic functions.<sup>9</sup> It ensures "continued acceptance of the laws by all of the people."<sup>10</sup> The right to a jury trial prevents government oppression.<sup>11</sup> Jury trials reflect checks on government power by "insistence upon community participation in the determination of guilt or innocence."<sup>12</sup>

---

7. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .").

8. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) ("[T]he [Sixth Amendment] promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down."); *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) ("[T]rial by jury in criminal cases is fundamental to the American scheme of justice . . .").

9. See *Flowers v. Mississippi*, 139 S. Ct. 2228, 2238 (2019) ("Other than voting, serving on a jury is the most substantial opportunity that most citizens have to participate in the democratic process.").

10. *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Jury service preserves the democratic elements of the law, as it guards the rights of the parties and ensures continued acceptance of the laws by all of the people."); *Ring v. Arizona*, 536 U.S. 584, 615–16 (2002) (Breyer, J., concurring) (discussing the jury as the "conscience of the community").

11. *Duncan*, 391 U.S. at 155–56; *Batson v. Kentucky*, 476 U.S. 79, 86–87 (1986).

12. *Duncan*, 391 U.S. at 156; see *Powers*, 499 U.S. at 411–12.

Yet Mr. McCloy points out that in 2019, “jury trials made up just 1.3 percent of all cases in Virginia that resulted in a felony conviction. . . . [B]ench trials made up 9 percent of all cases and guilty pleas made up 90 percent.”<sup>13</sup> Other jurisdictions reveal similarly dismal statistics about the use of jury trials and the predominance of the plea bargain.<sup>14</sup> Setting aside issues associated with plea bargaining,<sup>15</sup> criminal defendants in Virginia demonstrated a clear preference for bench trials.<sup>16</sup>

Given the noble purpose and democratic function of the jury trial, why on earth did Virginia’s criminal defendants keep choosing bench trials?

Mr. McCloy’s Note demonstrates a significant reason: defendants who opt for bench trials are more likely to receive a sentence within Virginia’s sentencing guidelines. He presents compelling data illustrating that jurors’ sentencing recommendations deviate upward from Virginia’s sentencing guidelines far more frequently than when judges sentence defendants.<sup>17</sup> Perhaps even more troubling is the fact that, although judges have the authority to modify a jury’s sentence to one that comports with the guidelines, they rarely do—even when a jury’s sentence produces a manifestly unjust result.<sup>18</sup> Virginia’s decision to prohibit jurors from seeing the guidelines creates incentive structures that discourage defendants from

---

13. McCloy, *supra* note 3, at 531.

14. *Id.* at 532.

15. See *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (discussing the prevalence of plea bargaining); see also, e.g., Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1033–34 (2006); H. Michael Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 75–77 (2011). See generally Brandon Hasbrouck, *The Just Prosecutor*, WASH. U. L. REV. (forthcoming 2021); Thea Johnson, *Fictional Pleas*, 94 IND. L.J. 855 (2019); Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 CRIM. L.Q. 67 (2005); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

16. McCloy, *supra* note 3, at 532.

17. See *id.* at 534–36.

18. See *id.* at 537–39.

exercising their constitutional rights, further exacerbating the problem of the decline in jury trials nationally and in Virginia.<sup>19</sup>

Mr. McCloy has ably demonstrated that Virginia's sentencing scheme likely imposed impermissible burdens on defendants' Sixth Amendment rights. This is a complicated issue, due in large part to shifting precedent from the Supreme Court. *United States v. Jackson*,<sup>20</sup> recognized that congressional objectives "cannot be pursued by means that needlessly chill the exercise of basic rights."<sup>21</sup> The flaw in the Federal Kidnapping Act in *Jackson* was not its inherent coercion, but that it "needlessly encourage[d]" defendants to plead guilty or waive jury trials.<sup>22</sup> Limiting the number of cases in which the death penalty was imposed was a legitimate purpose, but the chosen means—imposing it only when the defendant picked a jury trial—was a poor fit for those purposes because it placed an unnecessary burden on a defendant's Sixth Amendment right.<sup>23</sup>

The Supreme Court undermined *Jackson* a decade later in *Corbitt v. New Jersey*,<sup>24</sup> when it approved a New Jersey statutory scheme that provided that defendants whom the jury convicted of first-degree murder received mandatory life imprisonment, whereas defendants who pleaded guilty could be sentenced to life imprisonment or a maximum 30-year sentence.<sup>25</sup> *Corbitt* erroneously focused on the difference in penalties between that case and *Jackson*. In *Jackson*, the defendant faced the death penalty, but in *Corbitt*, the defendant was facing life in prison and the guilty plea did not guarantee a reduced sentence.<sup>26</sup>

---

19. See *Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas.").

20. 390 U.S. 570 (1968).

21. *Id.* at 582.

22. *Id.* at 583.

23. See *id.* at 582–83. See generally *Brady v. United States*, 387 U.S. 742 (1970).

24. 439 U.S. 212 (1978).

25. *Id.* at 215–16.

26. *Id.* at 217–18.

The problem, of course, is not the difference between life and death. The tension between *Jackson* and *Corbitt* is consistent with the Supreme Court's death penalty exceptionalism. The Supreme Court has required, as a matter of due process that juries be told in capital cases when a defendant is ineligible for parole if the defendant's future dangerousness is an issue.<sup>27</sup> In that situation, the jury *must* be informed so they do not unnecessarily sentence someone to death. While this is necessary as a matter of due process, decisions about keeping jurors in the dark may steer defendants towards waiving their Sixth Amendment rights because juries may be uninformed about the relevant law.

I do not dispute that facing the death penalty may be a greater degree of coercion than other prison sentences. Nonetheless, the difference in possible penalties, to the extent that it undermines a defendant's *choice* to exercise a constitutional right, is contrary to a defendant's right to autonomy.<sup>28</sup>

Mr. McCloy offers a nuanced approach to *Jackson*, suggesting it applies when there is an "impermissible purpose or motivation" for a statute, such as "needlessly encourag[ing] guilty pleas or waivers."<sup>29</sup> He reasons that, by restricting jury access to sentencing guidelines when the jury must sentence the defendant, Virginia's sentencing system needlessly encourages trial waivers because it is not connected to the legitimate purpose of jury sentencing.<sup>30</sup> The choice between a bench trial and a jury trial in Virginia is illusory if a defendant exercises their Sixth Amendment right to choose a jury trial and is

---

27. See, e.g., *Lynch v. Arizona*, 136 S. Ct. 1818, 1820 (2016) (per curiam); *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994). Virginia has extended this to noncapital felonies and requires judges to tell juries that parole has been abolished. See *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000).

28. Cf. *McCoy v. Louisiana*, 138 S. Ct. 1500, 1505 (2018)

With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.

29. *McCloy*, *supra* note 3, at 542.

30. *Id.* at 543.

promptly rewarded for their contribution to a democratic punishment structure with a harsher sentence.

Criminal punishment in the United States focuses on retribution rather than rehabilitation. Advocates for jury sentencing have asserted that juries are better suited to reflect community values and deliver an expressive message about the defendant's transgression of community norms and values. Yet depriving the jury of critical information undermines retributive values by creating some punishments that are disproportionately higher than other punishments. It may also invite juries to consider impermissible factors, such as race, or lead to arbitrary punishments when a jury has to select an appropriate penalty within a wide statutory minimum and maximum.<sup>31</sup>

The guidelines are, of course, discretionary. But they better serve critical retributive values of proportionality by ensuring consistency in sentencing. A jury's function as a "community conscience" does not give it a monopoly on democratic legitimacy. The legislative decision to create the Virginia Criminal Sentencing Commission to standardize sentences also represents democratic consensus.<sup>32</sup> As Mr. McCloy explains, the role of a community conscience *also* requires that community to be informed about the processes of justice.<sup>33</sup>

Mr. McCloy's analysis of the possible solutions is impressively thorough. Eliminating mandatory jury sentencing would solve part of the problem, and it would give defendants greater autonomy of choice. There is room to critique whether the criminal justice system actually could ever offer a defendant true autonomy, but through this solution, defendants would receive the benefit of a community judgment about their guilt or innocence as well as a proportional sentence. That said, if the jury does not receive sentencing guidelines, a defendant who

---

31. Cf. Alexis Hoag, *Valuing Black Lives: A Case for Ending the Death Penalty*, 51 COLUM. HUM. RTS. L. REV. 985, 989 (2020) (arguing that discretion in capital sentencing "allows . . . racism to operate undetected").

32. I do not suggest that the Virginia General Assembly is somehow more "just" than a jury, only that the sentencing guidelines are not necessarily less democratically legitimate.

33. See McCloy, *supra* note 3, at 555–56.



opted for jury sentencing may still receive a disproportionately harsher sentence. In this scenario, the defendant at least would retain a meaningful choice in the exercise of their critical Sixth Amendment rights.

Virginia has taken this approach. Jury sentencing is no longer mandatory for defendants who elected a jury trial, except in capital cases.<sup>34</sup> But this is arguably insufficient. Mr. McCloy concludes that the best approach should include providing jurors with completed sentencing worksheets for defendants as well as the ability to offer recommendations about sentence suspensions and whether sentences should be served concurrently.<sup>35</sup> Under his approach, defendants would have more flexibility exercising their Sixth Amendment rights and jurors would have the information they need (and often want) if they are faced with the task of sentencing a defendant.

This, of course, does not help defendants who had to waive their Sixth Amendment rights to a jury before the change to Virginia's law. Those defendants still deserve a remedy for the possible violation of their fundamental constitutional rights. So although Virginians can, and should celebrate this critical reform, there is yet more work to be done.

As the United States considers the pressing need for criminal justice reform, steps like those Mr. McCloy proposes are essential. These reforms are not sweeping, given the infrequency of jury trials in Virginia and in the United States. Yet these reforms are critical because they help to ensure that the Sixth Amendment right to a jury trial is more than a meaningless guarantee.

## II. THE MEANINGLESS GUARANTEE

Mr. McCloy's Note raises two interesting considerations, which I believe to be interrelated, that this section explores further. First, courts undermine the meaningful nature of the rights they extoll when they fail to give those rights substance. Mr. McCloy's Note highlights this problem by showing that

---

34. See SB 5007, 2020 Spec. Sess. (Va. 2020), <https://perma.cc/Y5BH-255G>.

35. See McCloy, *supra* note 3, at 561–62.

failing to adequately inform a jury of sentencing standards leads to arbitrarily harsher sentences. Second, in considering the statistics Mr. McCloy had compiled, I began to wonder why, when given the statutory minimum and maximum sentence range, jurors tend to favor longer sentences.

There is a difference between the idealized version of a constitutional right and the way the right is both realized and enforceable.<sup>36</sup> Guarantees of constitutional and individual rights are not worth the paper they are printed on if legislatures, executive officials, and courts do not act to ensure adequate protection and enforcement for individual rights. Likewise, what about situations in which members of a community are charged to act in a way to facilitate someone else's constitutional right? If that community is inadequately informed of its obligations, or fails to respect those rights, or its conscience is perhaps not entirely clear, then the guarantee of individual rights is essentially meaningless.

Juror participation is essential to uphold another member of a community's Sixth Amendment rights. But a jury trial is not a guarantee that trials will be fair or that the sentence the jury selects will serve justice. Looking back over United States history, juries have not been the idealized version of democracy courts describe. Through harmful community norms, exclusionary tactics, and judicial inaction, the Sixth Amendment right to a jury trial has too often been form without substance.

Consider the historic practices that ensured that Black people were not included in that community consensus either by ensuring that Black people never made it on a jury or diminished their participation by permitting nonunanimous

---

36. Cf. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 378 (1974) ("The equal protection clause states, I think, the finest aspiration of our society . . . . But, as anyone who has tried to challenge [discriminatory] practices in any forum knows, the fact of discrimination is one thing and its proof is quite another.").

juries.<sup>37</sup> In *Strauder v. West Virginia*,<sup>38</sup> the Supreme Court explained that discriminating in jury selection based on race “amounts to a denial of the equal protection of the laws[.]”<sup>39</sup> Nearly a century later, the Court repeated this principle in *Swain v. Alabama*,<sup>40</sup> only to conclude that the defendant had not suffered unconstitutional discrimination when the prosecutor struck all Black jurors because an attorney might use peremptory strikes on *any* juror.<sup>41</sup> The Court also brushed aside concerns that juror rolls contained smaller numbers of Black citizens than White citizens, despite a process that was based primarily on state officials’ discretion to select men (often men they knew personally) who were “honest, intelligent . . . esteemed for their integrity, good character, and sound judgment.”<sup>42</sup>

*Batson v. Kentucky*<sup>43</sup> finally put a standard in place for assessing when a peremptory strike demonstrated purposeful discrimination.<sup>44</sup> But *Batson* makes it awfully easy for a prosecutor to come up with a “neutral explanation,” for an alleged racially-motivated peremptory strike and has been heavily criticized for its failings.<sup>45</sup> Although the Supreme Court has recently concluded that the Sixth Amendment incorporates

---

37. See *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020) (discussing the origin of nonunanimous juries). See generally Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593 (2018).

38. 100 U.S. 303 (1879).

39. *Id.* at 311.

40. 380 U.S. 202 (1965).

41. *Id.* at 221–22.

42. *Id.* at 206–09 & n.4. Women were not even considered for jury service. *Id.* at 206.

43. 476 U.S. 79 (1986).

44. *Id.* at 96–97.

45. *Id.* at 97 (“[T]he prosecutor’s explanation need not rise to the level justifying exercise of a challenge for cause.”); see *Miller-El v. Dretke*, 545 U.S. 231, 267–68 (2005) (Breyer, J., concurring) (discussing the flaws in *Batson*); Paul Butler, *Mississippi Goddamn: Flowers v. Mississippi’s Cheap Racial Justice*, 2019 SUP. CT. REV. 73, 82–83.

the right to a unanimous jury,<sup>46</sup> “race-based exclusion from jury service” remains “central to criminal adjudication” in the United States.<sup>47</sup> Yet courts have been unwilling, with the exception of a pair of Justices, to give constitutional guarantees meaning through more dramatic steps like eliminating peremptory strikes.<sup>48</sup> At the time I delivered this Comment, the Court has yet to decide whether the right to a unanimous jury should apply retroactively, although it has granted certiorari to answer this critical question.<sup>49</sup> It may well decide it should not apply retroactively, leaving defendants whose convictions violated the Sixth Amendment without a remedy.

I raise these examples to highlight that the local concern Mr. McCloy’s Note addresses is a component of a problem that is endemic to our justice system. A right is meaningless unless there is a way to guarantee its protection and substance.

That, I believe is where the second question connects to the first. Keeping the community’s conscience in the dark about sentencing norms interferes with defendants’ rights. Yet, even when offered substantial discretion in sentencing, juries aimed high. Mr. McCloy offers the example of Norell Sterling Ward, a Black man convicted of two counts of possessing heroin with intent to distribute and one count of conspiracy to distribute, who faced a five-year minimum and forty-year maximum for each count.<sup>50</sup> The guidelines’ recommendation would have given

---

46. See *Ramos*, 140 S. Ct. at 1397 (“[I]f the Sixth Amendment’s right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.”).

47. *Frampton*, *supra* note 37, at 1623; see *Flowers v. Mississippi*, 139 S. Ct. 2228, 2235 (2019); *Butler*, *supra* note 45, at 84.

48. See *Batson*, 476 U.S. at 107 (Marshall, J., concurring) (“The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system.”); *Miller-El*, 545 U.S. at 273 (“I believe it necessary to reconsider *Batson*’s test and the peremptory challenge system as a whole.”).

49. See *Edwards v. Vannoy*, 140 S. Ct. 2737, 2737–78 (2020) (Mem.) (granting certiorari to consider “[w]hether this Court’s decision in *Ramos* v. Louisiana, 590 U.S. \_\_\_\_ (2020), applies retroactively to case on federal collateral review”).

50. See McCloy, *supra* note 3, at 564 & n.265.

Ward a sentencing range from six years and four months to ten years and five months.<sup>51</sup> The jury recommended *sixty-five years* or “a little under twenty-two years for each offense.”<sup>52</sup> And because juries operate in secrecy, it is impossible to know *why* Mr. Ward’s jury settled on twenty-two years. We only know that they did.

Jury sentencing provides an outlet for jurors to express the community’s displeasure with a defendant’s transgressions.<sup>53</sup> Without some method of channeling juror discretion, this exercise in retributivism fails to satisfy the proportionality necessary for retributive justice, rather than vengeance.<sup>54</sup> It also raises questions of whether Virginia’s sentencing system invites unreasonably arbitrary penalties. It is possible that jurors’ perceptions and sentencing preferences are colored by their beliefs about the justice system, fairness, and what particular defendants deserve. And given what we know about race and the criminal justice system, we would be deluding ourselves if we dismissed concerns that a defendant’s race may be a factor in sentencing when a jury has a thirty-five-year range to choose from without substantive guidance.<sup>55</sup>

Community standards of justice do not always comport with what is actually just. Consider the history of all-White juries

---

51. See *id.* at 564–65.

52. See *id.* at 565.

53. See *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (“[C]apital punishment is an expression of society’s moral outrage at particularly offensive conduct.”); see also Chad Flanders, *Time, Death, and Retribution*, 19 U. PA. J. CONST. L. 431, 434 (2016).

54. See *Enmund v. Florida*, 458 U.S. 782, 801 (1982); *Roper v. Simmons*, 543 U.S. 551, 571 (2005); Alexandra L. Klein, *Volunteering to Kill 34* (unpublished manuscript) (on file with author).

55. See generally Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). Mr. McCloy’s Note leaves open room for another interesting area of research—whether juries deviate upward more frequently for Black defendants. While most states generally ignore statistical evidence of racial bias to demonstrate constitutional rights violations, such a study could show whether bias is a possible factor in jury sentencing in Virginia. The sample size of such a study in Virginia would be quite small, given the infrequency of jury trials. Such research would nonetheless be valuable.

sentencing Black men to death in trials held at record speed.<sup>56</sup> None of us would agree that was justice. But members (White ones, anyway) of *that* community at *that* time might have thought it was just. Lynchings, a “tool of racial control,” offer another example of a situation in which a particular community’s brand of “justice” was deeply unjust.<sup>57</sup> As for the death penalty itself, there is substantial evidence that the penalty is disproportionately applied when the victim is White—reflecting community bias that certain lives matter more.<sup>58</sup> In a slightly different example, grand juries similarly reflect community bias, “almost never” indicting police officers who have killed unarmed civilians—another demonstration of community preference leading to injustice.<sup>59</sup>

A jury may be a tool against government oppression.<sup>60</sup> But juries can also impose a community’s particular style of oppression, such as racial discrimination.<sup>61</sup> When a jury is

---

56. See *Powell v. Alabama*, 287 U.S. 45, 53–58 (1932); see also EQUAL JUST. INITIATIVE, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* 62–63 (3d ed. 2017), <https://perma.cc/5KVA-ZVEU> (PDF) [hereinafter *LYNCHING IN AMERICA*].

57. *LYNCHING IN AMERICA*, *supra* note 56, at 27–29, 32; Hoag, *supra* note 31, at 998–1001; Tania Tetlow, *Discriminatory Acquittal*, 18 WM. & MARY BILL RTS. J. 75, 82–84 (2009).

58. See *McCleskey v. Kemp*, 481 U.S. 279, 312–18 (1987) (“The raw numbers collected by [McCleskey] indicate that defendants charged with killing white persons received the death penalty in 11% of the cases, but defendants charged with killing blacks received the death penalty in only 1% of the cases.”); *id.* at 339 (Brennan, J., dissenting) (lamenting the majority’s unwillingness to act upon McCleskey’s “striking evidence”); Hoag, *supra* note 31, at 992–93.

59. See Roger A. Fairfax, Jr., *The Grand Jury’s Role in the Prosecution of Unjustified Police Killings—Challenges and Solutions*, 52 HARV. C.R.-C.L. L. REV. 397, 399–400 (2017).

60. Jury nullification is one example of a protection against government oppression. See Butler, *supra* note 55, at 701–05.

61. See Tetlow, *supra* note 57, at 76–77. Of course, jury nullification, referenced *supra*, can serve as a form of popular oppression ensuring that wrongdoers go free. For example, a jury swiftly acquitted Roy Bryant and J.W. Milam of the brutal torture and murder of Emmitt Till, (despite their belief in the men’s guilt) and complied with Sheriff-Elect Harry Dogan’s request to “wait awhile before returning a verdict in order to ‘make it look good.’” PAUL H. ROBINSON & SARAH M. ROBINSON, *SHADOW VIGILANTES: HOW DISTRUST IN*

unwilling to do justice for illegitimate reasons, or that jury allows its own biases to enter the jury room, that jury deprives the defendant of their Sixth Amendment right to an “impartial” jury.<sup>62</sup> Mr. McCloy has demonstrated that when a state’s sentencing scheme conceals critical information from jurors, it deprives the defendant of their Sixth Amendment right by pressuring the defendant to waive their rights.

Virginia’s sentencing scheme left open too great an invitation for personal bias to creep in. Mr. McCloy’s Note highlights a key step for limiting jury discretion and ensuring more equitable sentences. Yet more is to be done. Informing a jury is an essential step, but it is equally important that the members of our society who will serve as jurors understand that the legitimacy of our criminal justice system rests on their willingness to do impartial justice.

If we choose to keep jurors in the dark, knowing they are likely to produce arbitrary and inequitable results, then the Sixth Amendment’s right to an impartial jury is nothing more than a meaningless guarantee.

---

THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS 35 (2018). Despite the community’s preference for an acquittal, this sort of action, intended to preserve White supremacy, is not justice—nor could it ever be.

62. U.S. CONST. amend. VI.