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Recommended Citation

Frank O. Bowman III, Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 U. Chi. L. Rev. 367 (2010)

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ARTICLE

Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended

Frank O. Bowman, III[†]

*This Article argues that the line of Supreme Court Sixth Amendment jury right cases that began with *McMillan v Pennsylvania* in 1986, crescendoed in *Blakely v Washington* and *United States v Booker* in 2004–2005, and continues in cases such as *Oregon v Ice*, is a colossal judicial failure. First, the Court has failed to provide a logically coherent, constitutionally based answer to the fundamental question of what limits the Constitution places on the roles played by the institutional actors in the criminal justice system. It has failed to recognize that defining, adjudicating, and punishing crimes implicates both the Sixth Amendment Jury Clause and the Fifth and Fourteenth Amendment Due Process Clauses, and it has twisted the Jury Clause into an insoluble logical knot. Second, the practical effect of the Court's constitutional malpractice has been to paralyze the generally beneficial structured sentencing movement, with the result that promising avenues toward improved substantive and procedural sentencing justice have been blocked. Even the most widely applauded consequence of these cases, the transformation of the federal sentencing guidelines into an advisory system, proves on close inspection to be a decidedly mixed blessing. The Court has made the Constitution not a guide, but an obstacle, to a desirable distribution of authority among the criminal justice system's institutional actors.*

*The Article provides a comprehensive analysis of all the opinions in the *McMillan-Apprendi-Blakely-Booker-Ice* line, considering both their constitutional reasoning and their practical impact on federal and state sentencing systems. It builds on a careful dissection of the defects in the Court's Sixth Amendment sentencing decisions to develop an alternative constitutional analysis that combines Sixth Amendment and due process principles to suggest a more intellectually coherent and practically desirable constitutional sentencing jurisprudence.*

INTRODUCTION

The set of institutions we refer to as the criminal justice system performs three basic functions. It defines what a “crime” is. It adjudicates guilt of crimes. It imposes punishment for crimes. In the United States, the responsibility for performing these three functions is distri-

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buted among the legislature, the judiciary (trial and appellate), the executive branch in the persons of the prosecutor and the prison and parole authorities, the defense bar, the jury, and in recent years and in some places, quasi-independent administrative bodies called sentencing commissions. In the last quarter of the twentieth century, the way these institutions interacted to generate criminal punishments changed dramatically. The dominant theory of punishment shifted, deemphasizing rehabilitation and embracing deterrence, incapacitation, and just deserts. Legislatures raised penalties and became enamored of mandatory minimum sentences for recidivists, drug offenders, and a growing list of crime types. Prison populations surged. Simultaneously, a structured sentencing movement arose and sought to guide the sentencing discretion of trial judges through rules tied to post-conviction judicial factfinding. Many jurisdictions abandoned parole boards and with them the idea that correctional experts should have significant back-end release authority. The federal government embraced all these trends. It raised penalties, imposed lots of mandatory minimum sentences, abandoned parole, and embarked on a still-controversial foray into guidelines sentencing.

These developments created a thicket of knotty issues. Some were plainly constitutional questions requiring resolution by the Supreme Court. Some implicated the balance of power between the federal judiciary and its coordinate branches and thus tempted the Court to use its constitutional interpretative powers in institutional self-defense. Others were legislative policy problems that the Court had, at best, only an indirect warrant to address, particularly at the state level. That the Court would participate in the national sentencing debate was inevitable. That it would botch the assignment so badly was not.

The sequence of Supreme Court decisions running from *McMillan v Pennsylvania*¹ in 1986, through *Apprendi v New Jersey*² in 2000, *Blakely v Washington*³ in 2004, *United States v Booker*⁴ in 2005, and culminating in *Oregon v Ice*⁵ in January 2009, has been a debacle in two major ways. First, the Court has failed to provide a logically coherent, constitutionally based answer to the fundamental question of what limits, if any, the Constitution places on the roles played by the institutional actors in the criminal justice system. It failed to recognize

¹ 477 US 79 (1986).

² 530 US 466 (2000).

³ 542 US 296 (2004).

⁴ 543 US 220 (2005).

⁵ 129 S Ct 711 (2009).

that defining, adjudicating, and punishing crimes implicates both the Sixth Amendment Jury Clause and the Fifth and Fourteenth Amendment Due Process Clauses, and it has twisted the Jury Clause into an insoluble logical knot. Second, the practical effect of the Court's constitutional bungling has been to paralyze the generally beneficial structured sentencing movement with the result that promising avenues toward improved substantive and procedural sentencing justice have been blocked. Even the most widely applauded consequence of the *Apprendi-Booker* line, the transformation of the Federal Guidelines into an advisory system, proves on close inspection to be a decidedly mixed blessing. The Court has made the Constitution not a guide, but an obstacle, to a desirable distribution of authority among the criminal justice system's institutional actors.

This Article proceeds in five parts. Part I describes the rise of the structured sentencing movement and the constitutional and institutional challenges that movement created for the federal judiciary. Part II analyzes the Supreme Court's initial efforts to reconcile constitutional jury trial and due process protections with emerging structured sentencing mechanisms, from the seminal case on the requirement of proof beyond a reasonable doubt for elements of a crime, *In re Winship*,⁶ to the case which launched the current spate of Sixth Amendment jury trial cases, *Apprendi*. The Part focuses particular attention on *McMillan* as an underappreciated source of many of the errors that have since ensnared the Court. Part III discusses the critical period after *Apprendi* when, in *Harris v United States*⁷ and *Blakely*, a Court obsessed with the interbranch struggle over federal sentencing fell under the spell of Justice Antonin Scalia's love of simple, bright-line rules and went irrevocably astray. Part IV addresses the Court's increasingly incoherent efforts to apply the flawed *Blakely* rule, most particularly to the Federal Sentencing Guidelines in *Booker* and its numerous progeny. Part V assesses the convoluted Sixth Amendment sentencing structure the Court has erected and concludes that it is a monumental failure. This final Part offers a comprehensive alternative model, based on both the Sixth Amendment right to a jury trial and the Fifth and Fourteenth Amendment rights to due process, and suggests that the accession of Justice Sonia Sotomayor to the Supreme Court may provide an opportunity for the Court to rethink and to move in the direction of the model I suggest.

⁶ 397 US 358 (1970).

⁷ 536 US 545 (2002).

I. THE STRUCTURED SENTENCING MOVEMENT AND THE FEDERAL JUDICIARY

A set of interlocking developments transformed the American criminal justice system at the end of the twentieth century. For decades prior to the 1970s, American criminal practice was dominated by a model of punishment that emphasized individualized sentences, rehabilitation of offenders, and judicial and administrative discretion.⁸ In this rehabilitative or “medical” model, the roles of the institutional actors in defining, adjudicating, and punishing crime were well understood as a matter of customary practice, if not much scrutinized in constitutional theory.

First, legislatures defined crimes.⁹ Second, legislatures set the punishment for each crime they created, customarily prescribing an array of possible sanctions including a range of fines and a range of restrictions on the defendant’s liberty. Thus, for the legislature to define a crime was to identify a set of facts, commonly called “elements,” which, if proven, subjected the defendant to criminal liability and exposed him to a specified range of punishments.

Third, once a defendant was convicted of a crime by trial or plea, the judge set a sentence somewhere within the legislatively prescribed range of punishments after receiving information about the particulars of the crime, the victim, and the defendant’s background. The judge was to individualize the sentence of each offender¹⁰ after weighing a variety of recognized sentencing objectives, among which rehabilitation was at least theoretically predominant.¹¹ The judge’s choice of sentence within

⁸ See Frank O. Bowman, III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 Wis L Rev 679, 680–89. See also Kate Stith and Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 Wake Forest L Rev 223, 227 (1993); Pamala L. Grisct, *Determinate Sentencing: The Promise and Reality of Retributive Justice* 11–12 (SUNY 1991).

⁹ The ancient common law power of judges to define new crimes through adjudication had essentially vanished by the late twentieth century. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 195 (1985) (“Judicial crime creation [in the United States] is a thing of the past.”).

¹⁰ See, for example, *Williams v New York*, 337 US 241, 248 (1949) (discussing “[t]oday’s philosophy of individualizing sentences”).

¹¹ Bowman, 1996 Wis L Rev at 684 (cited in note 8). In 1981, one commentator observed that “rehabilitation . . . seen as the *exclusive* justification of penal sanctions . . . was very nearly the stance of some exuberant American theorists in the mid-twentieth century.” Francis A. Allen, *The Decline of the Rehabilitative Ideal* 3 (Yale 1981) (“[T]he nature of the rehabilitative ideal is profoundly affected by whether rehabilitation is seen as the *exclusive* justification of penal sanctions (as was very nearly the stance of some exuberant American theorists in mid-twentieth century).”).

the statutory parameters for the crime(s) of conviction was largely unconstrained by either procedural rules or appellate review.¹²

Fourth, the judge's sentence was not the last word. Virtually all state and federal systems vested some back-end release authority in a parole board or similar body.¹³ In many systems, the parole board had an equal or even greater voice than the judge in determining how much time defendants would really serve.¹⁴ Nonetheless, parole boards could not impose punishment exceeding the range legislatively authorized by the original conviction.

In this setting, "element" facts were, and seemed, very important. They both created liability and set the outside limits of judicially imposed punishment. By contrast, judicial determinations of non-element facts at sentencing neither created liability nor set the limits of punishment. Non-element facts had no *necessary* effect on the sentence, even presumptively. Of course, judicial determinations of non-element facts had huge impacts on individual defendants. After all, as discussed below,¹⁵ even in a purely discretionary sentencing system, the only way for a judge rationally to distinguish one defendant from others who have committed the same statutory crime is to ascertain facts other than the fact of conviction that suggest a sentence at, above, or below the norm for that crime. But during the criminal procedure revolution that began in the 1960s, this logically inescapable process of imposing different sentences on defendants convicted of the same "crime" based on factual differences in their situations never suggested itself to the Supreme Court as requiring constitutional regulation or response.

The Court's indifference to sentencing was understandable because its criminal procedure revolution sprang from the soil of the mid-twentieth century's experience of, and assumptions about, the

¹² See *Koon v United States*, 518 US 81, 96 (1996) ("Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.").

¹³ See, for example, Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 29 *Crime & Justice* 39, 43 (2002) (describing North Carolina sentencing practices prior to 1981, which involved largely unconstrained front-end judicial sentencing discretion combined with a back-end parole release mechanism, as "typical for the times"). See also Sandra Shane-DuBow, Alice P. Brown, and Erik Olsen, *Sentencing Reform in the United States: History, Content, and Effect* 4 (National Institute of Justice 1985) (outlining the development of states' probation and parole policies, and noting that "[b]y 1922, . . . forty-four states" had instituted parole mechanisms).

¹⁴ Beginning in 1910, federal prisoners became eligible for parole release after serving one-third of the term imposed by the court. Parole boards had discretion in release determinations. Peter B. Hoffman, *History of the Federal Parole System* 6 (DOJ 2003), online at <http://www.usdoj.gov/uspc/history.pdf> (visited Dec 11, 2009).

¹⁵ See notes 344–45 and accompanying text.

nature of a criminal trial. The Bill of Rights confers on criminal defendants the general right to due process of law before being deprived of life or liberty,¹⁶ as well as a specific list of procedural rights. Most of them, particularly the Sixth Amendment rights to a speedy and public trial by a jury of one's peers,¹⁷ confrontation, and compulsory process, and the Fifth and Fourteenth Amendments' due process guarantee of proof beyond a reasonable doubt,¹⁸ are (either by obvious textual mandate or settled judicial interpretation) trial rights. To the extent they apply outside of trial, they protect primarily against government abuses in the process of gathering evidence in preparation for trial.¹⁹ Because a "trial" is, at its core, a mechanism for determining the existence of facts,²⁰ the reach of constitutional trial rights turns on which facts are to be determined by the trial.

Unsurprisingly, the Court's thinking about a defendant's constitutional protections developed contingent on the prevailing idea that a criminal trial was the process of adjudicating guilt of a "crime," which consisted of legislatively designated, punishment-limiting facts called "elements," and that (with a few geographic²¹ or subject matter²² exceptions) an American "trial" did not include the determination of the punishment appropriate for a particular offender. Thus, constitutional

¹⁶ US Const Amend V.

¹⁷ US Const Amend VI. See, for example, *Duncan v Louisiana*, 391 US 145, 149 (1968) (holding that the Fourteenth Amendment provides defendants with the right to a trial by jury in state criminal proceedings whenever such a right would be granted in federal court).

¹⁸ See *Patterson v New York*, 432 US 197, 210 (1977); *Winship*, 397 US at 361–64.

¹⁹ See, for example, *Miranda v Arizona*, 384 US 436, 461, 465 & n 35, 467 (1969) (extending to the setting of police interrogation the Fifth Amendment right not to be compelled to be a "witness" against oneself and the Sixth Amendment right to counsel).

²⁰ One might quibble with this characterization, noting, for example, that juries are asked not only to determine whether particular events occurred, but also to make mixed judgments of law and fact, such as whether or not given congeries of behavior and attendant circumstances amount to "negligence." But lawyers refer to such judgments as determinations of fact, and in any case, juries are at most asked to determine whether certain combinations of facts fit within predefined legal categories and not to define the categories themselves.

²¹ In 1960, roughly 25 percent of all states maintained jury sentencing for non-capital felonies. Note, *Statutory Structures for Sentencing Felons to Prison*, 60 Colum L Rev 1134, 1154 (1960) (canvassing various jurisdictions' jury sentencing provisions and noting that the practice "is authorized for all crimes in ten states and for a limited number in three others"). As of 2000, Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia still allowed juries to sentence the defendant in non-capital cases. Frank O. Bowman, III, *Fear of Law: Thoughts on 'Fear of Judging' and the State of the Federal Sentencing Guidelines*, 44 SLU L J 299, 311 (2000).

²² The Supreme Court's death penalty jurisprudence created mandatory jury sentencing phases in capital trials. See *Gregg v Georgia*, 428 US 153, 190–91 (1976). But see *Walton v Arizona*, 497 US 639, 648 (1990) (noting that judges may make sentencing decisions because "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury"), quoting *Hildwin v Florida*, 490 US 638, 640–41 (1989) (per curiam).

trial rights attached only to legal proceedings for determining elements. In post-conviction sentencing proceedings, defendants not only had no trial rights, but they had, at best, only minimal rights to any form of procedural due process.²³

These arrangements made sense given the dominant sentencing model and its attendant assumptions. Until quite recently, it was generally easy to figure out what the “elements” of a “crime” were. Legislatures enacted criminal codes that customarily identified crimes by name (murder, robbery, rape), subdivided them into degrees where appropriate (first degree murder, second degree murder, manslaughter), and defined them by writing into the statute language like, “the defendant commits the crime of X if he does act A, with mental state B, under circumstance C.” As a matter of practice, judges had become accustomed to legislative delegation of substantial sentencing discretion.²⁴ They thought of themselves as sentencing experts, and, unsurprisingly, trusted themselves to find sentencing-related facts accurately and to use the facts they found wisely.²⁵ As a matter of theory, considerations of due process seemed inapposite given the prevailing, if not very closely examined, assumption that judges were not really “doing law” when they passed sentence. Some conceived of sentencing judges as performing a quasi-medical evaluation and treatment function.²⁶ Others maintained that sentencing judges were performing a sui generis form of “moral reasoning” that could not be cabined within the fact-and-rule-bound strictures of adversarial due process.²⁷ After all,

²³ See, for example, *Williams*, 337 US at 249–51 (holding that due process allows judges broad discretion as to sources and types of information relied upon at sentencing and does not require confrontation or cross-examination at sentencing).

²⁴ To say that late twentieth-century judges had become used to substantial front-end sentencing discretion is not the same thing as suggesting, as Justice John Paul Stevens, Justice Sandra Day O'Connor, and others sometimes do, that largely unfettered judicial discretion within broad statutory limits had, until recently, been the nearly invariable practice in American law since soon after the nation's Founding. See *Apprendi*, 530 US at 481–82 (2000); id at 544–45 (O'Connor dissenting) (relying on past Court precedent “approv[ing] of—and the significant history in this country of—discretionary sentencing” in asserting that the majority's rule need not necessarily invalidate the Guidelines). To the contrary, the center of gravity for sentencing discretion among judges, juries, and legislatures has varied considerably from time to time and jurisdiction to jurisdiction. See Bowman, 44 SLU L J at 311–15 (cited in note 21).

²⁵ See Kate Stith and José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 28–29 (Chicago 1998) (discussing sentencing ethos of pre-Guidelines federal judges).

²⁶ Griset, *Determinate Sentencing* at 11 (cited in note 8) (discussing the rise of the rehabilitative “juggernaut” between 1877 and 1970 and noting that “[a] medical analogue was frequently invoked”).

²⁷ See Stith and Cabranes, *Fear of Judging* at 78–79 (cited in note 25) (noting that “adjudication has more in common with scientific than with moral reasoning,” but arguing that the latter concept is more consistent with what they see as the sentencing judge's duty to perform a sort of

one would scarcely insist on due process in the doctor's examining room or the tower of the philosopher-king.

So long as legislatures continued to define crimes in the traditional way and prevailing sentencing practices conformed to the conventional rehabilitative, discretionary model, the decisions of the criminal procedure revolution created no dissonance in the sentencing context. However, at the same time the criminal procedure revolution was unfolding, other trends were converging to produce dramatic changes in sentencing practice and procedure.

A. The Structured Sentencing Movement

Violent crime and property crime rates increased steadily through the 1960s and 1970s. Accompanying this trend were myriad other changes to American society, ranging from the women's and civil rights movements, to the anti-war movement, to the emergence of a widespread drug subculture.²⁸ The real increase in crime, in tandem with more general social upheaval, unsettled and frightened voters and their representatives, who demanded more social controls.²⁹ That demand produced a national movement toward tougher, more definite, less discretionary criminal sentences for both drug offenses and traditional crimes against persons and property.³⁰

These broad social movements gathered strength at the same time as a powerful critique of the dominant American sentencing model took hold among criminal justice insiders. Many observers doubted the ability of the rehabilitative sentencing model to rehabilitate,³¹ and urged that sentences be based more on considerations of

Aristotelian equity judgment). See also Bowman, 44 SLU L J at 319–26 (cited in note 21) (critiquing the Stith and Cabranes discussion of moral reasoning by sentencing judges).

²⁸ See Frank O. Bowman, III, *Murder, Meth, Mammon and Moral Values: The Political Landscape of American Sentencing Reform*, 44 Washburn L J 495, 498–99 (2005) (discussing the novelty of modern American recreational drug use). See also Frank O. Bowman, III, *Playing "21" with Narcotics Enforcement: A Response to Professor Carrington*, 52 Wash & Lee L Rev 937, 951–55 (1995) (recounting Americans' use of cocaine, opiates, and marijuana in the nineteenth and twentieth centuries, and characterizing the stages of Americans' reactions as "discovery, excitement, abuse, disillusionment, and prohibition, all crammed into a few short decades"); Steven B. Duke and Albert C. Gross, *America's Longest War: Rethinking Our Tragic Crusade against Drugs* 43–46 (Putnam 1993).

²⁹ See David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* 89–102 (Chicago 2001).

³⁰ See Bowman, 52 Wash & Lee L Rev at 972 (cited in note 28).

³¹ Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U Pa L Rev 550, 552 (1978) (noting the practical difficulty proponents of rehabilitation encounter when they attempt "[t]o probe a per-

just desert, deterrence, and (where necessary) incapacitation. Critics also complained that unconstrained front-end judicial sentencing discretion produced unjustifiable disparities of outcome and was open to infection by racial and other biases, whether conscious or unconscious.³² They argued that the back-end release authority of parole boards was too arbitrary and too shielded from public view, providing yet another avenue for unjust and unreviewable disparity.³³ These and other concerns³⁴ coalesced into a general movement toward “structured sentencing.”

The term “structured sentencing” covers an array of different sentencing arrangements, but broadly speaking, it refers to regimes that seek to guide judicial sentencing discretion within the range of punishments permitted by the fact of conviction for a particular crime or group of related crimes. This guidance can vary in complexity, from very simple arrangements in which conviction creates a presumptive, aggravated, and mitigated range and requires a sentence within the presumptive range absent judicial findings of aggravating or mitigating facts,³⁵ to intricate systems like the Federal Guidelines. Likewise, the idea of “structured sentencing” can embrace a spectrum of systems ranging from definite rules absolutely binding on judges to voluntary

son’s psyche and predict his future behavior”). See also Bowman, 1996 Wis L Rev at 688–89 (cited in note 8).

³² Bowman, 1996 Wis L Rev at 686–88 (cited in note 8). See also Comprehensive Crime Control Act of 1984, S Rep No 98-225, 98th Cong, 2d Sess 38 (1983), reprinted in 1984 USCCAN 3182, 3221 (concluding that the unreformed sentencing rules permitted “an unjustifiably wide range of sentences” even among similar offenders).

³³ See Bowman, 1996 Wis L Rev at 688 (cited in note 8). See, for example, Jonathan D. Casper, *Determinate Sentencing and Prison Crowding in Illinois*, 1984 U Ill L Rev 231, 235–36.

³⁴ For example, some critics argued that delegating to parole boards so much power to determine real sentence length made judicial sentencing more ceremonial than real; they wanted “truth in sentencing,” that is, a stronger correlation between the sentence announced by the judge and the time actually served by the defendant. See Bowman, 1996 Wis L Rev at 686–89 (cited in note 8).

³⁵ See, for example, Colo Rev Stat Ann § 18-1.3-401(1)(a)(V)(A) (West) (establishing six presumptive classes of sentencing ranges for defendants sentenced after July 1993, from the minimum of twelve to eighteen months, to the maximum of life imprisonment or death); Colo Rev Stat Ann § 18-1.3-401(6) (West):

If the court finds . . . extraordinary mitigating or aggravating circumstances, it may impose a sentence which is lesser or greater than the presumptive range; except that in no case shall the term of sentence be greater than twice the maximum nor less than one-half the minimum term authorized in the presumptive range for the punishment of the offense.

See also *Lopez v People*, 113 P3d 713, 723–25 (Colo 2005) (describing Colorado’s aggravated sentencing scheme under § 18-1.3-401(6) as allowing for judicial factfinding, and holding that the US Constitution requires that the jury find aggravated facts beyond a reasonable doubt, except in limited situations where the judge may do so).

guidelines that judges are at liberty to accept or reject.³⁶ Common to all structured systems, however, is *some set of standards, guidelines, or rules that correlate required, preferred, or suggested sentencing outcomes to non-element facts determined by the sentencing judge.*

Structured sentencing is often associated with the creation of sentencing commissions or analogous bodies of experts to study sentencing and corrections, to advise judges and legislators on sentencing policy, and in some cases to draft statutes, rules, or guidelines. In the context of the present discussion, a key function of sentencing commissions is to identify non-element facts that ought (or ought not) to influence the type and severity of punishment imposed on convicted defendants. Finally, the structured sentencing systems that arose beginning in the 1970s and 1980s commonly eliminated or drastically restricted the back-end release power of prison and parole officials.³⁷

B. Mandatory Minimum Sentences and Other Legislative Factual Add-ons

At the same time as the structured sentencing movement was gaining national traction, legislatures grew increasingly fond of two other kinds of sentencing mechanisms that are commonly, but erroneously, lumped into the category of structured sentencing: (1) mandatory minimum sentences and (2) other sentence-enhancing devices that might be called “factual add-ons.”³⁸

1. Mandatory minimum sentences.

Some mandatory minimum sentencing was, of course, a long-familiar feature of criminal codes. When a legislature sets the penalty for second degree murder as a range of ten to twenty years imprison-

³⁶ See, for example, Va Code § 19.2-298.01 (establishing rules governing use of discretionary sentencing guidelines).

³⁷ See, for example, Sentencing Reform Act of 1984 § 218(a)(5), Pub L No 98-473, 98 Stat 1837, 2027, repealing 18 USC § 4201 et seq (providing for federal parole system). Structured sentencing need not be coupled with elimination of parole release authority. For a powerful argument in favor of reviving back-end release authority in structured sentencing systems, see Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 Emory L J 377, 433 (2005).

³⁸ These devices are not mechanisms of structured sentencing, properly understood, and can subvert its aims. Structured sentencing seeks a set of rules that guide, but do not eliminate, the exercise of judicial discretion, while mandatory minimums place absolute limits on judicial discretion. Likewise, the structured sentencing movement is as much about the process by which rules are made as about the substance of the rules. The process is supposed to be a collaboration among interested institutions that blends considerations of politics and professional judgment. Mandatory minimum sentences and factual add-ons tend to be legislative diktats imposed with little consideration of how they fit into the sentencing structure on which they are imposed.

ment, the lower end of that range is both a minimum sentence and mandatory inasmuch as judges are barred from imposing a sentence of less than ten years. The novelty that appeared with increasing frequency in the 1970s and 1980s was the introduction of statutes that imposed a mandatory minimum sentence higher than the minimum prescribed for conviction of a particular crime based on proof of some fact not required for conviction of the crime itself. An example of this new type of mandatory minimum sentence would be a statute that set the sentencing range for unlawful possession of a controlled substance at zero to ten years, but in a separate provision required that the defendant be sentenced to not less than five years if he possessed a specified quantity of drugs. Sometimes, as in some federal drug laws, proof of a fact like drug quantity increases both the required minimum sentence and the potential maximum sentence.³⁹

2. Other factual add-ons.

In addition to creating mandatory minimum penalties, legislatures began attaching other kinds of penalty enhancements to proof of facts that would not conventionally have been seen as elements of a crime. Among the most common of these factual add-ons have been proximity provisions enhancing penalties for committing certain offenses (most commonly drug crimes) on or within a specified distance of particular kinds of facilities,⁴⁰ gun and injury enhancements,⁴¹ and recidivist enhancements.⁴² Some such statutes increase maximum sen-

³⁹ See, for example, 21 USC § 841(b) (setting the penalty range for manufacturing, distributing, dispensing, or possessing with intent to distribute a Schedule I or II controlled substance at zero to twenty years, but increasing the penalty range to five to forty years where specified amounts were involved, and to ten years to life imprisonment where larger specified amounts were involved).

⁴⁰ Federal law doubles the maximum penalty for distributing, manufacturing, or possessing controlled substances on or within one thousand feet of all public and private schools, colleges, public housing authority playgrounds, public swimming pools, or video arcade facilities. 21 USC § 860(a). Federal law also doubles the maximum punishment for drug offenses committed in, on, or within 1,000 feet of a truck stop or safety rest area. 21 USC § 849(b)(1). Proof of the requisite proximity sometimes also triggers a minimum sentence in addition to the enhanced maximum. See, for example, 21 USC § 860(a) (imposing one-year mandatory minimum sentence for distribution near the specified child-related facilities).

⁴¹ Many jurisdictions have enacted statutes increasing penalties for offenders who cause injury or use firearms, even if the underlying offense of conviction does not have weapon use or injury as one of its elements. See, for example, *McMillan*, 477 US at 84–85 (upholding a Pennsylvania statute imposing five-year mandatory minimum sentence for “visible possession” of a firearm in connection with certain enumerated offenses).

⁴² Such recidivist enhancements can take the form of so-called “three strikes” laws that impose substantial minimum sentences on defendants convicted of a specified number of prior offenses. See,

tences.⁴³ Some impose or increase minimum sentences.⁴⁴ Some do both.⁴⁵ And sometimes they require the imposition of an additional punishment to run consecutive to the punishment imposed for the underlying offense.⁴⁶

C. Structured Sentencing, Juries, and Due Process

Every structured sentencing system by definition requires some post-conviction judicial findings of fact. Creating binding rules or even advisory guidelines that differentiate rationally among defendants convicted of the same offense requires correlating non-element facts to preferred sentencing outcomes.⁴⁷ But the more factually specific and legally binding a structured system becomes, the more judicially found facts will begin to rival the elements of the crime itself in their impact on a defendant's actual sentence. This phenomenon, which in its extreme form has been characterized by the Supreme Court as the "tail which wags the dog,"⁴⁸ was felt by some to be suspect and perhaps illegitimate.⁴⁹

Some critics complained that according judicially found facts so much sentencing weight denigrated the constitutionally guaranteed role of the jury.⁵⁰ Others were concerned less about the identity of the factfinder than about the sufficiency of procedural protections in sentencing proceedings.⁵¹ Structured sentencing presents a mixed due

for example, *Ewing v California*, 538 US 11, 15 (2003) (describing and upholding a California "three strikes" statute imposing sentence of twenty-five years to life for theft of golf clubs).

⁴³ See, for example, 21 USC § 860(c) (tripling maximum sentence for one who employs a minor to distribute drugs near schools or playgrounds).

⁴⁴ See, for example, *McMillan*, 477 US at 88 (noting that Pennsylvania's law proscribing "visible possession" of a firearm while engaged in certain other felonious conduct "'ups the ante' for the defendant only by raising to five years the minimum sentence which may be imposed").

⁴⁵ See, for example, Colo Rev Stat Ann § 18-1.3-406 (West) (prescribing a minimum sentence at the midpoint of the presumptive range and doubling the maximum of the presumptive range for crimes involving the use of a deadly weapon or causing serious bodily injury or death).

⁴⁶ See, for example, 18 USC § 924(c) (imposing a term of years consecutive to the sentence for the underlying offense upon defendant who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm").

⁴⁷ See notes 349–50 and accompanying text.

⁴⁸ *McMillan*, 477 US at 88.

⁴⁹ See, for example, Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S Cal L Rev 289, 334–37 (1992).

⁵⁰ *Id* at 304–05.

⁵¹ *Id* at 307–10 (proposing that the "true reason" why legislatures allow for sentencing-phase factfinding is that it opens the door for the judge to consider "conduct that has not been proven beyond a reasonable doubt"). See generally Frank O. Bowman, III, *Completing the Sentencing Revolution: Reconsidering Sentencing Procedures in the Guidelines Era*, 12 Fed Sent Rptr (Vera) 187 (2000).

process picture. On the one hand, by identifying in advance the facts that will matter most in determining a defendant's sentence within the statutory range and requiring that judges make specific findings of those facts, structured sentencing regimes represent a clear improvement over the traditional model of unreviewable judicial sentencing discretion.⁵² On the other hand, most structured sentencing regimes have afforded minimal procedural protections to the adjudication of sentencing factors. As I wrote of the federal system in 2000:

Although judges must now make findings of fact as an integral part of the task of guidelines application, those findings are the product of a process in which the government's burden of proof is only a preponderance of the evidence, defendants have limited rights to the discovery of evidence germane to sentencing factors, much of the true fact-finding is done (at least preliminarily) by probation officers without the benefit of formal evidentiary presentation, and the sentencing hearing itself is not subject to the rules of evidence.⁵³

II. *WINSHIP* THROUGH *APPENDI*: THE PROBLEM OF LEGISLATIVE EVASION OF CONSTITUTIONAL PROCEDURAL PROTECTIONS

A. *Winship*, *Mullaney*, and *Patterson*

The agonizing doctrinal train wreck the Supreme Court has engineered at the intersection between the structured sentencing movement and the Sixth Amendment jury right exploded into the national conversation with the 2004 decision in *Blakely*. But the story begins in 1970 with the Court's holding in *Winship* that due process requires the government to prove each and every element of a crime beyond a reasonable doubt.⁵⁴ This succinct formulation is by now so familiar to the American legal mind that real effort is required to remember that the Court failed to define its two essential terms—"element" and "crime." To be sure, an "element" is a fact and a "crime" is established

⁵² See Kevin R. Reitz, *Reporter's Introductory Memorandum, Model Penal Code: Sentencing (Tentative Draft No 1)* xxxiii-xxxvii (ALI 2007). See also Bowman, 44 SLU L J at 325-26 (cited in note 21); Julie R. O'Sullivan, *In Defense of the U.S. Sentencing Guidelines Modified Real Offense System*, 91 Nw U L Rev 1342, 1386-87 (1997).

⁵³ Bowman, 12 Fed Sent Rptr at 187 (cited in note 51).

⁵⁴ 397 US at 364. Because *Winship* was a juvenile case, it did not implicate the Sixth Amendment jury trial right. See *In re Gault*, 387 US 1, 13 (1967) (holding that the Constitution does not grant juveniles in the juvenile court system the panoply of rights adults are guaranteed in analogous criminal proceedings, and noting that "the juvenile is not entitled to bail, to indictment by grand jury, to a public trial or to trial by jury").

once the government proves all of its constituent factual elements. But is a “crime” simply a name (“burglary” or “robbery” or “rape”) given to a designated set of factual elements, or is it instead an array of required or permitted punishments (which may or may not bear a special name) authorized by proof of a set of factual elements? And is a fact an “element” only if a legislature designates it as such, or does a fact *become* an “element,” regardless of the legislature’s intentions, if proving it has a particular effect on the nature and severity of the defendant’s punishment?

The answers to these questions matter because they determine the degree to which legislatures can circumvent *Winship*’s proof-beyond-a-reasonable-doubt rule, and would come to matter even more once the Court tied the Sixth Amendment jury trial right to the “element” concept.⁵⁵ The Court first confronted the problem of legislative circumvention of the reasonable doubt requirement in *Mullaney v Wilbur*,⁵⁶ a case involving the traditional distinction between murder and the lesser crime of manslaughter—the presence or absence of heat of passion on the part of the defendant. In *Mullaney*, the Maine statute defined murder as an unlawful and intentional killing.⁵⁷ The jury was instructed that, if the prosecutor proved that the defendant killed unlawfully and intentionally, it should find him guilty of murder unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion.⁵⁸ Concerned that this arrangement improperly relieved the prosecution of its constitutional burden to prove what the Supreme Court saw as a traditional feature of murder, the Court overturned the defendant’s conviction by construing the statutory requirement of an unlawful killing to mean a killing *not* in the heat of passion.⁵⁹ Thus, absence of heat of passion became an “element” the government bore the burden of proving under *Winship*.

Two years later, in *Patterson v New York*,⁶⁰ the Court reversed field.⁶¹ In *Patterson*, the New York statute defined murder as an inten-

⁵⁵ See *McMillan*, 477 US at 93 (rejecting petitioners’ argument that they were entitled to a jury trial on the question of “visible possession” which triggered a five-year mandatory minimum sentence because this fact was a sentencing factor and not an element of a crime).

⁵⁶ 421 US 684 (1975). See generally Ronald J. Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legislative Intervention*, 55 Tex L Rev 269 (1977).

⁵⁷ 421 US at 686 n 3, quoting 17 Me Rev Stat Ann § 2651 (1964) (“Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder and shall be punished by imprisonment for life.”), repealed by 1975 Me Laws 499 § 15.

⁵⁸ *Mullaney*, 421 US at 686–87.

⁵⁹ *Id* at 694–96.

⁶⁰ 432 US 197 (1977).

tional killing, and designated “extreme emotional disturbance” (the Model Penal Code phrase that embraces common law heat of passion⁶³) as an affirmative defense which, if proven by the defendant, reduced the homicide to manslaughter.⁶³ Functionally, the Maine and New York laws were indistinguishable. Both required the government to prove only intentional killing to establish murder and both placed on a defendant who sought mitigation to the lesser crime of manslaughter the burden of proving heat of passion. Yet in *Patterson*, the Supreme Court upheld the New York conviction on the theory that it is permissible for legislatures to shift the burden of proof to the defendant as to some facts by designating them “affirmative defenses” rather than “elements.”⁶⁴

Many, including Justice Lewis Powell in dissent,⁶⁵ have found this formalistic distinction logically unsatisfactory and unduly deferential to legislatures.⁶⁶ But the Court’s retreat in *Patterson* is unsurprising. The Court recognized both that affirmative defenses have a long tenure in Anglo-American law⁶⁷—a fact that detracts materially from the argument that affirmative defenses must necessarily offend the Constitution—and that the affirmative defense device serves very useful functions, particularly when used, as it customarily is, for facts of which the defendant would have unique knowledge (heat of passion,⁶⁸ self-defense,⁶⁹ insanity, and so on).⁷⁰ *Mullaney* placed affirmative defenses in constitutional jeopardy. Accordingly, the *Patterson* Court allowed legislatures to impose evidentiary burdens on defendants

⁶¹ As numerous commentators have observed, in *Patterson*, the Court “signal[ed] that it had erred in *Mullaney*.” Ronald J. Allen, *Montana v. Eglehoff—Reflections on the Limits of Legislative Imagination and Judicial Authority*, 87 J Crim L & Criminol 633, 645 (1997). See also Joshua Dressler, *Understanding Criminal Law* 68 (LexisNexis 3d ed 2001).

⁶² Dressler, *Understanding Criminal Law* at 542 (cited in note 61).

⁶³ *Patterson*, 432 US at 198, quoting NY Penal Law § 125.25(1)(a) (McKinney 1975).

⁶⁴ *Patterson*, 432 US at 210.

⁶⁵ *Id* at 221–25 (Powell dissenting) (deriding the Court’s jurisprudence concerning affirmative defenses as indefensibly “formalistic”).

⁶⁶ See, for example, Joshua Dressler, *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 Notre Dame L Rev 1507, 1515 (1999); Linda S. Eads, *From Capone to Boesky: Tax Evasion, Insider Trading, and Problems of Proof*, 79 Cal L Rev 1421, 1469 n 243 (1991).

⁶⁷ *Patterson*, 432 US at 202–03, 211.

⁶⁸ See, for example, *Commonwealth v Webster*, 59 Mass 295, 304 (1850) (requiring a murder defendant to prove heat of passion when the prosecution proves intentional killing).

⁶⁹ See, for example, *Martin v Ohio*, 480 US 228, 233 (1987) (upholding a placement of the burden on defendant to prove the elements of self-defense).

⁷⁰ I take this to be the Court’s point when it opines that a state need not place on the government the burden of proving mitigating facts as to which “proof would be too difficult.” *Patterson*, 432 US at 207.

through affirmative defenses designated as such, with the caution that “there are obviously constitutional limits beyond which the States may not go in this regard.”⁷¹

In one important respect, *Mullaney* and *Patterson* were simpler than later cases. Both involved ancient categories—murder and manslaughter—immediately recognizable to any lawyer as separate “crimes.” If pressed to articulate why the two categories are meaningfully distinct, the *Mullaney* and *Patterson* litigants might have pointed to differing mental states or the obvious fact that “murder” carried different and more severe consequences than “manslaughter,” but in neither case was there a need to think very hard about what precise differences in definition or consequences made each category a separate “crime.” Everyone accepted without question that the difference between murder and manslaughter was a matter requiring pleading, proof, and jury resolution.

B. *McMillan v Pennsylvania*

McMillan, decided in 1986, was the first case to raise squarely the question of how to recognize “crimes” and “elements” when the bundle of facts that generates the defendant’s penalty range has no special name and is not immediately recognizable as a separate “crime.” Dynel McMillan was convicted in a jury trial of the felony of aggravated assault⁷² which carried a maximum ten-year sentence.⁷³ At sentencing, the government asked the judge to apply Pennsylvania’s Mandatory Minimum Sentencing Act,⁷⁴ which required imposition of a five-year minimum term when the court finds by a preponderance of the evidence that the defendant “visibly possessed a firearm” during the commission of specified offenses.⁷⁵ McMillan argued that because proof of visible possession raised the minimum sentence applicable to aggravated assault alone, visible possession became an element of a separate and more serious crime and, under *Winship*, had to be proven beyond a reasonable doubt.⁷⁶

⁷¹ Id at 210.

⁷² 477 US at 82. McMillan’s appeal was consolidated with those of three other similarly situated defendants. Id.

⁷³ Id at 87.

⁷⁴ Id at 82.

⁷⁵ Mandatory Minimum Sentencing Act, 42 Pa Cons Stat Ann § 9712 (Purdon 1982). See also *McMillan*, 477 US at 81 n 1.

⁷⁶ *McMillan*, 477 US at 87–88.

The Supreme Court disagreed, holding that a fact triggering a mandatory minimum sentence is not an element, but a mere “sentencing factor,” at least so long as the required minimum is below the maximum of the otherwise applicable range.⁷⁷ Justice William Rehnquist’s majority opinion not only gets the immediate issue—how to distinguish an element from a sentencing factor—wrong, but in the process enshrines in precedent a tangle of fundamental conceptual errors from which the Court has never entirely escaped.

To give Rehnquist his due, he confronted very real difficulties. The *Mullaney-Patterson* two-step demonstrated how tricky it could be to apply the tenets of the criminal procedure revolution even to traditional sentencing systems in which conviction under well-understood categories like murder and manslaughter generated a broad discretionary sentencing range. *McMillan* was even trickier because it involved limitations on the judge’s discretion to select a sentence within a range created by conviction of a conventionally recognized “crime.” By 1986, when *McMillan* was decided, unfettered judicial sentencing discretion was in bad odor, the Sentencing Reform Act of 1984⁷⁸ (“SRA”) was on the books, the US Sentencing Commission was hard at work writing guidelines for federal judges, and across the country structured sentencing was the coming thing—new and intriguing, but not yet well understood. Rehnquist did understand, correctly, that determining a sentence in either traditional, broadly discretionary systems or the new structured systems required finding two categories of facts, those minimally necessary to conviction and a set of additional facts relevant only to punishment.⁷⁹ *McMillan* raised the question of whether a legislature could contract the penalty range available to a sentencing judge without providing trial-like procedural protections for the process of finding range-contracting facts, a question that implicated broader questions of how to distinguish between a conviction fact and a sentencing fact, and what procedural protections are constitutionally required for each. A poorly considered resolution of *McMillan* might either infringe on established legislative or judicial prerogatives or preempt desirable sentencing innovations.

⁷⁷ Id at 88–90.

⁷⁸ Sentencing Reform Act of 1984 (“SRA”), Pub L No 98-473, 98 Stat 1837.

⁷⁹ Rehnquist repeatedly alludes to the difference between element facts and facts relevant only to sentencing. See, for example, *McMillan*, 477 US at 92–93 (noting that in arriving at a sentence judges consider the “circumstances” of an offense, but insisting that the Court has never required that proof of those circumstances or other “related” facts surpass the reasonable doubt threshold).

In *McMillan*, Rehnquist cautiously pursued the double objective of preserving constitutional space both for traditional, broadly discretionary, sentencing systems and for emerging sentencing mechanisms that use post-conviction factfinding to guide judicial discretion. To protect traditional sentencing systems, he reaffirmed the Court's endorsement of statutes conferring broad judicial sentencing discretion with approving references to *Williams v New York*,⁸⁰ and to the fact that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all."⁸¹ To shield structured sentencing innovation, Rehnquist upheld Pennsylvania's mandatory minimum statute. He first invoked *Patterson*'s teaching that, when faced with the question of whether a fact is an element, the Court should generally defer to legislative definitions of crime,⁸² and he emphasized that the Pennsylvania legislature "expressly provided that visible possession of a firearm is not an element."⁸³ Rehnquist was nonetheless bound to acknowledge that legislative characterizations are not definitive because "there are constitutional limitations to the State's power" to define crime,⁸⁴ and thus was obliged to decide the question of whether Pennsylvania exceeded those limitations in the present case.

⁸⁰ 337 US 241, 250–52 (1949) (upholding as constitutional sentencing systems in which judges impose sentences within the range set by the crime of conviction as an exercise of discretion without formal findings of fact subject to any burden of proof). One might also fairly surmise that Justice Rehnquist rejected Justice Stevens's proposed rule that if a fact will "give rise both to a special stigma and to a special punishment," it "must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*," in part because its imprecise terms were open to the construction that any fact relied upon by a judge to justify a higher sentence than he would impose in its absence would have to be proven beyond a reasonable doubt. See *McMillan*, 477 US at 103 (Stevens dissenting).

⁸¹ *McMillan*, 477 US at 91.

⁸² This institutional deference was particularly congenial to Justice Rehnquist in cases involving state statutes because of his affinity for a revitalized federalism. *Id.* at 85 (emphasizing that *Patterson* rests in part on the premise that "preventing and dealing with crime is much more the business of States than it is of the Federal Government"). For Justice Rehnquist's views on federalism, see generally Marci A. Hamilton, *What Is Rehnquist Federalism?*, 155 U Pa L Rev PENnumbra 8 (2007), online at <http://www.pennumbra.com/responses/09-2006/Hamilton.pdf> (visited Dec 11, 2009); Richard A. Epstein, *The Federalism Decisions of Justices Rehnquist and O'Connor: Is Half a Loaf Enough?*, 58 Stan L Rev 1793 (2006); Ann Althouse, *Chief Justice Rehnquist and the Search for Judicially Enforceable Federalism*, 10 Tex Rev L & Pol 275 (2006).

⁸³ *McMillan*, 477 US at 85.

⁸⁴ *Id.* at 86.

1. Crimes, elements, directionality, and the centrality of judicial discretion.

The petitioners in *McMillan* argued that the distinguishing feature of the Pennsylvania statute is that a fact found by a mere preponderance *completely removes the sentencing court's discretion* to impose any sentence less than the minimum five years.⁸⁵ Rehnquist rejected their argument by baldly mischaracterizing it. He wrote:

Petitioners apparently concede that Pennsylvania's scheme would pass constitutional muster if only it did not remove the sentencing court's discretion, i.e., if the legislature had simply directed the court to *consider* visible possession in passing sentence. We have some difficulty fathoming why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional *guidance*.⁸⁶

To describe a flat prohibition on judicial imposition of a particular range of punishment as "guidance" to judges is willful torture of the English language. To "guide" a judge is to seek to influence his choices among options he has the legal power to choose. Placing absolute outside limits on the range of punishments a judge has the legal power to impose is not providing "guidance," but is instead making positive law. Indeed, the legislative correlation of designated facts to hard limits on judicial sentencing power is—or ought to be—what we mean by defining a crime, a point that becomes clear if one focuses on what the penalty section of a criminal statute does.

No criminal statute is self-executing. Legislatures write statutes that condition the imposition of penalties on the existence of certain facts. But legislators neither find facts nor impose sentences. Judges and juries perform those roles. At bottom, all criminal penalty statutes are nothing more than conditional, fact-activated authorizations to judges telling them what penalties they may and may not impose.⁸⁷ In effect, a criminal statute says to judges, "If facts A, B, and C are found, you *are* authorized to impose any punishment within the range Y to Z,

⁸⁵ Id at 92. The Court did not disagree with petitioners' characterization of the statute. Justice Rehnquist wrote in the second paragraph of his opinion that "[t]he Act operates to *divest the judge of discretion to impose any sentence of less than five years* for the underlying felony." Id at 81–82 (emphasis added).

⁸⁶ Id (emphasis added).

⁸⁷ In systems with back-end release mechanisms, administrative bodies like parole boards may be granted the power to ameliorate the severity of the judge's initial sentencing pronouncement, but this does not change the basic relationship of criminal penalty statutes to judicial sentencing power.

but you are *not* authorized to impose any punishment outside of that range." The essence of the authorization does not change if the statute prescribes only a single penalty, or requires rather than permits the judge to impose a penalty within the authorized range. What matters is the statute's correlation of certain facts with hard limits on judicial sentencing power.

Therefore, a sensible core definition of a "crime" would be "a bundle of facts that, once proven, establishes hard limits on judicial sentencing discretion." Rehnquist may have rejected this definition because it seems in tension with *Winship*, *Mullaney*, and *Patterson*. *Winship* holds that the government must prove every "element" of a "crime" beyond a reasonable doubt.⁸⁸ In both *Mullaney*⁸⁹ and *Patterson*,⁹⁰ heat of passion (or its absence) is plainly one of the facts that defines the crimes of murder and manslaughter and thus sets limits on judicial sentencing discretion, yet in *Mullaney* the government is required to prove absence of heat of passion, while in *Patterson* it is not.⁹¹ Under these precedents, then, the government is apparently not required to prove every fact in the bundle that distinguishes one "crime" from another. Therefore, if both *Winship* and *Patterson* are to remain good law, not all facts that distinguish one crime from another can be "elements" for due process purposes and the term "element" has to take on some special meaning.

The solution to this difficulty is to assign elements a directional effect on penalties. Thus, an "element" is a fact that, when proven alone or in combination with other facts, both sets hard limits on judicial discretion and *increases* the defendant's punishment. This definition reconciles *Mullaney* and *Patterson* because, in *Mullaney*, the absence of heat of passion was treated as a fact that changed the crime from manslaughter to murder and so increased the maximum sentence a judge could give, while in *Patterson*, the presence of heat of passion was construed to be a fact that reduced murder to manslaughter and so decreased the maximum sentence a judge could give.

Justice Stevens in dissent argued powerfully for this approach, contending that elements are facts that either expose a defendant to criminal liability or increase his punishment.⁹² Rehnquist refused to acknowledge that, for purposes of identifying "elements" and allocat-

⁸⁸ 397 US at 364.

⁸⁹ 421 US at 691-92.

⁹⁰ 432 US at 216.

⁹¹ See notes 56-64 and accompanying text.

⁹² *McMillan*, 477 US at 96-98 (Stevens dissenting).

ing burdens of proof, there is a dispositive difference between mitigating and aggravating facts.⁹³ He insisted, unconvincingly, that the statute at issue in *McMillan*, which increased punishment upon proof of a designated fact, was consistent with the holding in *Patterson*, a case about proving a fact that decreased punishment.⁹⁴ But the result in *Patterson* was supported by history and constitutional logic,⁹⁵ the result in *McMillan* by neither.⁹⁶

Anglo-American criminal law has long placed the burden of proving some mitigating facts on defendants,⁹⁷ but has no history of allowing a fact not proven by the government beyond a reasonable doubt to increase the range of legally permissible penalties. Moreover, as noted above, the kinds of mitigating facts the common law customarily cast as affirmative defenses (heat of passion, self-defense, insanity) were those intimately concerned with the defendant's state of mind and thus especially hard for the government to *disprove*. Such considerations simply do not apply to an aggravating fact like display of a weapon, which does not require government disproof of a matter uniquely within the defendant's knowledge.

These traditional patterns of Anglo-American criminal law are entirely consistent with the basic logic of the Due Process Clauses of the Fifth and Fourteenth Amendments, which erect procedural barriers when the government seeks to deprive a defendant of life, liberty, or property.⁹⁸ In the context of penalty-related facts, due process logic suggests that the government should be obliged to prove a fact that, if established, "deprives" the defendant of something in the sense of putting him in a worse sentencing position than he occupied absent proof of that fact. But, the government should not have to prove a fact that *improves* the defendant's sentencing position.

⁹³ Id at 84 (majority) (noting that in *Patterson*, "we rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt").

⁹⁴ "We believe that the present case is controlled by *Patterson*, our most recent pronouncement on this subject, rather than by *Mullaney*." *McMillan*, 477 US at 85.

⁹⁵ See notes 67–70 and accompanying text.

⁹⁶ See notes 80–84 and accompanying text.

⁹⁷ Even in modern law, defendants bear the burden of production with respect to virtually all affirmative defenses. Dressler, *Understanding Criminal Law* at 64 (cited in note 61) ("Almost always, the defendant has the burden of producing evidence pertaining to any affirmative defense she wishes to raise."). Defendants also bear the burden of persuasion as to some such defenses. MPC § 2.13 (ALI 1962) (allocating the burden of proving defense of entrapment to the defendant).

⁹⁸ US Const Amend V; US Const Amend XIV.

Rehnquist was having none of it. He grudgingly conceded that the position of the *McMillan* petitioners “would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment.”⁹⁹ But he insisted that, even if due process were to require proof beyond a reasonable doubt of any fact that increases a defendant’s punishment, punishment is only increased for constitutional purposes when, as in *Mullaney*, the fact increases the defendant’s maximum possible punishment and not, as in *McMillan*, when the fact merely narrows the range of permissible punishments by raising the minimum required penalty.¹⁰⁰ For Rehnquist and the other members of the *McMillan* majority, the Pennsylvania law lacked the feel of legislative evasion of constitutional requirements that so agitated the Court in *Mullaney* and *Patterson*. Employing a metaphor that would shape debate for the next twenty years, Rehnquist wrote, “The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense.”¹⁰¹

The obvious criticism of the *McMillan* rule is that it accords due process protections to determinations of facts that increase the sentence a defendant *might* get and no protection to determinations of facts that increase the sentence he *must* get. What has not been fully appreciated is that *McMillan*’s rule feels wrong not only because it is contrary to our intuitive understanding of what makes one criminal statute more punitive than another, but because it rests on a fundamental misapprehension of the institutional roles of legislatures and judges in the making and administration of criminal laws.

Suppose Statute A provides that, upon conviction, the judge may impose a sentence of zero to five years in prison, while Statute B provides that the judge may impose a sentence of zero to ten years. Any rational person would recognize Statute B as more punitive than Statute A, not simply because Statute B *permits* a judge to impose a high sentence between five and ten years, but because Statute A *prohibits* him from imposing such a sentence.

⁹⁹ 477 US at 88.

¹⁰⁰ *Id.*

Petitioners’ claim that visible possession under the Pennsylvania statute is “really” an element of the offenses for which they are being punished—that Pennsylvania has in effect defined a new set of upgraded felonies—would have at least more superficial appeal if a finding of visible possession exposed them to greater or additional punishment.

¹⁰¹ *Id.* See also notes 48–51 and accompanying text.

Likewise, if Statute C provides for a sentence of zero to ten years upon conviction, while Statute D provides a sentence of five to ten years, any rational person would consider Statute D the more punitive of the two. Again, it is not simply the fact that Statute C *permits* a judge to impose a low sentence of zero to five years, but that Statute D *prohibits* the judge from imposing such a sentence. In both hypotheticals, intuition produces the same result as careful institutional analysis—we instinctively recognize that what makes one statute more punitive than the other are the differences in hard limits on judicial power.

Thus, our working definition of an element can be further refined. An “element” is a fact that, when proven alone or in combination with other facts, (1) exposes the defendant to criminal liability; (2) sets hard limits on judicial sentencing discretion; and (3) increases the defendant’s punishment in the sense that it increases either the penalty a judge may impose or the penalty he must impose.

In *McMillan*, Rehnquist’s cautious determination to preserve space for structured sentencing impelled him to reject any “bright line rule” for identifying “crimes” and “elements,”¹⁰² and to limit his decision to upholding the validity of the Pennsylvania statute at issue. Regrettably, remaining doctrinally noncommittal impelled the Court to reject the arguments of the petitioners and the dissent, which had correctly identified the second and third tenets of our working definition of an element.

2. *McMillan* and due process in finding sentencing factors.

The damage done by *McMillan* goes deeper still. The constitutional challenge posed by structured sentencing is not limited to the question of what facts are “elements” and are thus subject to proof to a jury beyond a reasonable doubt. In virtually all American sentencing systems, proof of a set of elements, however defined, not only limits available punishments, but also leaves space inside those limits within which judges have discretion to choose among an array of punishments. As discussed in greater detail below,¹⁰³ those discretionary choices will necessarily be based on non-element facts—what Rehnquist labeled “sentencing factors.”¹⁰⁴ In traditional discretionary sentencing regimes, judicial determination of sentencing factors was attended by no due process protection because no particular fact had

¹⁰² Id at 91 (noting “our inability to lay down any ‘bright line’ test”).

¹⁰³ See notes 349–50 and accompanying text.

¹⁰⁴ *McMillan*, 477 US at 86.

any mandatory or even presumptive sentencing consequence. However, once legislatures started using structured sentencing mechanisms to correlate non-element sentencing factors with mandatory or presumptive constraints on judicial sentencing choices within the statutory range, this presented the question of whether proof of these now legally consequential facts should be attended by some due process protections, even if not full jury trial rights.

In *McMillan*, the petitioners' fallback argument was that, even if "visible possession of a firearm" was a sentencing factor rather than an element, due process should nonetheless require proof by the heightened standard of clear and convincing evidence (rather than the preponderance standard dictated by Pennsylvania law) for a fact that would raise a defendant's minimum sentence.¹⁰⁵ Rehnquist not only rejected petitioners' claim, but in doing so seemed to reject the principle that sentencing factors could ever be subject to heightened due process protection.¹⁰⁶ This was a critical turn. I describe below how the Court could have combined Sixth Amendment jury trial protections for properly defined elements and enhanced due process protections for sentencing factors to create a constitutional regime more intellectually coherent and more practically useful than what they have given us.¹⁰⁷ For now, it is sufficient to note that when Rehnquist categorically rejected the option of some enhanced due process (at least for sentencing factors legally correlated to constraints on judicial sentencing discretion), he moved the Court away from considering sentencing factfinding as a due process problem with a variety of possible practical solutions and towards a binary understanding of sentencing as a Sixth Amendment choice—a fact commands either full jury trial rights or no constitutionally based procedural rights at all.

¹⁰⁵ Id at 91–92.

¹⁰⁶ Justice Rehnquist cited *Williams*, 337 US 241, for the proposition that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." *McMillan*, 477 US at 91. He went on to observe that "embracing petitioners' suggestion that we apply the clear-and-convincing standard here would significantly alter criminal sentencing, for we see no way to distinguish the visible possession finding at issue here from a host of other express or implied findings sentencing judges typically make on the way to passing sentence." Id at 92 n 8. See also *Williams*, 337 US at 246.

¹⁰⁷ See Part V.B.

C. The Effect of *McMillan* on Subsequent Cases

1. *United States v Almendarez-Torres* and *California v Monge*.

The distorting effects of *McMillan* began to emerge in 1998, in *United States v Almendarez-Torres*.¹⁰⁸ In the dozen years since *McMillan*, there had been important changes in both the American legal environment and in the Court's membership. Structured sentencing mechanisms of various kinds had become common in state and federal courts. For both trial and appellate judges in the federal system, the Federal Sentencing Guidelines, adopted in 1987, had become an ever-present feature of daily life. At the Supreme Court, the panel which decided *Almendarez-Torres* included two critical new players, Justices Antonin Scalia and Stephen Breyer.

Justice Scalia joined the Court in the fall of 1986,¹⁰⁹ the term after *McMillan* was decided. Justice Scalia is a brilliant originalist, a textualist, always on the hunt for simple tests to resolve complex constitutional issues, and is often aggressively, even contemptuously, uninterested in the systemic consequences of the simple rules he espouses.¹¹⁰ He has never been a fan of the Federal Sentencing Guidelines, having filed a caustic dissent from the Court's ruling upholding the constitutionality of the Guidelines in *Mistretta v United States*.¹¹¹

By contrast, Justice Breyer, who joined the Court in 1994,¹¹² is an administrative law specialist with a nuanced and evolutionary philosophy of constitutional interpretation.¹¹³ He is tolerant of complexity and ambiguity in the Court's rulings,¹¹⁴ and acutely conscious of the

¹⁰⁸ 523 US 224 (1998).

¹⁰⁹ Supreme Court of the United States, *The Justices of the Supreme Court* *1 (2009), online at <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (visited Dec 11, 2009).

¹¹⁰ One of the most striking Scalian expressions of disregard for the real-world consequences of his constitutional stylings appears in *Blakely*, where he writes, "[u]ltimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice." 542 US at 313. See also Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U Chi L Rev 1175, 1187 (1989) (suggesting that judges who do "no more than consult the totality of the circumstances" act "more as factfinders than as expositors of the law").

¹¹¹ 488 US 361, 413, 421, 425 (1989) (Scalia dissenting) (arguing that authorizing the US Sentencing Commission to promulgate the Federal Guidelines is unconstitutional because the Commission would then be "an independent agency exercising government power on behalf of [the legislative] Branch where all governmental power is supposed to be exercised personally by the judges of courts").

¹¹² *The Justices of the Supreme Court* at *3 (cited in note 109).

¹¹³ See generally Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (Knopf 2005).

¹¹⁴ See Breyer, *Active Liberty* at 127–28 (cited in note 113) (noting that the "clear rules" favored by textualist judges are both overly broad and excessively restrictive). See, for example,

practical consequences of the Court's work.¹¹⁵ Critically, Breyer came to the Court after serving as a member of the first United States Sentencing Commission and thus as one of the drafters of the Federal Sentencing Guidelines.¹¹⁶

In *Almendarez-Torres*, petitioner was convicted of violating 8 USC § 1326(a), which prohibits reentering the United States after deportation.¹¹⁷ Violation of this section carries a sentence of up to two years in prison.¹¹⁸ Section (b)(2) of the same statute authorizes a term of up to twenty years if the initial "deportation was subsequent to a conviction of an aggravated felony."¹¹⁹ Petitioner admitted his illegal reentry and that his deportation was subsequent to three convictions for aggravated felonies.¹²⁰ However, he argued at sentencing that, because his prior felony convictions increased the maximum sentence to which he was subject, they constituted "elements" of a different and more serious crime and thus had to be alleged in the indictment pursuant to *Hamling v United States*.¹²¹ The district court rejected his argument and imposed a sentence of eighty-five months imprisonment,¹²² more than triple the twenty-four-month statutory maximum of his offense of conviction.

Writing for a 5-4 majority, Justice Breyer also rejected petitioner's claim, finding that his prior convictions were not elements, but were mere "sentencing factors" of the *McMillan* sort and thus need

Morse v Frederick, 551 US 393, 428 (2007) (Breyer dissenting in part) (noting that a bright-line rule permitting school officials to censor student speech reasonably interpreted as advocating drug use does not define the scope of permissible restrictions, and explaining that "school officials need a degree of flexible authority" that is inconsistent with the judicial prescription of school disciplinary policies); *Georgia v Randolph*, 547 US 103, 125 (2006) (Breyer concurring) (observing that since "no single set of legal rules can capture the ever-changing complexity of human life," the Court's tendency to reject bright-line rules in Fourth Amendment cases is justified).

¹¹⁵ See Breyer, *Active Liberty* at 120-31 (cited in note 113) (advocating for consequentialist reasoning because such reasoning "can help us determine whether our interpretations promote specific democratic purposes and general constitutional objectives"). See, for example, *Booker*, 543 US at 262 (Breyer) (explaining his interpretive method for determining Congressional intent in the sentencing statute, and concluding that the Court must "evaluat[e] the consequences of the Court's constitutional requirement in light of the Act's language, its history, and its basic purposes").

¹¹⁶ Consider *The Justices of the Supreme Court* at *2-3 (cited in note 109); Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon which They Rest*, 17 Hofstra L Rev 1, 8-31 (1988).

¹¹⁷ 523 US at 226-27.

¹¹⁸ 8 USC § 1326(a). See also *Almendarez-Torres*, 523 US at 226.

¹¹⁹ 8 USC § 1326(b)(2). See also *Almendarez-Torres*, 523 US at 226.

¹²⁰ *Id* at 227.

¹²¹ *Almendarez-Torres*, 523 US at 227. See *Hamling v United States*, 418 US 87, 117 (1974) (holding that a "sufficient" indictment alleges all elements of a crime because listing those elements "fairly informs a defendant of the charge against which he must defend").

¹²² *Almendarez-Torres*, 523 US at 227.

not have been alleged in the indictment.¹²³ Breyer's objective is easy to imagine. He, like Justice Rehnquist before him, probably feared that the wrong definition of the term "element" might endanger structured sentencing mechanisms—like his cherished Guidelines—which depended on post-conviction judicial findings of fact to adjust sentencing ranges both up and down. Moreover, it may be that Breyer's administrative law background makes him unusually receptive to factfinding procedures that are less cumbersome—or, as Justice Scalia would later say, less protective of constitutional rights¹²⁴—than a full adversarial trial. Whatever Breyer's objectives, the result in *Almendarez-Torres* is wrong and the Court's reasoning dispiritingly lax.

Justice Breyer first argued, in accord with Rehnquist's approach in *McMillan*, that the Court should defer to legislatures in identifying elements of a crime, and that in 8 USC § 1326 Congress intended prior convictions to be sentencing factors, not elements.¹²⁵ But unlike the New York statute in *Patterson* and the Pennsylvania statute in *McMillan*, both of which specifically stated that the fact at issue was not an element,¹²⁶ § 1326 was silent on the question. Breyer's effort to find evidence of legislative intent in a threadbare record was both labored¹²⁷ and largely beside the point. *Patterson*¹²⁸ and *McMillan*¹²⁹ held that courts owe deference to clearly expressed legislative determinations that a fact is or is not an element. Neither case suggested that legislative intent should matter when it is so obscure that it has to be judicially invented.

Breyer's opinion is in tension with precedent in other ways.¹³⁰ Most notably, *Patterson* is only reconcilable with *Mullaney* if there is a

¹²³ *Id.* at 226–27, 235.

¹²⁴ *Apprendi*, 530 US at 498–99 (Scalia concurring).

¹²⁵ *Almendarez-Torres*, 523 US at 228–29.

¹²⁶ Compare Mandatory Minimum Sentencing Act, 42 Pa Cons Stat Ann § 9712(b) (providing explicitly that the sentencing enhancement in subsection (a), a “[p]rovision[] of this section[,] shall not be an element of the crime”) with NY Penal Law § 125.25(1)(a) (defining extreme emotional distress as an “affirmative defense” rather than defining a lack thereof as an element).

¹²⁷ Justice Breyer's parsing of 8 USC § 1326 and its legislative history in *Almendarez-Torres* is so strained as to be almost unreadable. The only thing plain from the relevant materials is that Congress never gave a moment's thought to whether the penalty enhancement provisions of the statute were elements or sentencing factors, or whether they should be alleged in the indictment, proven to a judge or a jury, or established beyond a reasonable doubt or some lower standard.

¹²⁸ 432 US at 211 n 12.

¹²⁹ 477 US at 86.

¹³⁰ For example, in *Patterson*, the Court justified giving the defendant the burden of proving heat of passion on the grounds that the fact was mitigating, particularly within the knowledge of defendant, and hard for the government to disprove. 432 US at 211 n 13, quoting *People v Patterson*, 347 NE2d 898, 909 (NY 1976) (Breitel concurring). In striking contrast, *Almendarez-Torres*

constitutional difference between aggravating and mitigating factors. In *McMillan*, although Justice Rehnquist refused to explicitly concede the general principle that directionality matters, he was obliged to admit that petitioners' case would have been stronger "if a finding of visible possession exposed them to greater or additional punishment."¹³¹ In *Almendarez-Torres*, Breyer evaded the obvious implication of the differing results in *Patterson* and *Mullaney*, ignored Rehnquist's concession in *McMillan*, and then did Rehnquist one better by holding that even a fact which increases a defendant's maximum sentence ten-fold is not an element.¹³² According to Breyer, whether a fact is an element has no necessary relation to the *effect* that proving it has on a judge's sentencing power or a defendant's sentence.

Like Justice Rehnquist before him, Breyer offered no generally applicable test for identifying an element. He justified categorizing prior convictions as sentencing factors primarily on two grounds: first, by claiming that "recidivism is a traditional, if not the most traditional, basis for a sentencing court's increasing an offender's sentence";¹³³ and second, by denying that the statute at issue amounts to improper legislative manipulation of elements to evade constitutional protections (in *McMillan*'s phrase, the tail wagging the dog).¹³⁴

The claim that recidivism is a "traditional" ground for increasing punishment is true, but largely irrelevant. Recidivism has commonly been a factor judges rely on in imposing sentences, but the same is true of all sorts of factors such as mental state, injuries to victims, or amount of loss, which are sometimes made elements by legislatures and sometimes not.¹³⁵ In any event, the question is not whether judges

relieves the government of the obligation to charge and prove to a jury the defendant's prior record—a fact that is aggravating, not specially within knowledge of defendant, and easy for the government to prove.

¹³¹ 477 US at 88. See also notes 99–100 and accompanying text.

¹³² *Almendarez-Torres*, 523 US at 245.

¹³³ *Id* at 243.

¹³⁴ *Id* at 246.

¹³⁵ For example, at common law and in many modern statutes, the value of the property taken is the decisive element distinguishing misdemeanor and felony larceny (or theft, in modern statutes). Roger D. Groot, *Petit Larceny, Jury Lenity, and Parliament*, in John Cairns and Grant MacLeod, eds, *The Dearest Birth Right of the People of England* 47 (Hart 2002) (describing elements of grand and petit larceny). See, for example, MPC §§ 223.1(2)(a)–(b) (setting the dividing line between felony and misdemeanor theft at \$500). In some modern statutes, the amount of loss now distinguishes different grades of felony larceny, or misdemeanor theft. *Id* § 223.1(2)(b) (setting the dividing line between ordinary or petty misdemeanor theft at \$50). In these cases, loss amount is plainly an "element." On the other hand, the US Sentencing Guidelines use loss as a mere sentencing factor to determine the now-advisory sentencing range for federal economic criminals. USSG § 2B1.1(b)(1) (loss table).

have traditionally relied upon a bad criminal history to increase a defendant's sentence, but whether a judge can increase a defendant's sentence *above the otherwise applicable statutory maximum sentence* based on criminal history if the particulars of that history are not alleged in the indictment and are found by a judge applying a standard less than beyond a reasonable doubt.

Justice Breyer adduced no evidence that any such tradition exists. Indeed, the authorities he cited suggest the reverse. For example, he cited *Graham v West Virginia*¹³⁶ and *Oyler v Boles*¹³⁷ for the proposition that recidivism need not be alleged in the indictment in cases where proof of a prior record would enhance a sentence, but (as Breyer admitted) the state statutes in both cases required jury determination of disputed convictions.¹³⁸ To the extent these cases demonstrate any "tradition," it is one of states recognizing that facts which increase statutory maxima operate like traditional "elements" and therefore must be proven to juries beyond a reasonable doubt.¹³⁹

Establishing tradition rather than effect as the key to identifying a fact as an element has the additional drawback of making the element/sentencing factor distinction vague and manipulable. And Breyer's treatment of the *McMillan* tail-wags-dog metaphor further obfuscates the point of that already amorphous and almost infinitely malleable standard. Breyer declares that the statute at issue is acceptable because it does "not change a pre-existing definition of a well-established crime," and because Congress, in his opinion, did not intend to evade the Constitution by presuming guilt or restructuring the elements of an offense.¹⁴⁰ One might have thought that a statute providing that a post-conviction finding of fact raising the defendant's statutory maximum sentence from two years to twenty was as good an example of the sentencing tail wagging the conviction dog as could be imagined. But apparently legislatures can only violate the Constitution by rearranging the anatomy of old, "traditional," "well-

¹³⁶ 224 US 616, 624–25 (1912).

¹³⁷ 368 US 448, 452–53 (1962) (explaining both that recidivism is "essentially independent" from guilt as to the underlying offense in "habitual criminal" cases and that due process is not violated where facts relevant to the question of recidivism are found by a judge "in open court" and against defendants "represented by counsel," even though state statute requires a jury-determination of recidivism where defendants "den[y]" their identity or "remain[] silent").

¹³⁸ *Almendarez-Torres*, 523 US at 244.

¹³⁹ Justice Scalia's dissent contributes to the doubtfulness of Justice Breyer's argument by listing numerous cases in which state supreme courts have found that "a prior conviction which increases maximum punishment must be treated as an element of the offense under either their State Constitutions . . . or under common law." Id at 256–57, 261–62 (Scalia dissenting).

¹⁴⁰ Id at 246. See note 134 and accompanying text.

established” dogs, but are free to attach huge tails to tiny dogs so long as the dog is a new statutory breed.

Breyer’s opinion found no favor with Justice Scalia, who authored a scathing dissent joined by Justices Stevens, David Souter, and Ruth Bader Ginsburg.¹⁴¹ Scalia focused particularly on the conflict between the majority’s result and what he takes to be the plain implication (if not the express holding) of *McMillan*—that facts which increase maximum sentences are elements, while facts that merely narrow the range of permissible punishments by increasing minimum sentences are not.¹⁴² Scalia was not only dismissive of both the majority’s results and its reasoning, but decried the absence of any clear standard for lower courts to employ when trying to identify an “element.”¹⁴³ Because he thought the question was not squarely presented in *Almendarez-Torres*, Scalia took no definitive position on whether the implication of *McMillan* should become a constitutional rule.¹⁴⁴ However, three months later, in *California v. Monge*,¹⁴⁵ he took the plunge, opining that a fact which increases the statutory maximum sentence is necessarily an “element” triggering constitutional pleading and proof requirements.¹⁴⁶

Although Justice Scalia was in the minority in both *Almendarez-Torres* and *Monge*, his dissents in those cases (joined by Justices Stevens, Souter, and Ginsburg) represent a critical juncture in the developing debate over how to define crimes and elements. While Scalia disagreed with the outcome in *Almendarez-Torres*, he did so on the basis that Breyer was deviating from what Scalia took to be the rule of *McMillan*—facts that raise only minimums can be sentencing factors, while facts that raise statutory maximums must be elements. The problem, of course, is that both *McMillan* and *Almendarez-Torres* are wrong. In both cases, the facts at issue alter the hard statutory limits on judicial sentencing discretion to the disadvantage of the defendant, either by barring the judge from imposing certain low sentences or by

¹⁴¹ See, for example, *Almendarez-Torres*, 523 US at 253 (Scalia dissenting).

¹⁴² “[N]o one can read *McMillan* . . . without perceiving that the determinative element in our validation of the Pennsylvania statute was the fact that it merely limited the sentencing judge’s discretion within the range of penalty already available, *rather than* substantially increasing the available sentence.” *Id.* at 256.

¹⁴³ *Id.* at 262.

¹⁴⁴ *Id.* at 258–60, 270–71. Justice Scalia argued that, because the statute in *Almendarez-Torres* is so unclear on the question of whether the enhancement provisions are intended by Congress to be sentencing factors or separate crimes, the doctrine of constitutional doubt and the rule of lenity should move the Court to construe them as separate crimes. See *id.*

¹⁴⁵ 524 US 721 (1998).

¹⁴⁶ *Id.* at 740–41 (Scalia dissenting).

permitting the judge to impose high sentences that would otherwise be prohibited. In the decade since *Monge*, Justice Scalia has never seriously wavered in his allegiance to *McMillan*, a fact that, as we will see, ultimately had disastrous consequences.

2. *Jones v United States*.

The year after *Almendarez-Torres* and *Monge*, Justice Breyer's majority was already beginning to crack. In *Jones v United States*,¹⁴⁷ the Court considered the question of whether the federal carjacking statute—which imposed a fifteen-year sentence for conviction of the offense simpliciter, and more severe sentences if serious bodily injury or death resulted—was one offense with two sentence-enhancing factors that could be proven to a judge to a preponderance, or three separate crimes the elements of which must be proven to a jury beyond a reasonable doubt.¹⁴⁸ The Court, in an opinion by Justice Souter, found that it was the latter.¹⁴⁹

Formally, Souter's opinion broke no new ground. He based the outcome on statutory interpretation, concluding that Congress intended the construction he placed on the carjacking law. But the crux of the opinion was Souter's conclusion that a contrary reading would raise serious doubt about the constitutionality of the statute.¹⁵⁰ As he put it, "It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit."¹⁵¹ As tentative as this statement seemed, it turned *Almendarez-Torres* upside down. There, Justice Breyer had assembled five votes for an opinion in which he vigorously denied that the constitution required designating a sentence-enhancing fact as an element or even that the issue posed a serious constitutional question.¹⁵² In *Jones*, Justice Clarence Thomas, who had voted with Breyer in *Almendarez-Torres*, switched sides. Although *Jones* decided nothing definitively, its prevailing coalition of Justices Souter, Ginsburg, Stevens, Scalia, and

¹⁴⁷ 526 US 227 (1999).

¹⁴⁸ *Id.* at 229–31. See also 18 USC § 2119.

¹⁴⁹ *Jones*, 526 US at 236.

¹⁵⁰ *Id.* at 239 ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by other of which such questions are avoided, our duty is to adopt the latter."), quoting *United States Attorney General v Delaware & Hudson Co.*, 213 US 366, 408 (1916).

¹⁵¹ *Jones*, 526 US at 233.

¹⁵² See note 132 and accompanying text.

Thomas—an unlikely alliance of the Court's most conventionally liberal and conventionally conservative members—would control the Court's sentencing cases for the next decade.¹⁵³

3. *Apprendi v New Jersey*.

The *Jones* majority wasted little time. The very next term, the Court decided *Apprendi v New Jersey*. The case arose when Charles Apprendi, Jr, was charged in New Jersey state court with a bundle of felony firearms charges for shooting at the house of his African-American neighbors.¹⁵⁴ He pleaded guilty to three of these charges.¹⁵⁵ The prosecution dismissed the rest, but pursuant to the plea agreement, reserved the right to seek an enhanced sentence based on the New Jersey hate crimes statute.¹⁵⁶ This statute provided that the sentencing judge could impose a sentence greater than the statutory maximum sentence of the crime of conviction if he found by a preponderance of the evidence, in a hearing held after conviction, that the crime was motivated by racial bias.¹⁵⁷ The judge accepted the plea. The government sought the enhanced sentence. The judge held a lengthy hearing, found racial bias, and imposed a sentence higher than the statutory maximum for the count on which the sentence was imposed.¹⁵⁸

The Supreme Court split 5-4, aligning exactly as it had in *Jones*, and found a violation of Apprendi's rights under the Due Process

¹⁵³ *Jones* is interesting, as well, in that the separate concurrences of Stevens and Scalia presage their enduring disagreement over whether a fact increasing a minimum sentence must be an element. Compare *Jones*, 526 US at 252-53 (Stevens concurring) (advocating for a rule treating as elements not only those facts that increase the statutory maximum penalty but those "that increase the minimum as well") with *id* at 253 (Scalia concurring) (declining to resolve the constitutional question in this case, but noting his belief that criminal defendants are constitutionally entitled to a jury adjudication of those "facts that alter the congressionally prescribed range of penalties").

¹⁵⁴ 530 US at 469.

¹⁵⁵ *Id* at 470.

¹⁵⁶ "[T]he State reserved the right to request the court to impose a higher 'enhanced' sentence on count 18 (which was based on the December 22 shooting) on the ground that that offense was committed with a biased purpose, as described in [NJ Stat Ann] § 2C:44-3(e)." *Apprendi*, 530 US at 470.

¹⁵⁷ NJ Stat Ann § 2C:44-3(e) (West 2000), repealed by An Act Concerning Bias Crimes, 2001 NJ Laws 443 § 8.

¹⁵⁸ *Apprendi*, 530 US at 470-71. The sentence was lower than the maximum sentence the defendant could have received had the court stacked the unenhanced maxima of the counts of conviction. The government argued that this fact made the outcome harmless error, but the Supreme Court disagreed. The judge imposed the sentence on a single count, and the imposed sentence was higher than the unenhanced maximum sentence available for that count. Hence, the error was not harmless. *Id* at 474 (explaining that the bias enhancement "convert[ed] what otherwise was a maximum 10-year sentence" for the firearm count "into a minimum sentence").

Clause of the Fourteenth Amendment and the Sixth Amendment guarantee of trial by jury. Justice Stevens, writing for the Court, held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”¹⁵⁹ Stevens not only left *Almendarez-Torres* intact,¹⁶⁰ but declined to overrule *McMillan*’s holding regarding mandatory minimum sentences.¹⁶¹ Justices Scalia¹⁶² and Thomas added concurrences, Thomas arguing that the necessary implication of the Court’s ruling was abandonment of both *Almendarez-Torres* and *McMillan*.¹⁶³ Both Justices O’Connor¹⁶⁴ and Breyer wrote dissents.¹⁶⁵

Justice Stevens’s majority opinion is a peculiar production, constantly on the verge of announcing a clear principle with a clear theoretical rationale, and just as constantly muddying the waters with a qualifier, an odd turn of phrase, or a refusal to follow the argument to its obvious conclusion. Stevens began with a brief argument from Anglo-American legal history, contending that during the period of the Founding, judicial sentencing power was directly linked to pleading and proof to a jury of legally prescribed facts.¹⁶⁶ Stevens followed his history lesson with a revisitation of the Court’s cases from *Winship* to *Monge*.¹⁶⁷ His essential (and I think irrefutable) contention is that, if *Winship*’s due process guarantee, and by extension the Sixth Amendment jury trial right at issue in *Apprendi*, are to have any meaning, the term “element” must be defined primarily in terms of effect on punishment severity and judicial sentencing power.

¹⁵⁹ Id at 490.

¹⁶⁰ Id at 489–90.

¹⁶¹ *Apprendi*, 530 US at 487 n 13 (“We do not overrule *McMillan*.”). See also text accompanying note 77.

¹⁶² Id at 498–99 (Scalia concurring) (arguing that the Sixth Amendment “has no intelligible content” without the right to have a jury find “all the facts which must exist in order to subject the defendant to a legally prescribed punishment”). See also note 124.

¹⁶³ *Apprendi*, 530 US at 499 (Thomas concurring). Justice Thomas’s opinion is in many respects the best of the *Apprendi* menagerie. Professor Stephanos Bibas has suggested that, based on its structure, it was originally written as a majority opinion. Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending Apprendi to Upset Most Sentencing*, 15 Fed Sent Rptr (Vera) 79, 81 (2002) (“Thomas’s dissenting opinion is unusual in including a facts section, which suggests that it may have been a draft majority opinion until it lost Justice Scalia’s vote.”).

¹⁶⁴ *Apprendi*, 530 US at 523 (O’Connor dissenting, joined by Rehnquist, Breyer, and Kennedy).

¹⁶⁵ Id at 555 (Breyer dissenting, joined by Rehnquist).

¹⁶⁶ Id at 482–83 (emphasizing the “historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided”). Justice Thomas’s concurrence augments Stevens’s historical argument with a lengthy disquisition on American law from the founding to the Civil War. Id at 499–520 (Thomas concurring).

¹⁶⁷ Id at 484–90.

The problem with Stevens's opinion is its waffles. First, Stevens emphasized repeatedly that elements are facts that set limits on judicial sentencing discretion.¹⁶⁸ Yet he declined to overrule *Almendarez-Torres*, a case in which a judge-determined fact dramatically expanded the judge's sentencing authority. Although he labeled *Almendarez-Torres* "a narrow exception" to the general rule announced in *Apprendi*, he justified it by repeating Breyer's diversionary claim that recidivism is a "traditional" basis for increasing sentences,¹⁶⁹ and by noting (not once, but twice) that recidivism is a fact that relates not to the offense, but to the offender.¹⁷⁰ The result is to cast doubt on what seemed to be Stevens's primary point—that elements are to be identified by their *effect* on the limits of judicial sentencing power—and to lay false trails that would distract commentators, and some of his fellow justices, for years.¹⁷¹

Second, despite leaving *Almendarez-Torres* standing, Stevens finally prevailed on the basic point he made in dissent in *McMillan*—there is a constitutional difference between aggravating and mitigating facts, and the Constitution attaches procedural protections to the proof of facts that increase a defendant's punishment.¹⁷² Unfortunately, Stevens then artfully obfuscated what is meant by increasing a defendant's punishment. Stevens's personal views on the point had been clear since *McMillan*: a fact increases a defendant's punishment, and is thus an element, if it increases the defendant's sentencing "range" by raising *either* the maximum punishment a judge might impose or the minimum punishment a judge must impose.¹⁷³ If this view is right, then a

¹⁶⁸ *Apprendi*, 530 US at 483 n 10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury.").

¹⁶⁹ *Id* at 488.

¹⁷⁰ *Id* at 488, 496 (rejecting New Jersey's reliance on *Almendarez-Torres* because, "[w]hereas recidivism 'does not relate to the commission of the offense' itself, New Jersey's biased purpose inquiry goes precisely to what happened in the 'commission of the offense'") (citations omitted).

¹⁷¹ For example, the offense-offender distinction has piqued the interest of academics, see Douglas A. Berman and Stephanos Bibas, *Making Sentencing Sensible*, 4 Ohio St J Crim L 37, 55–57 (2006), and the interest of at least one Supreme Court justice, see *Cunningham v California*, 549 US 270, 297 (2007) (Kennedy dissenting) (noting that judicial determination is appropriate for "factors exhibited by the defendant" and that these factors would include "prior convictions; cooperation or noncooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community").

¹⁷² *Apprendi*, 530 US at 490. See *McMillan*, 477 US at 96 (Stevens dissenting).

¹⁷³ 477 US at 95–104 (Stevens dissenting) (arguing that there is no danger of a legislature passing legislation that allows suspects to prove mitigating circumstances by a mere preponderance of the evidence, but that it is very conceivable to imagine a legislature passing laws to relieve its burden of proof beyond a reasonable doubt); *Jones*, 526 US at 253 ("[I]n my view, a

fact that raises a mandatory minimum sentence must be an element and *McMillan* was wrongly decided. Yet Stevens expressly declined to overrule *McMillan*.¹⁷⁴

This forbearance might be explained by the fact that *Apprendi* did not specifically raise the issue of minimum sentences, but it is clear that more than judicial incrementalism was at work. On the one hand, Stevens not only left *McMillan* intact, but pointedly intimated that considerations of stare decisis might “preclude reconsideration” of its holding on minimum sentences.¹⁷⁵ On the other hand, Stevens summarized *Apprendi*’s holding in this notably odd passage:

Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the rule set forth in the concurring opinions in [*Jones*]: “[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the *prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.”¹⁷⁶

What makes this passage odd is the juxtaposition of a first sentence narrowly limiting *Apprendi*’s reach to facts that increase statutory maximum sentences with a second sentence endorsing a “rule” concerning facts that increase a “range of penalties.” Given that a “range” necessarily has both a top and a bottom, Stevens’s general rule certainly seems inconsistent with *McMillan*’s survival.

The explanation for all these elaborate head fakes in *McMillan* seems plain: Stevens needed Justice Scalia’s vote to maintain a 5-4 majority. Justice Scalia agreed with Stevens about facts that trigger increases in maximum sentences, but in 2000, when *Apprendi* was being decided, he had not (and has not to this day) receded from his embrace of *McMillan* in his *Almendarez-Torres* dissent.¹⁷⁷ So, to keep Sca-

proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence.”).

¹⁷⁴ *Apprendi*, 530 US at 487 n 13.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 490, quoting *Jones*, 526 US at 252–53 (emphasis added). See text accompanying notes 147–53.

¹⁷⁷ Scalia had been signaling that he and Stevens were not in accord on the definition of an element since *Jones*. There, Stevens filed a concurrence emphasizing that, as a constitutional matter, facts that increase a defendant’s range of penalties are elements, and that this principle includes facts that increase maximum sentences, those that increase minimum sentences, and those that trigger the death penalty. *Jones*, 526 US at 253 (Stevens concurring). Scalia filed a sepa-

lia in the tent, Stevens limited the specific holding of *Apprendi* and made conciliatory noises about *McMillan*, while at the same time articulating a general rule that would reverse *McMillan* if Scalia could be brought around.

The dissents by Justices O'Connor and Breyer are disappointing. They are both actuated by the fear (entirely reasonable as it turned out) that Stevens's approach would hamstring the beneficial reforms of the structured sentencing movement.¹⁷⁸ But they provide no persuasive counter to the majority's arguments and no useful alternative to its rule. Justice O'Connor nitpicked Stevens's and Thomas's historical analysis,¹⁷⁹ but as Justice Thomas pointedly observed, offered no historical evidence of her own.¹⁸⁰ She argued that the majority's conclusion is a departure from the Court's own precedent,¹⁸¹ but the only prior decision involving non-capital sentencing with which *Apprendi* really conflicts is Justice Breyer's ineffectual effort in *Almendarez-Torres*.¹⁸² As for Justice Breyer, his *Apprendi* dissent correctly points out the manifold difficulties posed by the majority's rule, but is so insensitive to the institutional roles and constitutional values at issue that he seems to suggest there is no constitutional difference between facts a judge relies upon to determine a sentence within a legislatively designated range and facts specified in a statute as controlling the extent of the range.¹⁸³

rate concurrence saying the same thing, with the conspicuous omission of Stevens's embellishment on the meaning of "range." *Id.* (Scalia concurring). In *Apprendi*, Scalia filed a concurrence which concludes by asserting that the constitution guarantees "the right to have a jury determine those facts that determine the maximum sentence the law allows." 530 US at 498–99 (emphasis added). In addition, Scalia joined Parts I and II, but not Part III, of Justice Thomas's concurrence. Part III was Thomas's conclusion that *Almendarez-Torres* and *McMillan* should be overruled.

¹⁷⁸ See *Apprendi*, 530 US at 549–52 (O'Connor dissenting); *id.* at 565 (Breyer dissenting).

¹⁷⁹ Justice O'Connor quibbles with Justice Stevens's quotation to a particular treatise, *id.* at 526–27, and denigrates Justice Thomas's reliance on nineteenth-century case law as evidence for the meaning of the term "element" at common law at the time of the founding. *Id.* at 528.

¹⁸⁰ *Apprendi*, 530 US at 502 n 2 (Thomas dissenting).

¹⁸¹ *Id.* at 529–39.

¹⁸² Justice O'Connor's best argument from precedent rests on *Walton v Arizona*, 497 US 639 (1990), in which the Court upheld against a Sixth Amendment challenge the Arizona practice of requiring that a judge determine whether a capital murder defendant should receive the death penalty based on a weighing of post-conviction judicial findings of aggravating and mitigating facts. *Id.* at 679. She is right that *Walton* is irreconcilable with *Apprendi*, but by 2000 the Court's capital sentencing jurisprudence had diverged so far from its rulings in non-capital contexts that the point had little impact. Recognizing the force of her argument, the Court overruled *Walton* in *Ring v Arizona*, 536 US 584, 589 (2002) (holding that "capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").

¹⁸³ Justice Breyer described his "basic problem with the Court's rule" as follows: "A sentencing system in which judges have discretion to find sentencing-related factors is a workable system and

Ultimately, the biggest defect in the dissents is that they offer no useful definitions of “crime” or “element” and no cogent account of how the Sixth Amendment jury trial right and *Winship*’s guarantee of proof beyond a reasonable doubt of the elements of a crime are to be implemented in a country with fifty-plus sentencing systems boasting every conceivable combination of discretionary judicial sentencing, modified determinate sentencing, post-conviction sentence enhancements, mandatory minimums, and several varieties of more- and less-binding sentencing guidelines. By sticking doggedly to a position that is historically unsustainable and invites dilution of constitutional protections, the dissenters effectively exclude themselves from a discussion of how to balance the Constitution with the procedural innovations they want to preserve.

Conversely, the fatal flaw in Stevens’s majority opinion was the failure to take seriously the very real problem of how the Constitution should treat facts that influence judicial sentencing choices within the range bounded by the statutory maximum and minimum. Stevens quite properly emphasized the importance in defining an “element” in terms of the restrictions it placed on judicial sentencing discretion. But he denigrated the concept of a “sentencing factor”¹⁸⁴ and blithely insisted that *Apprendi* did not affect judicial sentencing discretion within ranges.¹⁸⁵ Yet he knew judges had to find facts as a precondition of an intelligent exercise of discretion within range, and he knew that some structured sentencing schemes use post-conviction judicial factfinding to place varying degrees of constraint on that discretion. Because he never grappled squarely with the subtler problems presented by structured sentencing, or even admitted their existence, he could not draw the dissenters into his majority (or even into a meaningful dialogue) and he had to make his devil’s bargain with Scalia. The result was a confusing opinion, pregnant with the potential for future mischief.

one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing *statutes* any differently.” *Apprendi*, 530 US at 559 (Breyer dissenting).

¹⁸⁴ See *id.* at 494 (referring to “the constitutionally novel and elusive distinction between ‘elements’ and ‘sentencing factors’”).

¹⁸⁵ See *id.* at 481 (“We should be clear that nothing in this history suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing judgment *within the range* prescribed by statute.”).

III. AFTER *APPRENDI*: THE COURT LOSES ITS WAY IN *HARRIS* AND *BLAKELY*

A. *Harris v United States*

The seeds of mischief planted in *Apprendi* began to sprout in *Harris v United States*.¹⁸⁶ *Harris* involved a challenge to a federal firearms statute that imposed a five-year minimum sentence for using or carrying a firearm during a drug offense or violent crime,¹⁸⁷ but increased the mandatory minimum to seven years if the firearm was “brandished.”¹⁸⁸ The defendant claimed that, per *Apprendi*, the section raising the mandatory minimum from five to seven years upon proof of brandishing described an element of a separate, more serious, crime. The government maintained that brandishing was a mere sentencing factor permissible under *McMillan*.¹⁸⁹

The Supreme Court ruled 5-4 for the government.¹⁹⁰ The key vote was cast by Justice Scalia, who joined Justices Anthony Kennedy, Rehnquist, O'Connor, and Breyer—the four dissenters in *Apprendi*. Writing for the majority, Justice Kennedy framed the question squarely, “The principle question before us is whether *McMillan* stands after *Apprendi*.”¹⁹¹ He answered the question equally squarely—with a yes¹⁹²—but his justifications for that answer are serpentine and unconvincing. Kennedy argued that because the Constitution and historical usage permit legislatures to give judges sentencing discretion *within designated ranges*, and allow judges to exercise that discretion based on facts not subject to trial-like procedural protections,¹⁹³ then the Constitution must also permit legislatures to *set a floor on the ranges* within which judicial discretion may be exercised, *also based on facts*

¹⁸⁶ 536 US 545 (2002).

¹⁸⁷ 18 USC § 924(c)(1)(A)(i).

¹⁸⁸ 18 USC § 924(c)(1)(A)(ii). Under either subsection, the maximum possible sentence remained the same.

¹⁸⁹ *Harris*, 536 US at 551.

¹⁹⁰ *Id.* at 548, 568.

¹⁹¹ *Id.* at 550.

¹⁹² *Id.* at 557.

¹⁹³ Kennedy characterized *McMillan*'s result as stemming from “certain historical and doctrinal understandings about the role of the judge at sentencing,” and contended that because nineteenth-century criminal statutes commonly provided judges with sentencing discretion within a permissible range, statutory limits on the range of sentencing are also in accordance with the Constitution. *Harris*, 536 US at 558 (“Judicial fact finding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable doubt components of the Fifth and Sixth Amendments.”).

not subject to trial-like procedural protections.”¹⁹⁴ That simply does not follow. There is a categorical difference between granting authority to judges to exercise discretion and setting the boundaries within which that discretion is to be exercised. Indeed, Kennedy seemed to endorse just this view when he wrote, “Read together, *McMillan* and *Apprendi* mean that *those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime* for the purposes of the constitutional analysis.”¹⁹⁵

Yet somehow, for Kennedy, a fact that sets a *hard floor* on judicial power to impose sentences does not count. He said, “If the facts judges consider when exercising their discretion within the statutory range are not elements, they do not become as much merely because legislatures require the judge to impose a minimum sentence when those facts are found—a sentence the judge could have imposed absent the finding.”¹⁹⁶ The implication is that such statutes do not materially alter the position of either judges or defendants. But, of course, nothing could be further from the truth. Legislatures pass mandatory minimum statutes, judges dislike them, and defendants dread them not because they re-empower judges to impose an already available sentence at or above the designated minimum, but because they prohibit judges from imposing any lower sentence. A mandatory minimum statute is neither a redundancy nor a grant of additional judicial power, but a restriction of—in Kennedy’s own phrase, an “outer limit” on—that power.

Kennedy seems so painfully conscious of the weakness of his argument that, like Justice Rehnquist in *McMillan*,¹⁹⁷ he blurs the line between regulating or guiding judicial discretion and eliminating it altogether. His crowning effort is this passage:

If the grand jury has alleged, and the trial jury has found, all the facts necessary to impose the maximum, the barriers between government and defendant fall. The judge may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts are specified by the legislature and *even if they persuade the judge to choose a much higher sentence* than he or she otherwise would have im-

¹⁹⁴ See *id.* at 662.

¹⁹⁵ *Id.* at 567 (emphasis added).

¹⁹⁶ *Id.* at 560 (emphasis added).

¹⁹⁷ See notes 85–86 and accompanying text.

posed. That a fact affects the defendant's sentence, even dramatically so, does not by itself make it an element.¹⁹⁸

The suggestion that a statute imposing a mandatory minimum sentence "persuades" judges to "choose" the sentence it makes legally mandatory is a risible mischaracterization.

Kennedy is no more successful in dealing with *Apprendi*'s adoption of the principle that facts increasing a defendant's punishment are constitutionally different than facts that decrease it.¹⁹⁹ As he effectively concedes, a fact triggering an increased minimum often imposes a greater disadvantage on the defendant than a fact triggering an increase in the permissible maximum.²⁰⁰ In the end, unable to formulate a coherent effects-based distinction between elements and non-elements that would accommodate the result he wanted, Kennedy simply repudiated the very idea that elements can be identified by their effects on either judicial discretion or outcomes for defendants.²⁰¹

Having eschewed effects, Kennedy intimated that his preferred result has something to do with the notice function of criminal statutes, proclaiming, "The Fifth and Sixth Amendments ensure that the defendant 'will never get *more* punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that."²⁰² But he never explains why the Fifth Amendment Due Process and Indictment Clauses require a defendant to be put on notice of the sentence he *might* get, but not of the sentence he *must* get. Nor does he explain what notice has to do with determining Fifth Amendment burden of proof standards or Sixth Amendment jury trial rights.

A good many observers have expressed puzzlement over Scalia's vote in *Harris*.²⁰³ But, as we have seen, Scalia's position remained con-

¹⁹⁸ *Harris*, 536 US at 566 (emphasis added).

¹⁹⁹ *Apprendi*, 530 US at 486.

²⁰⁰ *Harris*, 536 US at 566.

²⁰¹ Kennedy wrote:

Why, petitioner asks, would fairness not also require [facts triggering mandatory minimum sentences] to be alleged in the indictment and found by the jury under a reasonable doubt standard? The answer is that because it is beyond dispute that the judge's choices of sentences within the authorized range may be influenced by the jury, a *factual finding's practical effect cannot by itself control the constitutional analysis*.

Id at 566 (emphasis added).

²⁰² Id at 566, quoting *Apprendi*, 530 US at 498 (Scalia concurring).

²⁰³ See, for example, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1495 n 329 (2008) (noting with apparent wonderment that only Justice Scalia was able to reconcile *Apprendi* and *Harris*); Benjamin J. Priester, *The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wag-*

sistent, from his dissents in *Almendarez-Torres* and *Monge* through his carefully worded concurrences in *Jones* and *Apprendi*. He has never deviated from the rule he derived from *McMillan*—facts that increase maxima are elements, facts that increase minima are not. The effect of Scalia’s bulldog tenacity (or unreasoning intransigence, depending on your point of view) was successive exercises in judicial logrolling. In *Apprendi*, Stevens secured Scalia’s vote by waffling on the fate of *McMillan*. In *Harris*, Kennedy brought Scalia aboard by writing an opinion purporting to reconcile *Apprendi* and *McMillan*, an opinion so intellectually indefensible that Justice Breyer could bring himself to concur only by disavowing its logic and reiterating his view that *Apprendi* was wrongly decided.²⁰⁴

B. The Court Finally Confronts Guidelines: *Blakely v Washington*

One of the peculiarities of the *McMillan-Harris* sequence is that much of the debate in these cases was plainly driven by their potential effect on guidelines and other structured sentencing systems,²⁰⁵ yet none of these cases involved such systems. Every case from *McMillan* in 1986 to *Harris* in 2002 involved a statute in which a legislature designated a fact or bundle of facts that, once proven, set a range with hard limits outside of which a judge could not sentence, but within

ging, 60 SMU L Rev 209, 233–34 (2007) (explaining the “Scalia conundrum” by arguing that Scalia believes that any sentence beneath the maximum, regardless of how it is determined is a “windfall to which the defendant has no constitutionally cognizable entitlement”); Avery Bryce Pardee, *Are Booker and Blakely Fatal Blows to Judicial Fact-Finding for Mandatory Minimums, or Will Harris v. United States Go On Singing?*, 32 Thurgood Marshall L Rev 27, 41 (2006) (re-marking that, “Justice Scalia’s shift from writing the Court’s decision in *Apprendi* to being a silent member of the *Harris* majority was surprising”); Bibas, 15 Fed Sent Rptr (Vera) at 80–81 (cited in note 163) (proposing that Scalia was present in the *Harris* majority because Kennedy’s opinion was specifically tailored to three principles Scalia likes: limits on judicial discretion, historical analysis, and a bright-line rule providing notice to defendants).

²⁰⁴ *Harris*, 536 US at 569 (Breyer concurring in part and concurring in the judgment):

I cannot easily distinguish *Apprendi* . . . from this case in terms of logic. For that reason, I cannot agree with the plurality’s opinion insofar as it finds such a distinction. . . . I continue to believe that the Sixth Amendment permits judges to apply sentencing factors—whether those factors lead to a sentence beyond the statutory maximum . . . or the application of a mandatory minimum.

²⁰⁵ See, for example, *McMillan*, 477 US at 86 (pointing out that “we should hesitate to conclude that due process bars the State from pursuing a chosen course in the area of defining crimes and prescribing penalties”); *Apprendi*, 530 US at 544 (O’Connor dissenting) (noting that the Court’s decision could apply to all “determinate-sentencing schemes”); *Harris*, 536 US at 570 (Breyer concurring in part and concurring in the judgment) (pointing out that “[a]pplying *Apprendi* in this case would not, however, lead Congress to abolish, or to modify, mandatory minimum sentencing statutes”).

which a judge could exercise discretion.²⁰⁶ These were, in short, the easy cases. Yet the Court emerged from them with a series of logically discordant holdings and no accepted theory about how to define “crimes” and “elements.” When the justices finally faced the more subtle constitutional problems presented by sentencing systems that sought to regulate the exercise of judicial discretion *within* the ranges generated by findings of traditional elements, they were crippled by the absence of a shared intellectual framework.

Blakely v Washington, decided in June 2004, involved a challenge to the Washington State Sentencing Guidelines. In Washington, a defendant’s conviction of a felony rendered him legally subject to a sentence within the upper and lower boundaries set by the statutory minimum and maximum sentences for the crime of conviction;²⁰⁷ however, the judge’s decision about what sentence to impose within those boundaries was constrained by the Washington State Sentencing Guidelines.²⁰⁸ These statutory guidelines were similar to (though simpler than) the Federal Sentencing Guidelines. They were based on a “sentencing grid.”²⁰⁹ The horizontal axis measured criminal history and the vertical measured offense seriousness.²¹⁰ Following conviction, the judge identified the value on the vertical axis corresponding to the offense of conviction and also determined the defendant’s “offender score” by finding the number and type of his prior convictions.²¹¹ The intersection of these two values on the grid produced a “standard range” expressed in months. By statute, the standard range became the “presumptive sentence.”²¹² However, the judge had the “discretion” to impose a sen-

²⁰⁶ One might argue that *Apprendi* was an exception to this categorization. But the New Jersey hate crimes statute in *Apprendi* was overturned precisely *because* it purported to allow a judge to sentence outside the hard upper limit set by the separate New Jersey firearms statutes to which defendant pled guilty. See text accompanying notes 155–59.

²⁰⁷ Wash Rev Code Ann § 9A.20.021 (West 1998). Some Washington offenses were subject to mandatory minimum sentences. Wash Rev Code Ann § 9.94A.505 (West) (setting minimum sentences for certain homicides and sex offenses); Wash Rev Code Ann § 9.92.090 (West) (setting minimum terms for habitual offenders).

²⁰⁸ Washington Sentencing Reform Act of 1981, recodified at § 9.94A.310–320 (West) (mandating, on the facts of the offense in *Blakely*, a sentence between forty-nine and fifty-three months). See also *Blakely*, 542 US at 299 (summarizing the sentence Ralph Howard Blakely, Jr, was mandated to receive under the Washington Sentencing Reform Act).

²⁰⁹ Washington Sentencing Guidelines Commission, *Adult Sentencing Guidelines Manual* 1997 I-2 table 1 (1997).

²¹⁰ *Id.*

²¹¹ Wash Rev Code Ann § 9.94A.360 (West 1998), recodified at § 9.94A.525 (West). See also generally *State v Ammons*, 713 P2d 719 (Wash 1986) (discussing the determination of defendant’s criminal history at sentencing hearing).

²¹² Wash Rev Code Ann § 9.94A.370 (West 1998), recodified at § 9.94A.530 (West).

tence above or below this range (an “exceptional sentence”),²¹³ *but not outside the statutory minimum or maximum*, so long as he found, “considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence.”²¹⁴ The Act provided lists of aggravating and mitigating factors that would justify exceptional sentences,²¹⁵ but emphasized that these lists are “illustrative only and are not intended to be exclusive reasons for exceptional sentences.”²¹⁶ The judge’s exercise of discretion in imposing an exceptional sentence was reversible on appeal only if “clearly erroneous.”²¹⁷

Blakely was convicted of second degree kidnapping, which, by statute, carried a maximum sentence of ten years.²¹⁸ Under the Washington guidelines, the kidnapping conviction, plus a special jury finding that Blakely committed the crime with a firearm which triggered a thirty-six month sentence enhancement, plus a judicial determination that Blakely had an offender score of two, generated a “standard range” of forty-nine to fifty-three months.²¹⁹ However, the judge also found that Blakely had committed the crime with “deliberate cruelty,” a factor enumerated

²¹³ Wash Rev Code Ann § 9.94A.390 (West 1998), recodified at § 9.94A.525 (West).

²¹⁴ Wash Rev Code Ann § 9.94A.120 (West 1998), recodified at § 9.94A.505 (West) (mandating that “whenever a sentence outside the standard range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law”).

²¹⁵ Wash Rev Code Ann § 9.94A.390(2) (West 1998), recodified at § 9.94A.525(2) (West) (stating aggravating factors); Wash Rev Code Ann § 9.94A.390(1) (West 1998), recodified at § 9.94A.525(1) (West) (stating mitigating factors).

²¹⁶ Wash Rev Code Ann § 9.94A.390(1) (West 1998), recodified at § 9.94A.525(1) (West).

²¹⁷ Wash Rev Code Ann § 9.94A.210(4) (West 1998), recodified at § 9.94A.585(4) (West) (stating that a sentence outside the sentence range can only be reversed upon finding that “the reasons supplied by the sentencing judge are not supported by the record,” that those reasons do not justify an enhanced sentence, or that the sentence was “clearly excessive or clearly too lenient”). See, for example, *State v Gore*, 21 P3d 262, 277–79 (2001) (holding that “vulnerability” is one of the statutory suggestions for an “exceptional sentence,” and holding that a factual finding concerning the small size of a rape victim can establish vulnerability despite the fact that it is not specifically listed in the statute), citing Wash Rev Code Ann § 9.94A.210(4) (West 1998), recodified at § 9.94A.585 (West).

²¹⁸ See Wash Rev Code Ann § 9A.40.030 (West 1998) (defining the crime of second degree kidnapping and classifying it as a Class B felony); Wash Rev Code Ann § 9A.20.021(1)(b) (West 1998) (specifying the maximum punishment for a Class B felony as imprisonment for a term or ten years, a fine of \$20,000, or both).

²¹⁹ See Wash Rev Code Ann § 9.94A.320 (West 1998), recodified at § 9.94A.515 (West) (classifying the seriousness for second degree kidnapping as level five); Wash Rev Code Ann § 9.94A.310(1), box 2-V (West 1998), recodified at § 9.94A.510 (West) (mandating the standard range of thirteen to seventeen months); Wash Rev Code Ann § 9.94A.310(3)(b) (West 1998), recodified at § 9.94A.510(3)(b) (West) (mandating the thirty-six-month firearm enhancement). See Wash Rev Code Ann § 9.94A.310(3)(f) (West 1998), recodified at § 9.94A.510 (West) (describing a “firearm enhancement” as “[p]ossession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, [or] use of a machine gun in a felony”).

in the guidelines that permitted imposition of a sentence above the standard range,²²⁰ and imposed a sentence of ninety months.²²¹ In an opinion by Justice Scalia, joined by the other members of the *Apprendi* gang—Justices Thomas, Stevens, Souter, and Ginsburg—the Supreme Court found that imposition of the exceptional sentence violated the defendant's Sixth Amendment right to a trial by jury.²²²

The three defects in Justice Scalia's majority opinion can be summarized concisely: First, the majority erred by conceiving of the Washington guidelines as presenting only a narrow Sixth Amendment jury trial problem, rather than an intersection of Sixth Amendment and procedural due process issues. Second, even if only the Sixth Amendment were at issue, Scalia found in the Washington sentencing regime a problem it did not have. Third, he then tried to fix the non-existent problem with a simplistic formula whose implications he had not fully considered.

1. The missing due process analysis in *Blakely*.

It is important to emphasize both what the Washington legislature was trying to accomplish with its guidelines and the simplicity, modesty, and rationality of its remedy. The legislature and its sentencing commission sought a solution to the problem of judicial arbitrariness inherent in systems in which conviction confers on judges unfettered power to select penalties within broad statutory sentencing ranges. They were trying to balance competing imperatives of ensuring sentencing consistency—treating similarly situated offenders similarly—and of preserving discretionary judicial authority to account for defendant individuality. After considerable intelligent work, the legislature approved simple guidelines that codified the commonsense notion that the ordinary or average offender ought to get a sentence roughly in the middle of the statutory range for the crime he committed, and that when deciding whether to go above or below that middle, judges should treat commonly occurring aggravators and mitigators in a consistent way. To assure procedural fairness, the guidelines limited the judge to consideration of facts admitted by the defendant, proven at trial, or proven by the government at the sentencing hearing by a

²²⁰ See Wash Rev Code Ann § 9.94A.390(2)(h)(iii) (West 1998), recodified at § 9.94A.535(2)(h)(iii) (West) (describing the aggravating circumstances related to domestic violence as including an ongoing pattern of abuse, the sight or sound of the abuse occurring in the presence of the offender's minor children, and "deliberate cruelty").

²²¹ See *Blakely*, 542 US at 298.

²²² *Id* at 313–14.

preponderance of the evidence.²²³ At the same time, by conferring on judges complete discretion to select sentences within the guidelines range and leaving them substantial discretionary authority to sentence outside the prescribed ranges based on factors unenumerated in the guidelines, Washington provided room for adjustment of this norm in individual cases.

The Supreme Court looked at this system and saw only a legislative effort to limit defendants' Sixth Amendment jury rights and, not incidentally, to limit judicial sentencing power. The Court failed to take account of the fact that standardless, and therefore arbitrary, exercise of judicial power over individual liberty is itself a problem of constitutional dimension. Traditional discretionary sentencing arrangements that empower a sentencing judge to choose among a range of disabilities from probation to decades in a cell, without requiring an evidentiary hearing, a reasoned explanation of the choice, or substantive appellate review, are in tension with the Fifth and Fourteenth Amendments' requirements that the state shall take neither life nor liberty without due process of law.²²⁴ It is true that in *Williams v New York*, the Supreme Court upheld wholly discretionary judicial sentencing against a procedural due process challenge.²²⁵ However, it did so based on the historical claim that American judges had exercised such standardless power since the early days of the Republic²²⁶ and the assertion that imposition of due process protections would impede the operation of "the prevalent modern philosophy" of individualized rehabilitative sentencing.²²⁷

It is one thing to say, as *Williams* did, that deference to tradition and a prevailing rehabilitative model of sentencing makes it *permissible* for a legislature to create a highly discretionary sentencing scheme. It is another thing altogether to suggest that the Constitution prohibits due process limitations on judicial sentencing power, or that legislatures may not try to solve procedural deficiencies through legislation. And where a legislature creates a system that attaches sentencing weight to specific facts, albeit not the same weight it attaches to elements, ordinary due process analysis suggests heightened procedural protections should certainly be permitted, and perhaps ought to be required.²²⁸

²²³ Wash Rev Code Ann § 9.94A.370(2) (West 1998), recodified at § 9.94A.530(2) (West).

²²⁴ US Const Amend V; US Const Amend XIV.

²²⁵ See notes 23 and 80.

²²⁶ *Williams*, 337 US at 245–46.

²²⁷ *Id* at 247–48.

²²⁸ See *Mathews v Eldridge*, 424 US 319, 335 (1976) (identifying three factors that determine the applicable level of due process: (1) the private interests affected by the proceeding,

In *Blakely*, another of Justice Rehnquist's *McMillan* chickens came home to roost. *McMillan* seemingly ruled out the possibility of applying flexible due process standards to within-range sentencing factors, which left Scalia, and indeed the entire Court, trapped in Sixth Amendment analysis. Either the facts triggering increases in Washington guideline ranges were elements requiring jury proof or they were nothing of constitutional consequence. Justices O'Connor and Breyer, in dissent, bewailed the fact that *Blakely*'s result had the perverse effect of diminishing the due process rights afforded Washington criminal defendants.²²⁹ But even they failed to recognize the need to combine Sixth Amendment and Due Process Clause analysis to form a coherent theory distinguishing between those facts that must be tried to a jury, those that trigger heightened due process protections because they channel judicial discretion within statutory ranges, and those as to which no special protections apply.

2. Justice Scalia in the Sixth Amendment vise.

In *Blakely*, having no hammer but the Sixth Amendment, Justice Scalia convinced himself that the Washington sentencing guidelines looked like a nail. He held that the Court was "require[d]" to vacate *Blakely*'s sentence by the rule of *Apprendi*: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."²³⁰ But *Blakely*'s sentence presented no necessary conflict with the *Apprendi* rule because, before *Blakely*, "statutory maximum sentence" was generally understood to mean the maximum sentence a statute defining a crime allowed a judge to impose, regardless of the number or severity of aggravating facts found by the judge post-conviction.²³¹ Indeed, we know that this is

(2) the risk of error created by the state's chosen procedure, and (3) the countervailing government interest supporting the use of the challenged procedure). See generally Richard Singer and Mark D. Knoll, *Elements and Sentencing Factors: A Reassessment of the Alleged Distinction*, 12 Fed Sent Rptr (Vera) 203, 204-05 (2000) (discussing the application of enhanced burdens of proof in criminal sentencing).

²²⁹ *Blakely*, 542 US at 316-17 (O'Connor dissenting); id at 343-44 (Breyer dissenting).

²³⁰ Id at 301, quoting *Apprendi*, 530 US at 490.

²³¹ It seems clear, for example, that Justice Stevens understood the term in just this way when writing the *Apprendi* opinion. He denigrates the distinction between "elements" and "sentencing factors," but is at pains to observe that the term "'sentencing factor' . . . appropriately describes a circumstance, which may be either aggravating or mitigating in character, that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense." *Apprendi*, 530 US at 494 n 19. While Stevens's language is ambiguous enough to accommodate the later *Blakely* holding, a more natural reading is that he recognized and

precisely how the Washington legislature understood the term because it specified in its Sentencing Reform Act that, “If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence.”²³² Thus, until *Blakely* was decided, the “prescribed statutory maximum” for the Class B felony of second degree kidnapping to which *Blakely* pleaded guilty was the maximum sentence of ten years prescribed for Class B felonies by the Washington legislature.²³³ And *Blakely* was sentenced to a term less than ten years.

Not only was *Blakely*’s particular sentence consistent with the plain language of the *Apprendi* rule, but the Washington guidelines system as a whole exhibited no necessary conflict with the vision of the Sixth Amendment Justice Scalia articulated in *Blakely*. According to Justice Scalia, the principle upon which *Blakely* rested was the constitutional imperative of giving “intelligible content to the right of jury trial,” a right that “is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.”²³⁴ What Scalia presumably meant by this ringing encomium was that juries, not judges, should find the facts that set the legal boundaries on criminal punishments (with the qualification imposed by *McMillan* and *Harris* that the jury right extends only to facts that set the upper legal boundary of punishment). One should, therefore, be able to recognize a sentencing scheme that violates Scalia’s Sixth Amendment jury right by one of two signs—either (a) it confers on judges the power to impose, based on a post-conviction judicial finding of fact, a higher sentence than would formerly have been possible, or (b) it deprives juries of the authority to decide sentence-enhancing facts that were previously within their province.

Neither form of Sixth Amendment transgression was present in *Blakely*. In *Apprendi*, the constitutional flaw in the challenged hate crime statute was its grant to judges of the power to impose a longer sentence than allowed by the separate statute he was convicted of violating, based on a post-conviction finding of racial motivation. The Washington guidelines granted judges no such power. A Washington defendant convicted of second degree kidnapping was exposed to no greater penalty after the guidelines were passed than before. The

accepted the propriety of identifying aggravating and mitigating facts that provide legal support for judicial assignment of a sentence high or low in a statutorily authorized range.

²³² Wash Rev Code Ann § 9.94A.420 (West 1998), recodified at § 9.94A.599 (West).

²³³ Wash Rev Code Ann § 9A.20.020(1)(b) (West 1998).

²³⁴ *Blakely*, 542 US at 305–06.

guidelines merely formalized the common sense proposition that a court should sentence a typical offender in roughly the middle of the statutory range generated by conviction unless it articulates fact-based reasons for sentencing above or below the middle. Likewise, no sentence-affecting fact that was committed to juries before the guidelines was withdrawn from them by the guidelines. In short, the Washington guidelines neither granted judges additional sentencing power, nor deprived juries of power they formerly possessed.

To be fair to Justice Scalia, this test for Sixth Amendment transgression is essentially historical. That is, it assumes the structured sentencing regime at issue is an overlay on a preexisting system with already-defined statutory crimes correlating to established statutory sentencing ranges, thus permitting an easy before-and-after comparison. Such a test would be harder to apply to a complete recodification in which a legislature simultaneously redefined the elements of many traditional offenses, set new sentencing ranges, and identified a separate set of sentencing factors intended to guide judicial sentencing discretion within the new ranges. It would also be more difficult to apply to the federal system inasmuch as the federal criminal code is such a disorganized hodgepodge that the Federal Guidelines amounted to a *de facto* recodification of federal criminal law.²³⁵ A comparative historical rule therefore might be seen as leaving the door open to legislative evasion, although as Justice Stevens rightly observed in *Apprendi*, there are “structural democratic constraints” on blatant legislative alterations of traditional criminal law norms.²³⁶ Moreover, a purely historical test would impose an implicit, and arguably unjustifiable, limitation on the legislative power to define crimes by suggesting that significant deviation from traditional definitions of crime is constitutionally suspect. Thus, while historical analysis suggests that the Washington sentencing guidelines presented little or no threat to the Sixth Amendment interests the Court sought to protect, Scalia was not wrong in seeking a test for identifying “crimes” and “elements” that set constitutional limits on legislative authority re-

²³⁵ Stith and Cabranes, *Fear of Judging* at 148 (cited in 25). See also Frank O. Bowman, III, *The 2001 Economic Crime Sentencing Reforms: An Analysis and Legislative History*, 35 Ind L Rev 5, 12–23 (2001) (describing the disarray in federal economic crime statutes and the effort by the US Sentencing Commission to impose structure through the Guidelines mechanism).

²³⁶ *Apprendi*, 530 US at 490 n 16. See also *Blakely*, 542 US at 322 (O'Connor dissenting) (“The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase of lesser included and easier-to-prove offenses.”).

gardless of whether the legislature was amending an old regime or writing on a clean slate.

Scalia's attempt at such a generally applicable test required constructively amending the *Apprendi* rule by redefining "statutory maximum sentence" to mean something it had never meant before. Justice Scalia decreed that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."²³⁷

As many have observed (beginning with Justice O'Connor in dissent²³⁸), Scalia's rule is weirdly asymmetrical and absurdly formalistic. As often as this feature of *Blakely* has been remarked upon, the familiarity conferred by the passage of years should not be allowed to obscure its surpassing oddity. The broad principle that supposedly actuates *Blakely* is that juries, not judges, should find the facts that set the legal boundaries on criminal punishments.²³⁹ Yet Scalia's rule does not apply to facts that establish or increase minimum sentences,²⁴⁰ those that reduce maximum or minimum sentences,²⁴¹ or those relating to criminal history.²⁴² Thus, many of the facts that determine how much time a defendant *must* serve, and many that determine how much he *may* serve, need never be considered by a jury.

Moreover, Scalia's rule leaves odd gaps that invite legislatures to draft around *Blakely* to keep sentence-affecting facts away from juries and in the hands of judges. For example, Justice Breyer noted in his dissent that the legislature could decree that all defendants are presumptively subject to the statutory maximum sentence absent proof of mitigating factors, and guidelines could be written to work downward from the presumptive maximum.²⁴³ Alternatively, *Blakely* would be satisfied by guidelines identifying facts that, when found by a judge post-conviction, triggered presumptive minimum, but not maximum, sentences below the statutory maximum sentence. Because the maximum sentence in such a regime would always be the statutory maximum, the *Blakely* rule would not be implicated.²⁴⁴

²³⁷ *Blakely*, 542 US at 303.

²³⁸ *Id.* at 321 (O'Connor dissenting) ("[I]t is difficult for me to discern what principle besides doctrinaire formalism motivates today's decision.").

²³⁹ See note 230 and accompanying text.

²⁴⁰ See *Harris*, 536 US at 568–69 (2002).

²⁴¹ See *Blakely*, 542 US at 339–40 (Breyer dissenting).

²⁴² See *Almendarez-Torres*, 523 US at 226–27.

²⁴³ *Blakely*, 542 US at 339–40.

²⁴⁴ For a further description of this possibility, and references to various critiques of it, see Frank O. Bowman, III, *Memorandum Presenting a Proposal for Bringing the Federal Sentencing*

Other methods of drafting around *Blakely* can be easily devised. For example, the Washington guidelines themselves only fall foul of Scalia's rule due to the fortuity that, as written, they assign a convicted defendant to a "standard range" based purely on the fact of conviction, without any other post-conviction judicial finding of fact.²⁴⁵ Consequently, Scalia can characterize the conviction as having generated a maximum sentence (the top of the standard range), which cannot legally be exceeded absent post-conviction judicial factfinding. However, the Washington legislature might just as easily have written the guidelines to say: (1) conviction exposes a defendant to the entire range of punishments within the statutory minimum and maximum sentences; and (2) the defendant will be assigned a guideline range somewhere inside the statutory limits only *after* a set of post-conviction judicial findings regarding aggravating and mitigating factors.²⁴⁶ So long as there was no guideline range to which a defendant could be assigned based on the conviction alone, then no post-conviction judicial finding of a non-element fact necessary to assigning a guideline range would increase the potential maximum sentence higher than it stood at the moment of conviction. In short, the Washington legislature could have kept exactly the same system voided in *Blakely*, with exactly the same distribution of sentencing authority between legislature, judge, and jury, if they had only thought to word it differently.

Even given the new rule, the *Blakely* majority need not have read Washington's Sentencing Reform Act in a way that created a constitutional issue. Whether Scalia's rule applies to any given sentencing regime depends entirely on what one takes to be the original position of a defendant at the moment he is convicted of a crime under that re-

Guidelines into Conformity with Blakely v. Washington, 16 Fed Sent Rptr (Vera) 364, 367-68 (2004); Frank O. Bowman, III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 Am Crim L Rev 217, 262-63 (2004).

²⁴⁵ Actually, the judge must make post-conviction findings regarding the defendant's criminal history to determine his standard range, but this was decreed constitutionally permissible under *Almendarez-Torres*. See 523 US at 243-44.

²⁴⁶ Washington might have said that, upon conviction, the defendant was eligible to be sentenced to any punishment up to the statutory maximum, but that, before sentencing, the court must examine non-element facts relating to offense and offender to determine whether a defendant should be assigned to the "low," "middle," or "high" range. The guidelines would specify particular facts as indicative of each status, and contain rules for assigning ranges. The only difference between this hypothetical system and the real one would be the requirement of a post-conviction affirmative finding of enumerated non-element facts indicating suitability for the "middle range," as opposed to an automatic relegation to the "standard range" upon conviction. Since only a post-conviction finding of non-element facts would place the defendant in the "middle range," and that range would have a presumptive maximum less than or equal to the statutory maximum, as would the low and high ranges, such a regime would seemingly not violate *Blakely*.

gime. In Washington, Scalia's rule applies if the original position of a defendant is that his conviction legally entitles him to a sentence no higher than the top of the presumptive standard range created by the guidelines, an entitlement that can only be disturbed by proof of certain non-element facts. But if the original position is that the defendant's conviction exposes him to punishment anywhere within the entire statutory range, and that the presumptive standard range created by post-conviction application of the guidelines operates as a restriction on judicial discretion that can never increase his legal maximum sentence and usually reduces his presumptive maximum sentence, then Scalia's rule should not come into play.²⁴⁷

One can view the Washington sentencing scheme as falling into the first category—if you cock your chin at the proper angle and squint your eyes just so—but the second better describes both what the Washington legislature intended and what it achieved. Its object in passing guidelines (in common with the designers of virtually all other sentencing guidelines systems around the country) was not to create new crimes with new elements triggering different statutory penalty ranges, but to structure discretionary judicial sentencing choices within the existing ranges for the old crimes.²⁴⁸ Yet given a choice between (a) an interpretation of Washington law that gave legal terms their accepted meanings, embodied the legislature's intent as clearly articulated in the statute and manifested in its effects, and would have sustained the Washington sentencing scheme as constitutional, and (b) a completely novel interpretation un-compelled by the text which required a tortured redefinition of a well-understood term of art, the *Blakely* majority opted to torture the statute into unconstitutionality.

²⁴⁷ Dissenting in *Rita v. United States*, 551 US 338, 387–90 (2007) (Souter dissenting), Justice Souter recognized precisely this point, but justified the result in *Blakely* on the questionable ground that, had the Court decided otherwise, legislatures might “bypass *Apprendi* by providing an abnormally spacious sentencing range for any basic crime . . . then leaving it to a judge to make supplementary findings not only appropriate but necessary for a sentence in a sub-range at the high end.” Justice Souter justified both a strained reading of the Washington statute and a very odd formalistic rule, not to prevent a present evil, but to prevent future legislatures from enacting a statute aimed at getting around the Court's formalistic rule.

²⁴⁸ The Washington Sentencing Reform Act of 1981 states that its “purpose . . . is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentencing.” Wash Rev Code Ann § 9.94.010 (West).

3. Why *Blakely*? The determinative influence of the Federal Guidelines experience.

Viewed in isolation, the Court's decision to rule as it did in *Blakely* is nearly incomprehensible. Why would five justices strain so hard to craft a silly rule to overturn a sensible state sentencing system? A big part of the answer is surely that, while Justice Rehnquist was at pains in his 1986 *McMillan* decision to maintain constitutional space for the novelty of structured sentencing,²⁴⁹ by 2004, structured sentencing was commonplace and in the minds of federal judges had become conflated with the Federal Guidelines and their characteristic set of problems. It is revealing that the second question posed (by Justice O'Connor) during the *Blakely* oral argument was, "Well, I assume that if your position were adopted it would invalidate the Federal sentencing scheme that we have."²⁵⁰ Indeed, it is fair to conclude that *Blakely* was, at bottom, never about Washington law, but was primarily driven by attitudes shaped by the Court's encounters with the federal sentencing system. As explained next, the Federal Guidelines era conditioned federal judges to associate structured sentencing with legislative and executive assaults on judicial power, acute manifestations of the "tail wags the dog" problem, and very high sentences.

a) *The federal experience and judicial perceptions of the relationship between structured sentencing and judicial power.* All forms of structured sentencing shift power away from judges and toward the legislatures and sentencing commissions who make sentencing rules and the prosecutors who control proof of the facts upon which the application of the rules depends.²⁵¹ Nonetheless, the degree of both the actual and perceived power shift varies tremendously depending on the structured system a jurisdiction adopts, and on the prior experiences and settled expectations of its judges. A detailed comparison of the Federal Guidelines and the many state variants of structured sentencing reform is beyond the scope of this Article, but it is plain that the changes in federal sentencing that began with the Sentencing

²⁴⁹ See notes 77–84 and accompanying text.

²⁵⁰ Oral Argument of Jeffrey L. Fisher on Behalf of *Blakely*, *Blakely v Washington*, No 02-1632, *3 (Mar 23, 2004) (available on Westlaw at 2004 WL 728362) (noting that counsel responded to Justice O'Connor's question by arguing that Washington's system is distinct from the federal system because Washington's system is a series of legislative mandates, while the federal system is a system of court rules).

²⁵¹ See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum L Rev 1315, 1318 (2005).

Reform Act were, and were perceived by federal judges to be, more profound than anything experienced in the states.

In the pre-SRA world, federal judges enjoyed virtually unchecked authority to impose sentences anywhere within the minimum and maximum sentences associated with the crime(s) of conviction.²⁵² In 1984, the SRA abolished parole²⁵³ and created the US Sentencing Commission.²⁵⁴ The Anti-Drug Abuse Act of 1986²⁵⁵ (ADAA) increased drug penalties across the board, and most importantly, created an unprecedentedly tough quantity-based regime of mandatory minimum sentences for most illegal drugs.²⁵⁶ In 1987, the Commission promulgated, and Congress approved, the Federal Sentencing Guidelines.²⁵⁷ With this sequence of enactments, Congress and the US Sentencing Commission erected the most complicated, fact-dependent, and restrictive set of sentencing mechanisms ever devised. Although the new regime never came as close to stripping judges of all discretion as the Guidelines' harshest critics sometimes claimed,²⁵⁸ the interlocking mesh of mandatory minimum statutes and binding guidelines placed real, detailed constraints on judicial sentencing authority. Moreover, everyone involved in federal sentencing policy understood that limiting judicial discretion was not merely the regrettably unavoidable incident of a rationalizing reform. Rather, one of the avowed objectives of federal sentencing reform was to limit the power of sentencing judges and thus to impose law on the assertedly lawless realm of sen-

²⁵² See text accompanying notes 10–12.

²⁵³ See SRA § 218(a)(5), 98 Stat at 2027 (repealing Chapter 311 of Title 18, United States Code, relating to parole).

²⁵⁴ SRA § 217, 98 Stat at 2017–26, codified at 28 USC §§ 991–98 (establishing the Sentencing Commission as an independent body in the judicial branch and detailing its purposes, duties, and powers).

²⁵⁵ Anti-Drug Abuse Act of 1986 (ADAA), Pub L No 99-570, 100 Stat 3207 (declaring that the Act is designed “to strengthen Federal efforts to encourage foreign cooperation in eradicating illicit drug crops and in halting international drug traffic” and “to improve enforcement of Federal drug laws and enhance interdiction of illicit drug shipments”).

²⁵⁶ See, for example, 21 USC § 841(b) (imposing mandatory minimum sentences for possession with intent to distribute a variety of illegal drugs).

²⁵⁷ See 28 USC § 994(p). For a detailed history of the approval of the Federal Sentencing Guidelines, see Stith and Koh, 28 Wake Forest L Rev 223, 288–89 & n 406 (cited in note 8) (noting that “no substantive hearings or detailed consideration of the Guidelines” occurred in Congress before the Guidelines came into effect).

²⁵⁸ See, for example, Charles J. Ogletree, Jr, *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 Harv L Rev 1938, 1960 (1988) (arguing that the Sentencing Commission’s “obsession” with producing justice in the aggregate has severely inhibited judges’ ability to use their discretion in sentencing and that “blind justice is injustice”).

tencing.²⁵⁹ Particularly when the Guidelines were new, federal judges viewed them as a direct challenge to judicial power, a challenge to which the majority of lower courts responded by declaring them unconstitutional.²⁶⁰

Nonetheless, after the Supreme Court upheld the Guidelines' constitutionality in *Mistretta* in 1989,²⁶¹ judges learned to live with them. Trial courts continued to struggle for at least some relaxation of the Guidelines' strictures and for a restoration of more of their traditional discretion, a struggle that sometimes put them at odds with Congress and the Sentencing Commission.²⁶² However, by the mid-1990s the Guidelines were settling in as an accepted, if never universally admired, feature of the federal legal landscape.²⁶³ Yet even as familiarity slowly increased judicial acceptance of the Guidelines, a complex array of factors was coming together to imperil that accep-

²⁵⁹ As federal judge Marvin Frankel, one of the first and most influential critics of federal sentencing before the Guidelines, wrote, "[T]he almost wholly unchecked and sweeping powers we give to judges in the fashioning of sentences are terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, *Criminal Sentences: Law without Order* 5 (Hill and Wang 1973).

²⁶⁰ Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 NYU L Rev 1377, 1399–1403 (1998) (finding that in 1988, 61 percent of the nearly three hundred federal judges who ruled on the constitutionality of the Guidelines found them unconstitutional as a violation of the separation of powers doctrine, an excessive delegation of legislative power, or on other grounds).

²⁶¹ 488 US at 412.

²⁶² The history of the twenty-year triangular relationship between judges, the Commission, and Congress is too tangled for detailed recounting here. In rough outline, for some years after the Guidelines were promulgated, the Commission was often at odds with district judges as it sought to establish its authority. In this early contest, the Supreme Court and the courts of appeals generally backed the Commission, holding that the Guidelines were indeed legally binding. Early in the Guidelines era, Congress stayed largely aloof from the details of Guidelines sentencing policy. The confluence of two events—the Republican takeover of the House of Representatives in 1995 and the Supreme Court's decision in *Koon v United States*, 518 US 81 (1996), loosening the standard of appellate review of guidelines departures—brought a marked change. Congress began to recognize the political utility of tweaking the Guidelines to raise sentences for the crime du jour, and Republicans in particular found it convenient to castigate as “soft” those judges who imposed sentences below the guideline range. See notes 265–72 and accompanying text. See also David M. Zlotnick, *The War within the War on Crime: The Congressional Assault on Judicial Sentencing Discretion*, 57 SMU L Rev 211, 218–20 (2004) (discussing how Congress in the 1990s increased punishments for drug crimes).

²⁶³ One factor contributing to the increased acceptance of Guidelines among judges was the ever-increasing proportion of judges who had known no other system. This phenomenon is even more pronounced today. By 2008, “[s]lightly more than 90% of active federal judges were appointed after the Guidelines became effective; even including senior district judges, more than two-thirds were appointed during the Guidelines regime.” Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1496 n 333 (2008).

tance and to place the judiciary once again at odds with those who made federal sentencing policy.²⁶⁴

The interbranch tension re-escalated, slowly at first but then more rapidly, between 1995 and 2004 as conservative Republicans gained increasing control over Congress and the Executive.²⁶⁵ Particularly after the Bush Administration took office in 2001, the Republican Congress began producing a steady stream of legislation increasing statutory maximum penalties, adding mandatory minimum sentences, urging higher Guideline ranges on the Commission, and imposing greater constraints on judicial sentencing discretion.²⁶⁶ The legislation was accompanied by ever-sharper rhetoric asserting congressional hegemony over sentencing and attacking judges as soft on crime.²⁶⁷ The high-water mark of this trend was the Feeney Amendment to the PROTECT Act of 2003,²⁶⁸ which initially sought to strip judges of virtually all power to depart below the applicable guideline range, and even in its final form, legislatively overturned the Supreme Court's decision in *Koon v United States*²⁶⁹ liberalizing the law governing departures from the Guidelines,²⁷⁰ and directly amended the Guidelines to restrict departures.²⁷¹ By 2003, the highly structured federal sentencing system once again seemed to be infringing steadily on judicial authority and was emerging as a major front in a broader power struggle between the judiciary and the elected federal branches.²⁷²

²⁶⁴ For a brief description of the Sentencing Commission's composition, see *Mistretta*, 488 US at 368–69.

²⁶⁵ As a result of the 1994 midterm elections, Republicans gained control of both House and Senate in January 1995. President George W. Bush won the presidency in the 2000 election, though the Democrats held the Senate. In the 2002 midterm elections, Republicans regained control of both congressional chambers.

²⁶⁶ See Zlotnick, 57 SMU L Rev at 226–27 (cited in note 262).

²⁶⁷ See, for example, F. James Sensenbrenner, Jr, Remarks before the US Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar 16, 2004), online at <http://judiciary.house.gov/legacy/news031604.htm> (visited Dec 11, 2009) (impliedly threatening impeachment of judges who impose “illegal” sentences).

²⁶⁸ Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub L No 108–21, 117 Stat 650.

²⁶⁹ 518 US 81 (1996).

²⁷⁰ *Id.* at 95–100 (changing the standard of appellate review for Guidelines departures from de novo to abuse of discretion, an alteration that afforded greater deference to the sentencing judge's decision to depart and thus conferred additional sentencing discretion on the judge).

²⁷¹ See generally Douglas A. Berman, *Locating the Feeney Amendment in a Broader Sentencing Reform Landscape*, 16 Fed Sent Rptr (Vera) 249 (2004). See also United States Sentencing Commission, *Report to the Congress: Downward Departures from the Federal Sentencing Guidelines*, B-31–33 (Oct 2003), online at <http://www.ussc.gov/departtrpt03/departtrpt03.pdf> (visited Dec 11, 2009).

²⁷² See Bowman, 41 Am Crim L Rev at 260–62 (cited in note 244).

b) *The federal tail-wags-dog problem.* The year before the Federal Guidelines went into effect in 1987, the Supreme Court had expressed concern in *McMillan* about the “tail wags the dog” problem presented by systems in which sentencing facts rival elements in their effect on defendants’ final sentences.²⁷³ The post-SRA federal system differs from state systems in at least six ways that combine to make the “tail wags dog” phenomenon dramatically more pronounced in federal court.

First, federal judges must find many more sentencing facts than state judges. Over the past twenty years, Congress and the Commission have sought to identify virtually every type of fact potentially relevant to the imposition of a criminal sentence and make a statute or rule about whether the sentencing judge should consider it, and if so, how.²⁷⁴ The number of mandatory minimums and factual add-ons in federal law has crept steadily upward. The Federal Guidelines and accompanying commentary and policy statements started out long in 1987 and have subsequently almost doubled in size.²⁷⁵ No state, even among those which have adopted guidelines systems, has attempted so exhaustive a catalogue.

Second, only the federal system has meticulously quantified the effect of virtually all the facts identified in its guidelines as relevant to sentencing. The Washington and California structured systems that were the subject of *Blakely* and the later case of *Cunningham v California*²⁷⁶ provide an illustrative comparison. Washington sentencing guidelines prescribed a “standard range” of forty-nine to fifty-three months for *Blakely*’s crime of second degree kidnapping with a firearm.²⁷⁷ California statutes prescribed a “middle term” sentence of twelve years for John Cunningham’s conviction of sexual abuse of a child under fourteen.²⁷⁸ In both states, the sentencing judge could impose a higher or lower sentence than the “standard range” or “middle term” if he found one or more aggravating or mitigating facts, most of

²⁷³ 477 US at 87–88.

²⁷⁴ Stith and Cabranes, *Fear of Judging* at 75 (cited in note 25).

²⁷⁵ Including appendices, the Guidelines in 1987 totaled 384 pages, while the Guidelines in 2007 totaled 659 pages. Compare United States Sentencing Commission, *Guidelines Manual* (1987) with United States Sentencing Commission, *Guidelines Manual* (2007).

²⁷⁶ 549 US 270 (2007). For further discussion of *Cunningham*, see Part IV.B.

²⁷⁷ The standard range for the offense of second degree kidnapping alone for someone with *Blakely*’s criminal history was thirteen to seventeen months, with a thirty-six month enhancement for use of a firearm. *Blakely* entered a guilty plea in which he admitted both guilt of the offense and use of the firearm. *Blakely*, 542 US at 299. See notes 208, 218–19, and accompanying text.

²⁷⁸ *Cunningham*, 549 US at 275.

which were enumerated in a nonexhaustive list created by the state sentencing commission (Washington) or Judicial Council (California).²⁷⁹ However, neither the Washington guidelines nor the California Judicial Council rules assigned any numerical value to these facts. If found, they permitted the judge to impose a nonstandard sentence, but they bore no necessary or recommended quantitative relationship to the magnitude of any departure from the standard sentence. By contrast, the federal system assigns specific weights to most of the facts identified in the Federal Guidelines. A finding of forty grams of powder cocaine equates to a fourteen-level increase in offense level, while three hundred grams generates a twenty-two-level increase.²⁸⁰ A timely guilty plea reduces the offense level by three,²⁸¹ while a finding of a minimal role in a multidefendant offense provides a four-level reduction.²⁸²

Third, unlike all but a very few states, the Federal Guidelines not only identify and quantify myriad sentencing facts, but they mandate cumulation of the assigned values. To return to the Washington and California examples, both states empowered a judge to impose a higher-than-standard sentence if he found one or more aggravating factors enumerated in the statute. They did not, however, require, presume, or even suggest that a judge should impose a higher sentence on a defendant with two or three aggravating factors rather than one.²⁸³ And they certainly did not attempt to quantify the precise amount by which a case with two specified aggravators should differ from a case with one or three. By contrast, once Federal Guidelines facts are found, their prescribed quantitative values must be added and subtracted according to detailed Guidelines rules.²⁸⁴

²⁷⁹ See Wash Rev Code Ann § 9.94A.120(2) (West 1998), recodified at § 9.94A.505(2) (West). Another Washington statute provided a list of “illustrative factors which the courts could consider in the exercise of their discretion to impose an exceptional sentence.” See Wash Rev Code Ann § 9.94A.390 (West 1998), recodified at § 9.94A.535 (West). In California, the California Penal Code specified a lower, middle, and upper term for specified crimes and instructed courts to impose the middle term “unless there are circumstances in aggravation or mitigation of the crime.” Cal Penal Code § 1170(b) (West). The California Judicial Council, pursuant to Cal Penal Code § 1170.3 (West), adopted a nonexclusive list of circumstances in aggravation and mitigation. Cal Ct Rules 4.421, 4.423. In California, each crime has only a single lower, middle, and upper term. See *Blakely*, 542 US at 299 (explaining the Washington sentencing guidelines’ application to *Blakely*).

²⁸⁰ USSG § 2D1.1(c) Drug Quantity Table.

²⁸¹ USSG § 3E1.1 (acceptance of responsibility).

²⁸² USSG § 3B1.2(a).

²⁸³ See note 279.

²⁸⁴ See, for example, USSG § 3B1.1.

Fourth, the Federal Guidelines are a so-called “modified real offense system.”²⁸⁵ That is, they require the sentencing judge to take into account not only the facts of the offense(s) of conviction, but also all “relevant conduct.” Relevant conduct includes unconvicted crimes and misconduct aided and abetted by the defendant or committed by co-conspirators during the offense of conviction²⁸⁶ or as part of the same course of conduct or common scheme or plan as the offense of conviction.²⁸⁷ The judge must factor relevant conduct into his guideline calculation so long as it is proven to a preponderance of the evidence.²⁸⁸ Because of the difference between the preponderance standard for sentencing facts and the beyond a reasonable doubt standard for element facts, the federal system permits judges to rely on acquitted conduct in determining a guideline sentencing range.²⁸⁹

Fifth, the pre-*Booker* Guidelines—because of their level of factual detail, the quantification of the value of sentencing facts, the required cumulation of those values, and the strong presumption created by statute and subsequent judicial rulings that a Guideline sentence is the correct one—bound judicial sentencing discretion into a web of rules more tightly than any state structured sentencing system. The binding effect of the Guidelines was enhanced by the numerous (and steadily proliferating) statutory mandatory minimum sentences that interacted with Guidelines rules.

Sixth, the Federal Guidelines system has a unique directional bias. Most state structured systems are like those of Washington and California in that the fact of conviction alone puts the defendant presumptively in the middle of the statutory seriousness scale, with judicial findings of fact roughly equally likely to produce upward or downward adjustments from the middle. However, under the Federal Guidelines, conviction of the crimes most common in federal court

²⁸⁵ See Julie R. O’Sullivan, *In Defense of the U.S. Sentencing Guidelines’ Modified Real-Offense System*, 91 Nw U L Rev 1342, 1349–51 (1997) (describing and defending the Guidelines’ modified real offense model). See also Herman, 66 S Cal L Rev at 311–14 (cited in note 49) (contending that the modified real offense model contributes to the tail-wags-dog problem).

²⁸⁶ Conduct of co-conspirators is attributable to the defendant only if reasonably foreseeable. USSG § 1B1.3(a)(1)(B).

²⁸⁷ USSG § 1B1.3(a)(2).

²⁸⁸ See, for example, *United States v Tejeda*, 481 F3d 44, 57 (1st Cir 2007) (rejecting the beyond a reasonable doubt standard); *United States v Grier*, 475 F3d 556, 561 (3d Cir 2007). But see Roger W. Haines, Jr, Frank O. Bowman, III, and Jennifer C. Woll, *Federal Sentencing Guidelines Handbook* 1785–87 (West 2008) (suggesting that some courts may require a higher standard of proof when the relevant conduct has an “extremely disproportionate effect on the sentence”).

²⁸⁹ See *United States v Watts*, 519 US 148, 153–54 (1997).

produces a very low base offense level²⁹⁰ (or in the case of most drug offenses no base offense level at all²⁹¹), and the vast majority of judicial findings of sentencing facts generate increases in offense level and thus increase the prescribed sentencing range. Thus, unlike in the states, most federal sentencing proceedings have the feel of unstructured mini-trials in which a judicial finding of virtually any of the contested facts equates to “guilt” of a more serious, and more severely punished, grade of the offense of conviction.

These six attributes of the Federal Guidelines combined to produce a system in which conviction of a crime sometimes seemed disquietingly less important than the subsequent sentencing proceeding, and proof of the elements of the crime less important than proof of the Guidelines facts that generated a sentencing range. Not only did defendants receive no jury trial on these surpassingly important sentencing facts, but the level of due process available even in the sentencing proceeding before the judge was strikingly low.

c) *Sentencing process in an era of mass incarceration.* Between 1974 and 2005, the number of inmates in federal and state prisons jumped from approximately 216,000 to 2,186,230.²⁹² In the same period, the rate of imprisonment more than tripled, from 149 inmates to 488 inmates per 100,000 population.²⁹³ From 1977 to 2004, the number of federal inmates increased sixfold, from 32,088 to 180,328.²⁹⁴ None of the Supreme Court’s recent sentencing process cases turns, at least expressly, on the severity of sentences. But at least several justices are

²⁹⁰ For example, conviction of an economic crime sentenced under USSG § 2B1.1 (which governs most federal theft and fraud cases) generates a base offense level (BOL) of either six or seven. For a first-time offender, the guideline range associated with a BOL of six or seven is zero to six months. USSG § 5A Sentencing Table.

²⁹¹ USSG § 2D1.1. For further explanation of this distinction, see note 316.

²⁹² Compare Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S. Population, 1974–2001* *2 table 1 (Aug 2003), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf> (visited Dec 11, 2009) with Bureau of Justice Statistics, *Prison and Jail Inmates at Midyear 2005* *2 table 1 (May 2006), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf> (visited Dec 11, 2009).

²⁹³ Compare Bureau of Justice Statistics, *Prevalence of Imprisonment* at *2 table 1 (cited in note 292) (showing that the rate of incarceration has risen dramatically from 1974 to 2001) with Bureau of Justice Statistics, *Midyear 2005* at *4 table 3 (cited in note 292) (showing that rates of incarceration have risen steadily over ten years).

²⁹⁴ Bureau of Justice Statistics, *Prisoners under State or Federal Jurisdiction, Federal and State-by-State, 1977–2004* (Dec 2005), online at <http://bjsdata.ojp.usdoj.gov/content/data/corpop02.csv> (visited Dec 11, 2009). For other statistics on recent trends in American incarceration policy, see Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 *Ariz St L J* 47, 52–54 (2008) (observing that between 1972 and 2003, the nation’s prison population increased 500 percent).

plainly uneasy about the punitive trend of American criminal law,²⁹⁵ and it is reasonable to conclude that federal judges have come to associate structured sentencing with severe sentences.

First, despite the moderate intentions of many structured sentencing pioneers,²⁹⁶ the simultaneous evolution of structured sentencing and a more punitive national crime policy has led many to assume a causal relation between the two. Second, criminal justice hard-liners have sometimes found in the procedural mechanisms of structured sentencing an array of tools well suited to their ends. From crude devices like the mandatory minimum sentence to more complex and subtle arrangements like the Federal Sentencing Guidelines, tough-on-crime legislators recognized that structured sentencing allowed them (or sentencing commissions acting at their behest) to craft rules requiring, or at least strongly urging, judges to impose ever higher sentences. Third, the federal system, with Guidelines at its center, has become a one-way ratchet in which penalty levels are raised easily and often, but lowered only rarely and with the utmost difficulty.²⁹⁷ Since the advent of the Guidelines, the number of federal prisoners has exploded.²⁹⁸ In the states, guidelines and other structured sentencing mechanisms have sometimes been used to increase penalties, but have also been used to focus scarce resources on the most serious offenders and thereby to limit the expansion of prison populations.²⁹⁹ Nonethe-

²⁹⁵ See Anthony M. Kennedy, *Speech at the American Bar Association Annual Meeting* (Aug 9, 2003), online at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html (visited Dec 11, 2009) ("Our resources are misspent, our punishments too severe, our sentences too long."); Stephen Breyer, *Federal Sentencing Guidelines Revisited*, 11 Fed Sent Rptr (Vera) 180, 184 (1999) (expressing opposition to mandatory minimum sentences).

²⁹⁶ See, for example, Andrew Von Hirsch, *Doing Justice: The Choice of Punishments* 98–102 (Hill and Wang 1976) (advocating short but definite terms of incarceration for most crimes, and urging structured sentencing in part because it could restrain the punitive impulses of judges).

²⁹⁷ See Bowman, 105 Colum L Rev at 1319–20 (cited in note 251) (explaining how the complex structure of the Federal Guidelines system, the institutional interests of the main sentencing policy actors, and the absence of fiscal restraint at the federal level have combined to produce the one-way upward ratchet phenomenon).

²⁹⁸ From 1988, the first full year in which the Guidelines were in effect, to 2005, the number of prisoners in federal custody quadrupled from 46,714 to 184,484. Compare Bureau of Justice Statistics, *Correctional Populations in the United States, 1993* *12 table 1.10 (1995), online at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cpop93bk.pdf> (visited Dec 11, 2009) with Bureau of Justice Statistics, *2005 Midyear* at *1 (cited in note 292).

²⁹⁹ See, for example, Ronald F. Wright and Susan P. Ellis, *A Decade of Sentencing Guidelines: Revisiting the Role of the Legislature, A Progress Report on the North Carolina Sentencing and Policy Advisory Commission*, 28 Wake Forest L Rev 421, 422–23 (1993); Wright, 29 Crime & Just at 39 (cited in note 13). In part because states have used structured sentencing more constructively, state guidelines systems are generally considered a qualified success. See, for example, Reitz, *Reporter's Introductory Memorandum* at xxxi (cited in note 52).

less, the Federal Guidelines experience has cemented the correlation between structured sentencing and long sentences³⁰⁰ in the minds of federal judges for whom the Guidelines are a daily preoccupation.

In sum, by the summer of 2004 when *Blakely* was decided, federal judges, including, I suspect, those on the Supreme Court, had come to associate the era of structured sentencing with four features: (1) a decrease in the discretionary sentencing authority of trial judges; (2) a pervasive encroachment on federal judicial power generally by an alliance of Congress and the Executive; (3) a perception of procedural unfairness arising from the tail-wags-dog phenomenon; and (4) a general increase in sentencing severity.

The influence of these considerations on *Blakely* is not unambiguously clear. For example, while one strongly suspects that the severity concern was at least a subliminal motivator for the more liberal justices in the *Blakely* majority (Stevens, Ginsburg, and Souter), the one justice who has spoken out most publicly about the length of federal sentences, Justice Kennedy,³⁰¹ was in dissent both in *Blakely* and in the subsequent *Booker* decision invalidating the Federal Guidelines. And the two other members of the *Blakely* majority, Scalia and Thomas, have not been notable for their sympathy to convicted criminals.³⁰²

My sense is that some interplay of the perception that federal judges were under siege by Congress and the Executive, and the prominence of the tail-wags-dog problem in the federal system, did influence some justices. To a degree now difficult to recall, by 2004, federal judges felt themselves under relentless assault.³⁰³ And the

³⁰⁰ The Federal Sentencing Guidelines are in such bad odor among criminal justice professionals nationally that pre-*Blakely* proponents of structured sentencing reforms for state systems were forced to begin their sales pitch with an express disavowal of the Federal Guidelines and a detailed explanation of how the federal experience is an atypical outlier among structured systems. See Michael Tonry, *Sentencing Commissions and Their Guidelines*, 17 *Crime & Justice* 137, 138–39 (1993) (observing that sentencing commissioners in North Carolina, Texas, and Ohio explicitly rejected the Federal Guidelines as a model for their own practices).

³⁰¹ Kennedy, *ABA Speech* (cited in note 295) (“Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just.”).

³⁰² Consider *In re Davis*, 130 S Ct 1, 2 (2009) (Scalia dissenting) (“This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”).

³⁰³ See Shelley Murphy, *Judge Wolf Raps Focus on Guns, Drugs in US Docket*, Boston Globe A27 (Feb 6, 2004) (reporting that Judge Mark Wolf became upset with the portrayal of federal judges as being soft on crime); Linda Greenhouse, *Chief Justice Attacks a Law as Infringing on Judges*, NY Times A14 (Jan 1, 2004) (quoting Chief Justice Rehnquist as saying that the Feeney Amendment “could appear to be an unwarranted and ill-considered effort to intimidate individual judges”); Ian Urbina, *New York’s Federal Judges Protest Sentencing Procedures*, NY Times B1 (Dec 8, 2003) (observing that numerous federal judges expressed disapproval of the Feeney Amendment).

Guidelines-centered federal sentencing regime really was the apotheosis of a system in which sentencing factors had come to overshadow elements. This reality not only seemed to devalue the jury, but Congress was employing the dog-wagging Guidelines, interlocked with proliferating mandatory minimum sentences, to disempower the judiciary in the criminal arena. The federal system felt wrong. The Court was receptive to a rule that upended it.

Deputy Solicitor General Michael Dreeben, the superb advocate who appeared for the United States in both *Apprendi* and *Blakely*, argues that the *Blakely* decision cannot really be about substance because it neither ensures juries a significant role in deciding sentencing-determinative facts nor effectively prevents legislatures from limiting judicial sentencing discretion without using the jury as a factfinder.³⁰⁴ He suggests *Blakely* “is really about Justice Scalia’s view of constitutional interpretation, [which] prefers tests that are grounded in constitutional text, bright-line rules, history[,] and other ways of deciding a case that do not require judges to do much subjective thinking about the way the Constitution works.”³⁰⁵ But while Justice Scalia employed his approach to constitutional interpretation to fashion the *Blakely* rule, his methodological preferences cannot explain the embrace of that rule by Justices Stevens, Ginsburg, and Souter—justices who ordinarily have no affinity for Scalia’s interpretive methods.³⁰⁶ It seems to me more probable that those justices thought the rule generated by Scalia’s methods would solve, if perhaps imperfectly, the substantive problems that concerned them. The fact that, as we will see, Scalia’s rule accomplished very little does not mean those who embraced it hoped for no substantive effects. It means only that they failed to appreciate the implications of Scalia’s formula.

³⁰⁴ Robert Weisberg, ed, *Excerpts from “The Future of American Sentencing: A National Roundtable on Blakely,”* 2 Ohio St J Crim L 619, 627–28 (2005) (Michael Dreeben).

³⁰⁵ Id at 628.

³⁰⁶ For a detailed discussion of these justices’ approaches to constitutional and statutory interpretation, see generally Lackland H. Bloom, Jr, *Methods of Interpretation: How the Supreme Court Reads the Constitution* (Oxford 2009).

IV. THE OTHER SHOE (FINALLY) DROPS: *UNITED STATES V BOOKER* AND THE COURT'S JUDICIAL REVISION OF FEDERAL SENTENCING LAW

A. *United States v Booker*

I have told elsewhere³⁰⁷ the story of the confusion that reigned in federal courts in the six months between *Blakely* and the January 2005 decision in *Booker*. During the interregnum, some observers were distressed.³⁰⁸ Others were jubilant.³⁰⁹ But all recognized that the Federal Sentencing Guidelines seemed to violate the new *Blakely* rule. The surprise in *Booker* was not that the same five justices who prevailed in *Apprendi* and *Blakely* found the Guidelines unconstitutional in their original binding form,³¹⁰ but that the defection of Justice Ginsburg allowed Justice Breyer and the *Apprendi-Blakely* dissenters to fashion the remedy for the constitutional violation.³¹¹ The remedial majority transformed the Guidelines into what it deemed a constitutionally acceptable system in two steps. First, it excised two statutory subsections—18 USC § 3553(b)(1), which “requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure),”³¹² and 18 USC § 3742(e), which sets forth standards of review on appeal for sentences imposed under the Federal Guidelines.³¹³ Second, it substituted its own standard of appellate review—that of “reasonableness”—for the standard in excised § 3742(e).³¹⁴

The *Booker* opinions have been dissected at length.³¹⁵ I will not repeat the more commonly expressed criticisms. Rather, I want to ex-

³⁰⁷ See Bowman, 41 Am Crim L Rev at 262–64 (cited in note 244).

³⁰⁸ See, for example, id at 264 (expressing concern that *Blakely* could be extended to hold that structured sentencing is unconstitutional).

³⁰⁹ Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 Me L Rev 569, 579 (2005) (describing the reaction of federal judges and describing one camp as the “free at last” group).

³¹⁰ *Booker*, 543 US at 225–44 (2005). Justice Stevens wrote the “merits” majority opinion, joined by Justices Scalia, Souter, Thomas, and Ginsburg.

³¹¹ Id at 244–68. Justice Breyer wrote the “remedial” majority opinion, joined by Justices Rehnquist, O’Connor, Kennedy, and Ginsburg.

³¹² Id at 259–60.

³¹³ Id at 258–62 (holding that if Congress had been aware of the constitutional jury requirement, they would not have passed the Act in its present form).

³¹⁴ *Booker*, 543 US at 260–62.

³¹⁵ See, for example, David C. Holman, Note, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 Wm & Mary L Rev 267, 274–77 (2008) (pointing out that it is unclear how courts will interpret the remedial requirement of “reasonableness” review in conjunction with an advisory Federal Guidelines system, and that

plore a point that has not hitherto been explored, which is that, read together, the merits and remedial opinions left an opening (however narrow) for a sensible solution of the interlocking problems of jury rights, due process rights, and distribution of institutional sentencing authority posed by structured sentencing systems. Sadly, in the cases since *Booker*, the Court has shut the door on good sense. But we should at least understand the opportunity lost.

The *Booker* merits majority is a straightforward application of the *Blakely* rule. For both Freddie Booker and Duncan Fanfan, it was possible to determine a guideline range based purely on the facts found by the jury at trial,³¹⁶ and the Federal Guidelines required a

judges may revert to pre-*Booker* practices of enforcing the Federal Guidelines rigidly); Graham C. Mullen and J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing after United States v. Booker*, 41 U Richmond L Rev 625, 630–31 (2007) (noting that while the Court made the Guidelines “advisory” and adopted a reasonableness standard of review, it did not provide any guidance in interpreting these standards); Ronald J. Allen and Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 Stan L Rev 195, 208 (2005) (noting that the Court’s reasoning from *Apprendi* to *Booker* leads to a conclusion that the same result that was overturned in *Booker* as unconstitutional could be reached by “tweaking” the sentencing system to make the statutory maximum sentence the mandatory sentence, and then allowing judges to mitigate downwards from this statutory maximum); M.K.B. Darmer, *The Federal Sentencing Guidelines after Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 SC L Rev 533, 558–65 (2005) (asserting that by striking down the mandatory nature of the Federal Guidelines, the Court has, in essence, returned to a world of “open-ended discretion”).

³¹⁶ Interestingly, this need not have been the case. The Federal Guidelines designate a “Base Offense Level” (BOL) for almost all commonly occurring federal crimes, and then add or subtract offense levels based on facts found after conviction. See, for example, USSG § 2B1.1(a)(1) (assigning base offense levels to economic crimes); USSG § 2B1.1(b) (identifying “Specific Offense Characteristics” associated with increases or decreases in offense level). The process of determining a defendant’s ultimate Guidelines range is not legally complete until the judge makes all the factual findings called for by the Guidelines. USSG § 1B1.1 (listing the order in which the provisions of the Guidelines Manual are to be applied). However, a sentencing range can be calculated using only the BOL and the defendant’s criminal history score. Therefore, for most federal crimes, at the moment of conviction, one can identify a range analogous to Washington’s “standard range,” and any post-conviction judicial finding of fact increasing the offense level can be viewed as increasing the Scalian “statutory maximum sentence,” thus violating *Blakely*.

However, the main federal drug guideline, USSG § 2D1.1, has a different structure. Under § 2D1.1, unless the offense of conviction involves death or serious bodily injury, the fact of conviction itself generates no base offense level. Rather, the base offense level is determined by the type and quantity of drugs attributable to the defendant. Except in cases involving drug quantities triggering simultaneous increases in both maximum and mandatory minimum sentences, drug quantity is not charged in the indictment or found by the jury at trial, but is determined only at the sentencing hearing after conviction. Thus, *at the moment of conviction*, whether by plea or jury verdict, no guideline range can be calculated, the only ascertainable sentencing range is the one created by statute for the crime of conviction, and the “statutory maximum sentence,” even by Justice Scalia’s reckoning, is the statutory maximum sentence in its traditional sense. Therefore, application of the drug guidelines in a great many, perhaps most, federal cases does not offend *Blakely*.

judge to find additional facts to justify a sentence above the top of that range. Therefore, per *Blakely*, the Guidelines were unconstitutional as applied.³¹⁷ More importantly, the merits majority reaffirmed a critical—but I think tragically mistaken—aspect of the *Blakely* holding: the premise that there is no constitutional difference between a sentencing rule that imposes absolute limits on judicial sentencing discretion and one that creates a presumptively correct sentencing range from which a judge possesses discretionary authority to vary.³¹⁸ Justice Stevens’s merits opinion emphasized that the availability of judicial discretion to sentence outside of the applicable guidelines range did not save the Washington guidelines from unconstitutionality, and thus could not be invoked to preserve the federal scheme.³¹⁹

However, the remedial majority reintroduced the possibility of a constitutionally acceptable sentencing scheme in which jury-found facts (“elements”) set hard outside limits on judicial sentencing authority, while judge-found facts produced Guidelines ranges with some degree of presumptive weight.³²⁰ The SRA made the original Guidelines fairly strongly presumptive by requiring in § 3553(b)(1) that the sentencing judge “shall impose a sentence of the kind, and within the range” determined under the Guidelines, “unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into account by the Sentencing Com-

By chance or design, the Solicitor General sought review of two drug cases that differed from the norm. The indictments of Booker and Fanfan charged—and the jury found—threshold amounts of drugs triggering statutory mandatory minimum sentences. In these cases, therefore, the defendants could plausibly argue that because *some* drug amount had been found by the jury and thus *some* guideline range could be calculated based solely on the facts established at the time of conviction, then any additional post-conviction findings that increased the range would violate *Blakely*. Had the Solicitor General’s office sought certiorari in one case with a charged mandatory minimum and one without, it could have illustrated graphically the absurd artificiality of the *Blakely* rule. In the case where the jury was asked to find a minimum drug quantity, application of the sentencing guidelines would violate the Sixth Amendment jury right, while in the case in which the jury was given no role in finding drug quantity, the guidelines would infringe on the jury trial right not at all. Sadly, the Solicitor General missed his chance.

³¹⁷ The merits majority rejected all three arguments advanced by the government to distinguish the Federal Guidelines from the Washington guidelines. It found that the origin of the Federal Guidelines in a sentencing commission rather than a legislature was immaterial, *Booker*, 543 US at 237–39, that none of its prior cases upholding various provisions of the Federal Guidelines against constitutional attack on other grounds barred a Sixth Amendment challenge, *id* at 239–41, and that its result was not inconsistent with the *Mistretta* decision upholding the Federal Guidelines against separation of powers challenges, *id* at 241–43.

³¹⁸ *Booker*, 543 US at 233–35.

³¹⁹ *Id* (recognizing that because judges could depart from the Guidelines only after finding some aggravating or mitigating factor not considered by the Sentencing Commission, departures would be unavailable in most cases given the comprehensive nature of the Guidelines).

³²⁰ *Id* at 259.

mission in formulating the Guidelines that should result” in a sentence outside the range.³²¹ Over time, the Commission strengthened the presumption favoring a within-range sentence by including more and more facts in the offense level calculation³²² and by expressly excluding from consideration in awarding departures a great many classes of facts judges have historically used to distinguish defendants from one another at sentencing.³²³ The Supreme Court made the Guidelines slightly less binding with its 1996 *Koon* decision holding that the standard of review for departures was abuse of discretion.³²⁴ But Congress stepped in with the PROTECT Act of 2003 to retighten the Guidelines’ hold by restoring a de novo standard of appellate review for departures.³²⁵ Hence, by 2005, the Guidelines were strongly presumptive, both in theory and in practice.³²⁶

Unlike the *Booker* merits majority, the remedial opinion does not denude the Guidelines of all presumptive weight. Section 3553(a) remained in effect,³²⁷ and although it merely lists factors the court “shall consider” in imposing a sentence, the Guidelines loom large on that list.³²⁸ Sections 3553(a)(4) and (a)(5) require judges to consider the sentencing range established by the Guidelines and any policy statements issued by the Sentencing Commission.³²⁹ And since the Guidelines were written by the Commission with the objective of incorpo-

³²¹ 18 USC § 3553(b)(1).

³²² See, for example, Frank O. Bowman, III, *Pour Encourager les Autre? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 Ohio St J Crim L 373, 426–28 figures 5A & 5B (2004) (identifying many of the amendments to the economic crime Guidelines between 1987 and 2003).

³²³ See generally USSG ch 5, pt H (designating as “not ordinarily relevant” to imposing a sentence outside the guideline range factors such as age, § 5H1.1; education and vocational skills, § 5H1.2; mental and emotional conditions, § 5H1.3; physical condition and drug and alcohol dependence, § 5H1.4; employment record, § 5H1.5; family ties and responsibilities or community ties, § 5H1.6; military, charitable, or public service, or record of prior good works, § 5H1.11; and lack of guidance as a youth, § 5H1.12).

³²⁴ 518 US at 98–100.

³²⁵ See note 271 and accompanying text.

³²⁶ In 2004, 72 percent of all federal sentences imposed were within the applicable Guidelines range. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations about the Operation of the Federal Sentencing System after Booker*, 43 Houston L Rev 279, 297, 300 figure 2 (2006). Of those not imposed within the range, roughly 22 percent were the beneficiaries of a government-requested downward departure, and only 5.2 percent received non-Guidelines sentences as a result of departures not sanctioned by the government. *Id.* at 306 figures 3A & 3B.

³²⁷ *Booker*, 543 US at 259–60.

³²⁸ 18 USC § 3553(a)(4).

³²⁹ 18 USC § 3553(a)(4)–(5).

rating the remainder of the factors listed in § 3553(a), at the very least the Guidelines embody the Commission's best judgment (flawed though it may have been) on how to account for those factors in the ordinary case. If § 3553(a) means anything at all, it means that the Guidelines are supposed to carry significant, even if not absolutely determinative, weight in the sentencing decision of the district court. Moreover, as Justice Breyer was at pains to observe, the "reasonableness" standard created by the remedial majority for appellate review of sentences is not reasonableness in the abstract, but reasonableness in carrying out the statutory commands of § 3553(a).³³⁰ Thus, a sentencing decision that accords the Guidelines no weight cannot be a reasonable one.

One plausible reading of Justice Breyer's remedial opinion is that by striking § 3553(b) and replacing the *de novo* standard of review in § 3742(e) with reasonableness, he was attempting to restore the Guidelines to the form he thought they should have taken all along—a set of mildly to moderately presumptive guides for judicial sentencing behavior. I hold no brief for Justice Breyer's juridical methods in *Booker*. The severability analysis he employs to justify remedial surgery on the SRA deserves all the scorn that the dissenters³³¹ and numerous subsequent commentators³³² have heaped upon it. Nonetheless, I am disposed

³³⁰ Justice Breyer wrote:

[T]he text [of § 3742(e)] told appellate courts to determine whether the sentence "is unreasonable" with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

Booker, 543 US at 261.

³³¹ See *id.* at 271–304 (Stevens dissenting):

Neither the Government, nor the respondents, nor any of the numerous *amici* has suggested that there is any need to invalidate either provision in order to avoid violations of the Sixth Amendment in the administration of the Guidelines. The Court's decision to do so represents a policy choice that Congress has considered and decisively rejected.

Id. at 303–13 (Scalia dissenting) ("The majority's remedial choice is thus wonderfully ironic: In order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.").

³³² See, for example, Frank O. Bowman, III, "The Question Is Which Is to Be Master—That's All": Cunningham, Claiborne, Rita, and the Sixth Amendment Muddle, 19 Fed Sent Rptr (Vera) 155, 161 (2007) (referring to the effort to square the *Booker* remedy with congressional intent as "a comically solemn exercise in counterfactual absurdity—an attempt to divine what Congress would have intended if it had intended to enact a statute it did not enact"); Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 Georgetown L J 639, 665 (2005) (skewering Breyer's analysis as having "no basis in statutory law and no basis as legislative policy"); David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo Wash L Rev 639, 665 (2008) (arguing that Breyer's opinion viewed the severability doctrine in binary

to forgive the use of extraordinary measures in a rearguard action against Scalia's arid *Blakely* formalism. As the cases following *Booker* would prove, Scalia's rule is both intellectually unsupportable and pragmatically undesirable. Conversely, if extrapolated beyond the confines of the federal system, the structure of Breyer's remedy implied a sensible and generally applicable Sixth Amendment rule: juries *must* find facts that set impermeable outside limits on judicial sentencing discretion, but judges *may* find facts that set presumptive constraints on their own discretion within those limits, so long as the presumption is not so strong that it becomes, de facto, the sort of hard limit on judicial discretion that only jury factfinding should generate.

B. *Cunningham v California*: The Court Goes Irrevocably Astray

The *Booker* decision left the Court divided (more closely than ought to be possible for a nine-member body) between Scalia's mechanical rule and Breyer's flexible remedy. The question was whether the Court would explore the path suggested by Breyer or cling to Scalia's seductive simplicity. In January 2007, in *Cunningham*, the Court was seduced.

Cunningham tested the constitutionality of the California state sentencing system. Under California law, the statute defining an offense prescribed three precise terms of imprisonment—a lower, middle, and upper term.³³³ California Penal Code § 1170(b) provided that “the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.”³³⁴ The aggravating or mitigating circumstances were to be determined by the judge. The State Judicial Council promulgated rules defining “circumstances in aggravation [or mitigation]” as “facts that justify the imposition of the upper [or lower] prison term.”³³⁵ The rules went on to provide a nonexhaustive list of aggravating and mitigating circumstances and provided that the “judge is free to consider any ‘additional criteria reasonably related to the decision being made.’”³³⁶ Upon finding aggravating or mitigating facts, the judge was permitted, but not required, to impose either an upper or lower term sentence. In an opinion by Justice Ginsburg, the Supreme Court found this system in violation of the Sixth

terms and that it was an “extraordinarily bad way” to mix supposed congressional intent with the Sixth Amendment).

³³³ See, for example, Cal Penal Code § 288.5.

³³⁴ Cal Penal Code § 1170(b).

³³⁵ Cal Ct Rule 4.405.

³³⁶ *Cunningham*, 549 US at 278–79.

Amendment because a precondition for a sentence above the middle term was a post-conviction judicial finding of fact.

In one sense, this was hardly a surprising outcome since the California law was functionally indistinguishable from the Washington statute voided in *Blakely*. *Cunningham* is nonetheless significant, in part because it was the debut appearance on the Sixth Amendment sentencing stage of Chief Justice John Roberts and Justice Samuel Alito, who, during the two years since *Booker*, had taken the seats of Chief Justice Rehnquist and Justice O'Connor.³³⁷ Chief Justice Roberts seemingly altered the Court's delicate equipoise by joining the five justices who had formed the *Booker* merits majority in voting to void the California statute, in effect moving Justice Rehnquist's vote from the Breyer camp to the Scalia/Stevens bloc. But it was Justice Alito's dissent from Justice Ginsburg's majority opinion that crystallized the questions left unresolved by the dueling *Booker* majorities.

The *Cunningham* opinion might also have been notable had Justice Ginsburg used it to explain the rationale for her straddle in *Booker*, but her opinion for the *Cunningham* majority is a straightforward application of the *Blakely* rule.³³⁸ In California, a sentencing judge only acquires the discretionary authority to impose an upper-term sentence if he finds a non-element aggravating fact.³³⁹ Therefore, said Ginsburg, the California law violates the Sixth Amendment.³⁴⁰ Justice Alito responded by pointing out that the presence of appellate reasonableness review in the *Booker* remedy necessarily means that, even after *Booker*, there remains some class of federal sentences that cannot legally be imposed without a post-conviction judicial finding of fact.³⁴¹ Accordingly, contends Alito, the California sentencing scheme is not constitutionally distinguishable from the federal remedial regime prescribed

³³⁷ Justice O'Connor retired on January 31, 2006, and Justice Samuel Alito assumed her seat on the same day. Chief Justice John Roberts was sworn in on September 29, 2005, to replace Chief Justice William Rehnquist, who died on September 3, 2005. *Members of the Supreme Court of the United States*, online at <http://www.supremecourtus.gov/about/members.pdf> (visited Dec 11, 2009).

³³⁸ *Cunningham*, 549 US at 288.

³³⁹ Cal Penal Code § 1170(b) (2004).

³⁴⁰ *Cunningham*, 549 US at 291.

³⁴¹ *Id.* at 301–02 (Alito dissenting):

[U]nder the post-*Booker* system, there will be cases—and, in all likelihood, a good many cases—in which the question whether a defendant will be required to serve a greater or lesser sentence depends on whether a court of appeals sustains a finding of fact made by the sentencing judge.

in *Booker* and thus should not be voided unless the Court is also prepared to abandon the *Booker* remedy.³⁴²

Justice Alito's argument has implications far beyond the question of the validity of the California statute. First, Alito illuminates the inconvenient truth that the rule of *Blakely* is logically incompatible with the *Booker* remedy. Second, although Alito does not make the connection himself, the incompatibility stems from the central flaw in Scalia's *Blakely* rule, which is that it amounts to a declaration that, in any system incorporating judicial sentencing discretion, such discretion cannot be subjected to the rule of law.³⁴³ A full understanding of Alito's argument and its implications requires some elaboration.

1. Judicial discretion, appellate review, and the rule of law at sentencing.

If conviction of Crime X generates a range of possible penalties from which a judge may choose, then a judge sentencing defendants convicted of Crime X can either declare that all persons convicted of Crime X in his courtroom will receive the same penalty or try to distinguish among those who have committed Crime X. If he takes the latter course and does so on any basis other than a lottery, he must identify—at least in his own mind—facts that distinguish the case before him from the universe of other cases involving convictions of Crime X. The facts deemed important by the judge might be facts about the offender (age, prior criminal record, prior good works, family ties, and the like) or facts about the offense that make this instance of Crime X more or less troublesome than other instances (violence,

³⁴² “Unless the Court is prepared to overrule the remedial decision in *Booker*, the California sentencing scheme . . . should be held to be consistent with the Sixth Amendment.” *Cunningham*, 549 US at 311 (Alito dissenting).

³⁴³ See Carissa Byrne Hessick and F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 Ala L Rev 1, 36–40 (2008) (suggesting that the *Booker* remedy “cannot achieve the uniformity necessary for its legitimacy, while at the same time maintaining the discretion necessary for its constitutionality”). Professors Hessick and Hessick argue, correctly, that in its *Rita v United States*, 551 US 338 (2007), and *United States v Kimbrough*, 552 US 85 (2007), decisions addressing the “reasonableness review” of federal sentences created by the *Booker* remedial opinion, “the Court concluded that to preserve the *Booker* remedy, it was necessary to sacrifice the two central functions of appellate courts: error correction and lawmaking.” *Id* at 37. But the Court's abandonment of law as a limitation on judicial discretion is not limited to the peculiar federal world created by *Booker*; it is instead a logically unavoidable feature of Justice Scalia's *Blakely* rule and thus constrains state sentencing systems as well.

quantity of drugs, amount of loss, role in the offense, and so forth).³⁴⁴ But a judge making rational distinctions among those who have committed Crime X must do so by finding facts, and those facts cannot be the elements of Crime X, because by definition all members of the defendant class committed those elements.

Moreover, in every existing sentencing system in which conviction presents the judge a choice of more and less severe punishments for the same crime, a rational sentencing judge must find the existence of aggravating non-element factors in order to justify imposition of some subset of the legally available sentences.³⁴⁵ If, as in California, the law provides for a lower, middle, and upper term upon conviction, a rational judge would be obliged to find some non-element fact to justify imposition of the upper term even if the law did not affirmatively require it. Similarly, if the law provides a presumptive, aggravated, and mitigated range upon conviction, as was true in the Washington guidelines invalidated in *Blakely*, a rational judge is obliged to find some non-element aggravating fact to justify imposition of a sentence in the aggravated range. Even in a system that specified no middle term or presumptive middle range but instead, upon conviction, presented the sentencing judge with an undifferentiated range within which to exercise sentencing discretion, a rational judge would nonetheless have to identify some non-element aggravating factor to justify a sentence at the upper end of the range.

Thus far, law does not enter the analysis. We are merely defining the minimum requisites of rational decisionmaking by a judge possessing sentencing discretion. Law enters only when two additional conditions exist: (1) rules that correlate non-element facts with some required or preferred sentencing outcome, and (2) a mechanism for enforcing those rules. Rules of this correlating sort can emerge from a variety of sources, including statutes, administratively enacted guidelines, or common-law judicial rulemaking. Likewise, they may take a wide variety of forms. They may, for example, say that if the judge finds Fact A, he must impose a particular sentence; or that if he finds Fact B, he may, but need not, impose a higher (or lower) sentence than would otherwise have been possible in the absence of Fact B; or that if

³⁴⁴ See, for example, *Cunningham*, 549 US at 296–97 (Kennedy dissenting), citing Berman and Bibas, 4 Ohio St J Crim L at 55–57 (cited in note 171) (arguing for a constitutional distinction between offense and offender facts).

³⁴⁵ As Justice Breyer noted in *Blakely*, 542 US at 339–40 (Breyer dissenting), it would be possible to create a system in which conviction of an offense generates both a sentencing range and a presumption that the sentence should be imposed at the top of the range absent proof of mitigating factors, but no such system exists in the real world.

he finds Facts A, B, and C, he should sentence within a particular elevated (or reduced) range; or that if he finds one or more facts of a general type (for example, “aggravating” or “mitigating”), he may, or should, or must impose a different sentence than he would in the absence of such facts. What makes these correlations “law” is the presence of an enforcement mechanism with legal power to overturn the sentencing judge’s decision if he fails to adhere to the rule correlating facts with outcomes. Just as traffic law is a body of rules governing the conduct of drivers, sentencing law is a body of rules governing the conduct of sentencing judges. If a judge is absolutely at liberty to impose sentences in contravention of sentencing rules without ever being reversed, those rules are no more law than traffic regulations would be if no tickets could be issued or fines collected. *The only available enforcement mechanism for sentencing rules is appellate review.*

Note that sentencing rules imposing quite different kinds and degrees of constraint on judicial sentencing discretion may properly be considered law. Compare, for example, a rule requiring the sentencing judge to impose a sentence of ten years’ imprisonment, no more and no less, upon the finding of Fact X, with another rule that declares that a judge may, but need not, impose a sentence of more than ten years only if Fact X is found. The first rule simultaneously empowers and requires the judge to impose ten years upon a finding of Fact X, whereas the second empowers him to do so without requiring it. Both rules are forms of “law” so long as a court of appeals is empowered to vacate a sentence violating the rule, either because the judge did not find the required fact or because, having found it, the judge imposed a sentence different from that required by the rule. Similarly, a rule correlating a set of judge-found facts to a range of permissible sentences is a law so long as an appellate court can vacate a sentence imposed within the range for failure to find the facts generating the range, or vacate a sentence imposed outside the permissible range for failure to abide by the rule requiring a sentence within it.

Likewise, in sentencing, as elsewhere, a rule creating a presumption may be a form of law. Consider a rule stating that a judicial finding of Fact X creates a presumption that a sentence of ten to twelve years is proper, but that some other sentence may be imposed if there exist extraordinary aggravating or mitigating circumstances sufficient to overcome the presumption. Such a rule is a rule of law so long as an appellate court can overturn a sentence outside the range, either on the ground that the sentencing judge found no aggravating or mitigating circumstance or on the ground that the circumstances found were not sufficiently “extraordinary” to overcome the presumption. Finally,

and critically to the present discussion, even a rule that grants the sentencing judge an array of choices upon conviction, subject only to the constraints that he explain his choice and that the choice be a reasonable one, allows for the operation of law within the array so long as an appellate court has the power to reverse a sentence on the ground that the judge's decision to impose it was unreasonable.

2. The *Blakely* rule versus the *Booker* remedy.

This last type of sentencing rule deserves particular attention because it is the system prescribed by the *Booker* remedial majority. *Booker* found the Federal Sentencing Guidelines unconstitutional because they prohibited a judge from imposing a sentence above the range created by the Guidelines' base offense level unless the judge found some additional aggravating fact that would either increase the sentencing range or permit an upward departure.³⁴⁶ Justice Breyer sought to circumvent this difficulty by making the Guidelines advisory. However, declaring the Guidelines advisory does not alter the fundamental requirements of rational decisionmaking. After *Booker*, a sentencing judge is still presented with a statutorily created range of sentencing choices, and a sentence at the upper end of such a range cannot be rationally justified unless the judge finds some fact in addition to the elements of the crime.

In the case of federal sentencing, the logical imperatives of rational decisionmaking are reinforced by specific statutory commands. Section 3553(a)(4)(A), which was left intact by *Booker*, requires that judges at least consider the range produced by application of the Sentencing Guidelines and thus requires that judges find the facts necessary to determination of that range.³⁴⁷ Section 3553(c) requires that the court provide a statement of the "specific reason for the imposition of a sentence" outside the Guidelines range, a requirement that obliges the court to find non-element facts to justify a sentence above the Guidelines range but below the statutory maximum.³⁴⁸ Additionally, although *Booker* surely reduced the importance of the Guidelines in the final sentencing calculus, all the non-Guidelines factors and purposes listed in 18 USC § 3553(a)(1) and (2) also require, expressly or by necessary implication, findings of one or more facts not necessary to conviction of the underlying crime. Finally, the SRA's so-called parsimony provision

³⁴⁶ See text accompanying notes 316–27.

³⁴⁷ See 18 USC § 3553(a)(4)(A).

³⁴⁸ See 18 USC § 3553(c).

provides that the sentencing court “shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 USC § 3553(a)(2)].”³⁴⁹ At a minimum, the parsimony rule would appear to require that a sentence greater than the minimum required by law be justified by reference to some case-specific consideration, or in *Blakely* terms, some non-element finding of fact.

In short, the judicially amended post-*Booker* remainder of the SRA expressly mandates what rationality would in any case require—fact-based justifications, at least for sentences at the high end of the legally available range, and, if one gives a strong reading to the parsimony provision, for any sentence above the legal minimum. But what transforms the provisions of the SRA requiring rational fact-based explanations of sentencing choices from a set of suggestions into law subject to constitutional regulation is precisely the *Booker* Court’s imposition of reasonableness review. Without appellate authority to reject some sentences as unreasonable correlations between facts and outcomes, the sentencing power of judges would be unconstrained within the wide boundaries set by statutory minimum and maximum penalties and thus not subject to the rule of law. *Booker*’s imposition of reasonableness review means that it is a violation of the law, for which there is a remedy, for a judge to impose an unreasonable sentence. As Justice Alito observed, “although the post-*Booker* Guidelines are labeled ‘advisory,’ reasonableness review imposes a very real constraint on a judge’s ability to sentence across the full statutory range without finding some aggravating fact.”³⁵⁰

Justice Alito is thus correct that the California sentencing scheme at issue in *Cunningham* cannot be distinguished from the federal remedial regime prescribed in *Booker*—at least on the basis of the *Blakely* rule.³⁵¹ But Alito proves too much. He is right that “the Court’s remedial holding in *Booker* . . . necessarily stands for the proposition that it is consistent with the Sixth Amendment for the imposition of an enhanced sentence to be conditioned on a factual finding made by

³⁴⁹ 18 USC § 3553(a) (listing a variety of factors for judges to consider when sentencing a defendant, including but not limited to: the nature and circumstances of the offense, the history and characteristics of the defendant, the need for incapacitation and rehabilitation, and the kinds of sentences available). See also Marc L. Miller and Ronald F. Wright, *Your Cheatin’ Heart(land): The Long Search for Administrative Sentencing Justice*, 2 Buff Crim L Rev 723, 745–49 (1999) (examining the legislative history of the parsimony provision).

³⁵⁰ *Cunningham*, 549 US at 309 (Alito dissenting).

³⁵¹ “Unless the Court is prepared to overrule the remedial decision in *Booker*, the California sentencing scheme . . . should be held to be consistent with the Sixth Amendment.” Id at 311.

a sentencing judge and not by a jury.”³⁵² But if that is so, then one of three conclusions necessarily follows: either the Federal Guidelines in their original form should have been upheld in *Booker*; or the *Booker* remedy is fatally inconsistent with the Sixth Amendment as interpreted in *Blakely*; or there is some constitutionally critical distinction between the pre- and post-*Booker* Guidelines that invalidates the former and preserves the latter.

The basic distinction between the pre- and post-*Booker* Guidelines is obvious. The pre-*Booker* Guidelines were strongly presumptive while the *Booker* remedial opinion made them dramatically less so. Or to phrase the point in terms of judicial discretion, the pre-*Booker* Guidelines severely constrained judicial sentencing discretion, while the *Booker* remedial opinion markedly relaxed controls on that discretion. Justice Ginsburg’s *Cunningham* opinion vigorously denies that generous grants of judicial sentencing discretion can save a system that violates the “bright line” rule of *Blakely*.³⁵³ Given that Ginsburg was the sole justice in both *Booker* majorities, this denial borders on the bizarre. What factor did she think distinguished the old Guidelines from the new? As for Justice Alito, the curious gap in his otherwise admirable dissent is that he either overlooks or declines to engage on this critical question.

Despite its lacunae, the implications of *Cunningham* for subsequent cases were clear. If the Court’s Sixth Amendment doctrine was to become intellectually coherent, it would have to pursue one of three courses: (a) reverse *Blakely*; (b) deny guidelines rules all presumptive effect by abandoning or eviscerating appellate reasonableness review in federal cases; or (c) attempt to define constitutionally permissible degrees of restriction on judicial sentencing discretion.

C. *Rita v United States*: Just When You Thought It Couldn’t Get Weirder

In *Rita v United States*,³⁵⁴ the Court began trying to deal with the contradictions exposed by Justice Alito in *Cunningham*. In *Rita*, the Fourth Circuit upheld a sentence imposed within the applicable guideline range in reliance on its general rule that “a sentence imposed ‘within the properly calculated guideline range . . . is presumptively

³⁵² Id at 310.

³⁵³ “We cautioned in *Blakely*, however, that broad discretion to decide what facts may support an enhanced sentence, or to determine whether an enhanced sentence is warranted in any particular case, does not shield a sentencing system from the force of our decisions.” Id at 290.

³⁵⁴ 551 US 338 (2007).

reasonable.”³⁵⁵ The Supreme Court granted certiorari to resolve a circuit split on the question of whether, after *Booker*, federal sentencing ranges should enjoy such a presumption.³⁵⁶ Justice Breyer wrote the majority opinion, joined by Justices Roberts, Stevens, Kennedy, Ginsburg, and Alito, and joined in part by Justices Scalia and Thomas. Justices Stevens and Ginsburg filed one concurrence, Justices Scalia and Thomas another, and Justice Souter dissented.³⁵⁷ One might have thought a majority opinion that secured the unqualified votes of six justices and the partial support of two more would resolve a great many questions. It did not.

1. The circuit split.

When the Supreme Court grants certiorari to resolve a circuit split, the presumable point is to decide which position adopted by the lower courts is right, or in unusual cases where none of the lower courts is right, to articulate the correct position. In *Rita*, Justice Breyer simply refused to resolve the split. Instead, he defined the question in a way that permitted him to avoid a definitive answer. He wrote: “The first question is whether a court of appeals *may* apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines. We conclude that it *can*.”³⁵⁸ He emphasized that his ruling merely “permits” appellate courts to adopt a presumption of reasonableness, but does not require them to do so.³⁵⁹ In short, the Court held that courts of appeals are at liberty to presume the reasonableness of within-range sentences or not, as suits them.

³⁵⁵ *United States v Rita*, 177 Fed Appx 357, 358 (4th Cir 2006), quoting *United States v Green*, 436 F3d 449, 457 (4th Cir 2006).

³⁵⁶ *Rita*, 551 US at 341. The Supreme Court originally granted certiorari in *Rita* intending that it comprise one of a pair of cases, along with *United States v Claiborne*, 439 F3d 479 (8th Cir 2006), cert granted as *Claiborne v United States*, 549 US 1016 (2006), presenting two aspects of the central question regarding what legal weight should be accorded to properly calculated Federal Guidelines ranges. However, the petitioner in *Claiborne* died during the pendency of the appeal, see *Claiborne v United States*, 551 US 87, 87–88 (2007), leaving only Victor Rita’s case for decision by the Court. The issues raised in *Claiborne* were decided the next term in *Gall v United States*, 552 US 38 (2007). For a description of the issues presented by *Claiborne*, see Bowman, 19 Fed Sent Rptr (Vera) at 158–59 (cited in note 332) (noting that the distinctive feature in *Claiborne* was that the Court ruled that an extraordinary deviation from the Federal Guidelines must be accompanied by extraordinary circumstances).

³⁵⁷ *Rita*, 551 US at 340.

³⁵⁸ *Id* at 347 (emphasis added).

³⁵⁹ *Id* at 354 (“The fact that we permit courts of appeals to adopt a presumption of reasonableness . . .”).

Breyer's opinion is a striking abdication of responsibility. The question presented to the Court in *Rita* was not whether the law "permits" a court of appeals to apply a presumption of reasonableness to a Guidelines sentence if it feels like it, but whether, after *Booker*, the legal nature of the Guidelines is such that they command such a presumption.³⁶⁰ In *Booker*, Breyer and the other members of the remedial majority took it upon themselves to rewrite federal sentencing law, but in *Rita* they refuse to provide an authoritative interpretation of their own creation. The Court thus expressly sanctions a federal sentencing system in which different rules apply in different circuits.

2. Trial court versus appellate court presumptions.

Breyer hastens to insist that the optional "presumption of reasonableness" may be applied only by appellate courts and not by sentencing judges.³⁶¹ This holding rests on two points, one semantic and the other substantive. First, under *Booker*, the question of whether a sentence is "reasonable" is only presented on appeal, after the district court has calculated the Guidelines range, considered the other § 3553(a) factors, and imposed a sentence. At the district court level, therefore, a properly calculated Guidelines range might enjoy a presumption of correctness, but not of "reasonableness."³⁶² Second, Breyer justifies an appellate presumption of reasonableness as a form of deference to the confluence of judicial and administrative judgment that is presented whenever a sentencing judge imposes a sentence within the range recommended by the Sentencing Commission.³⁶³

Interestingly, Justice Breyer strongly implies, but never quite says, that sentencing judges may not accord Guideline ranges presumptive weight.³⁶⁴ At the same time, he is at pains to disparage the argument advanced by petitioner that a de jure appellate presumption of reasonableness necessarily creates a de facto trial court presumption of

³⁶⁰ See Petition for Writ of Certiorari, *Rita v. United States*, No 06-5754, *5 (filed July 28, 2006) (available on Westlaw at 2006 WL 4114065) (arguing that the circuit split is over "whether a sentence within the guideline range is presumptively reasonable," not whether it *could* be) (emphasis added). But the question certified by the Court was whether it is "*consistent with [Booker]*, to accord a presumption of reasonableness to within-Guidelines sentences." See *Rita v. United States*, 549 US 1016 (2006) (granting certiorari) (emphasis added).

³⁶¹ *Rita*, 551 US at 351 ("We repeat that the presumption before us is an *appellate* presumption.").

³⁶² See id. at 354.

³⁶³ Id. at 355–56.

³⁶⁴ See id. at 351–56.

correctness.³⁶⁵ He is plainly struggling with the central conflict embedded in the *Booker* remedy—since judges are obliged to make Guidelines calculations, the results will have some weight, and yet formal acknowledgement that they have weight highlights their incompatibility with the *Blakely* rule.

Among all the justices, only Justice Souter was prepared to label the Court's nice distinction between appellate and trial court presumptions the arrant nonsense it is:

Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate fact finding in disparagement of the jury right and will sentence within the high sub-range. This prediction is weakened not a whit by the Court's description of within-Guidelines reasonableness as an "appellate presumption." What works on appeal determines what works at trial, and if the Sentencing Commission's views are as weighty as the Court says they are, a trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox fact finding to justify a sentence outside the Guidelines range.³⁶⁶

3. Justice Scalia's concurrence in *Rita*.

The most intriguing of the *Rita* opinions is Justice Scalia's concurrence. This is Scalia at his best and worst. He begins by accepting, on stare decisis grounds, the *Booker* remedial revisions of the Guidelines,³⁶⁷ and by acknowledging Justice Alito's insight in *Cunningham* that in any system where the sentencing judge's discretionary sentencing decision is subject to substantive appellate review, some set of enhanced sentences will be legally justifiable only in the presence of judge-found, non-element facts.³⁶⁸ He then argues that because the

³⁶⁵ *Rita*, 551 US at 350–54 (emphasizing that it is the duty of a sentencing judge to determine "an appropriate sentence for a given offender" rather than to presume that the Guidelines sentence is correct).

³⁶⁶ *Id.* at 391 (Souter dissenting) (citations omitted).

³⁶⁷ *Id.* at 368 (Scalia concurring in part and concurring in the judgment).

³⁶⁸ *Id.* at 369–70:

Under the scheme promulgated today, some sentences reversed as excessive will be legally authorized in later cases only because additional judge-found facts are present; and, as Justice Alito argued in *Cunningham*, some lengthy sentences will be affirmed (i.e., held lawful) only because of the presence of aggravating facts not found by the jury, that distinguish the case from the mine-run.

Booker remedial structure as described by Justice Breyer in *Rita* envisions substantive appellate review, it must also violate the Sixth Amendment.³⁶⁹ This would seem to present Justice Scalia with an insoluble dilemma—how can the *Booker* remedy he just accepted survive if appellate review renders it constitutionally invalid?

Scalia's solution is simply to declare that no *substantive* review of a sentence imposed within the statutory minimum and maximum is constitutionally permissible. "I would hold that reasonableness review cannot contain a substantive component at all."³⁷⁰ The implications of this statement are genuinely breathtaking. This is the architect of the *Blakely* formula declaring that the Constitution prohibits appellate review of the substance of trial judges' discretionary sentencing choices. In other words, if Congress were to abolish the Guidelines tomorrow and replace them with a sentencing regime that permitted judges to sentence defendants anywhere within the statutory minimum and maximum, subject only to the limitation that the sentence be reviewable by appellate courts for substantive reasonableness, such a statute would, according to Justice Scalia, violate defendants' constitutional right to a jury trial.³⁷¹ Scalia's Sixth Amendment comes to this: a legislature can make sentencing rules triggered by jury factfinding that place absolute limits on judicial sentencing discretion, but within the limits set by jury-found facts, the discretionary power of the sentencing judge must be absolute and unreviewable.

One is tempted to a certain reluctant admiration for Scalia's tenacity. Confronted with the absurd, but logically inescapable, implications of his *Blakely* formula, he endorses the *reductio ad absurdum* refutation of his own thesis as a serious real world result. However, one's admiration for Scalia's tenacity is sensibly diminished by two considerations.

First, as extreme as Scalia's position is, it does not solve the logical dilemma created by the *Blakely* rule. His problem is that the dictates of rational decisionmaking require sentencing judges to find facts beyond those found by juries in order to have a rational basis for the sentences they impose. This means that federal trial judges *must*

³⁶⁹ *Rita*, 551 US at 368–74 (Scalia concurring in part and concurring in the judgment).

³⁷⁰ *Id.* at 370, 374.

³⁷¹ *Id.* at 376.

[T]he Sixth Amendment would be violated even if appellate courts really were exercising some type of common law power to prescribe the facts legally necessary to support specific sentences. . . . It makes no difference whether it is a legislature, a Sentencing Commission, or an appellate court that usurps the jury's prerogative.

sometimes do the very thing Scalia says is constitutionally impermissible—find facts beyond the jury verdict to justify high sentences. Scalia obviously cannot bar judges from finding facts in the sentencing process.³⁷² Nor can he ban them from relying on those facts to determine the proper sentence. Nor, one presumes, would he ban judges from publicly explaining exactly what facts they found and how those facts justified a high sentence. What he wants to declare unconstitutional is any grant of power to an appellate court to determine whether the use to which the facts were put by the trial judge was reasonable. Because he cannot ban logic from the sentencing process, Scalia would simply conceal the fact that logic is at work by banning law.

Second, a careful reading of the portion of Scalia's opinion endorsing "procedural" review of trial court sentencing decisions shows that even he flinches from a constitutional requirement of completely lawless sentencing discretion. Scalian "procedural review" would permit appellate reversal where the district court "appears not to have considered § 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with § 3553(c)'s requirement for a statement of reasons."³⁷³ The problem, of course, is that appellate review of even these "procedural" matters would inevitably require substantive evaluation of the district court's sentence.

Consider, for example, appellate review of a district court's failure to provide an explanation for a sentence. If all this entails is determining whether the judge wrote or said something in the form, "I impose this sentence because . . .," the requirement is meaningless and achieves none of the Act's objectives for such statements. Presumably, Scalia means that there must be an explanation that actually explains, that is, provides rational reasons for, the judge's choice. And presumably even Scalia would require that the explanations meet some minimal standard of rationality. He concedes as much in his footnote disagreeing with Justice Stevens's argument that "a district court which discriminates against Yankee fans is acting in a procedurally 'impeccable' way."³⁷⁴ But he elides the real issue by characterizing that hypothetical as relying on an "impermissible" factor. However, the reason being a Yankee fan is an impermissible factor in increasing a sentence is not that being a Yankee fan is a status like race or religion, but because it is difficult to see how being a Yankee fan could ever be

³⁷² "To be clear, I am not suggesting that the Sixth Amendment prohibits judges from ever finding any facts." *Id.* at 373.

³⁷³ *Rita*, 551 US at 382 (Scalia concurring in part and concurring in the judgment).

³⁷⁴ *Id.* at 382 n 6.

logically relevant to length of sentence. Thus, the task of discriminating between permissible and impermissible factors necessarily involves assessing the rationality of the connection between a fact and a sentence imposed in reliance on that fact. Which means that, despite Scalia's protestations, "procedural" reasonableness review requires some appellate evaluation of the rationality of the sentencing judge's choices. Such an evaluation—a sort of rational basis test—might be a weaker form of substantive review than the "reasonableness" review endorsed by Justice Breyer's majority opinion, but it would be substantive review nonetheless. It would still require a judge to provide a reason that offered at least a rational connection between a judge-found fact and a high sentence, and thus it would still violate Justice Scalia's model of what the Sixth Amendment requires.

The very dilute rationality test necessarily implied by Scalia's opinion would surely reduce the number of cases in which an appellate court would find a high sentence improper for want of a judge-found fact justifying the sentence. But Scalia himself is insistent that reducing the number of constitutional violations created by a sentencing system is no defense against the system's unconstitutionality so long as some sentences it would impose are unconstitutional.³⁷⁵ Squirm how he will, Scalia cannot escape from his own logical box.

D. The Court Pushes On: *Kimbrough*, *Gall*, *Nelson*, *Spears*, and *Ice*

The Supreme Court decided five more Sixth Amendment sentencing cases in the two years after *Rita*. With each case, the Court bound itself more firmly to the mast of the leaky *Blakely-Booker* vessel, even as each opinion plumbed new depths of logical incoherence.

1. *Kimbrough v United States*.

On December 10, 2007, the Court decided *Kimbrough v United States*,³⁷⁶ which dealt with the degree to which a district court is obliged to defer to the policy judgments of the Sentencing Commission and Congress embedded in the Guidelines. Derrick Kimbrough pleaded guilty to four charges involving possession and distribution of crack and powder cocaine.³⁷⁷ He was therefore subject to a ten-year mandatory

³⁷⁵ *Id.* at 375–78.

³⁷⁶ 552 US 85 (2007).

³⁷⁷ *Id.* at 91.

minimum sentence based on the quantity of crack he possessed,³⁷⁸ plus a consecutive five-year mandatory minimum term for possessing a firearm in connection with a drug crime.³⁷⁹ However, his Guidelines range was even higher—228 to 270 months, or 19 to 22.5 years.³⁸⁰ The district judge determined that a sentence in the Guidelines range would be “greater than necessary,”³⁸¹ in large measure because the high Guideline range was driven by the controversial 100-to-1 powder-to-crack weight ratio that prescribes far harsher punishments for crack defendants than for those who possess an equivalent amount of powder cocaine.³⁸² Accordingly, the court sentenced Kimbrough to the fifteen-year statutory minimum.³⁸³ The Fourth Circuit reversed on the ground that a below-Guidelines sentence based on judicial disagreement with the crack-powder disparity was “per se unreasonable.”³⁸⁴

The question presented to the Supreme Court was whether a district court could justify a downward variance from a properly calculated Guidelines range based, not on any circumstance peculiar to the defendant, but on the judge’s disagreement with a policy judgment embedded in the Guidelines. The Court, in an opinion by Justice Ginsburg, found that, at least in the case of the crack-powder ratio, a sentencing judge could do just that.³⁸⁵ In one sense, this result is an unsurprising, and indeed logically necessary, consequence of the *Booker* remedy. If a judge cannot legally deviate from a properly calculated range based on disagreement with the Guidelines themselves, then in a case where neither the crime nor the defendant possesses any notable feature distinguishing the case from the ordinary run, the Guidelines would in such a case be mandatory rather than “advisory.”

A notable feature of the *Kimbrough* opinion, however, is the degree to which it emphasizes the ongoing importance of the Sentencing Commission and the weight that must still be accorded the Guidelines. Justice Ginsburg insisted that “[w]hile rendering the Sentencing

³⁷⁸ Possession with intent to distribute more than fifty grams of crack cocaine carries a mandatory minimum sentence of ten years to life imprisonment. 21 USC § 841(b)(1)(A)(iii).

³⁷⁹ The sentence for possession of a firearm in furtherance of a drug-trafficking offense is five years to life, which must run consecutively to the underlying drug offenses. 18 USC § 924(c)(1)(A).

³⁸⁰ *Kimbrough*, 552 US at 92.

³⁸¹ 18 USC § 3553(a) (mandating that every sentence should be “sufficient” but not “greater than necessary” to offer just punishment, deter criminal conduct, and protect the public from the defendant).

³⁸² *Kimbrough*, 552 US at 93.

³⁸³ *Id.*

³⁸⁴ *United States v Kimbrough*, 174 Fed Appx 798, 799 (4th Cir 2006) (per curiam).

³⁸⁵ *Kimbrough*, 552 US at 109–10.

Guidelines advisory, we have nevertheless preserved a key role for the Sentencing Commission,” in consequence of which “in the ordinary case, the Commission’s recommendation of a sentencing range will ‘reflect a rough approximation of sentences that might achieve § 3553(a)’s objectives.’”³⁸⁶ She then set up a differential standard of review for different types of variance from the Guidelines. She quoted *Rita* for the proposition that “a district court’s decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case ‘outside the heartland’ to which the Commission intends individual Guidelines to apply,”³⁸⁷ but observed that “closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge’s view that the Guidelines range fails to properly reflect § 3553(a) considerations even in a mine-run case.”³⁸⁸ Moreover, the *Kimbrough* opinion seems to have relied heavily on the peculiar history of the crack-powder disparity. To make a long story short, the Court plainly implied that the district court was justified in deviating from the Guidelines here primarily because the Commission itself had repeatedly expressed doubts about the rationality of the 100-to-1 ratio. The opinion exuded reluctance to signal a green light for variances based purely on differences between a judge’s personal sentencing philosophy and the policy judgments of the Commission in cases other than those involving crack.³⁸⁹

2. *Gall v United States*.

On the same day it issued *Kimbrough*, the Court also decided *Gall v United States*,³⁹⁰ which addressed the weight a court of appeals can accord a properly calculated Guidelines range as part of reasonableness review.³⁹¹ In *Gall*, the defendant admitted to having trafficked in significant quantities of ecstasy and marijuana while in college, but asserted (without contradiction from the government) that he had

³⁸⁶ Id at 109, quoting *Rita*, 551 US at 350.

³⁸⁷ *Kimbrough*, 552 US at 109, quoting *Rita*, 551 US at 351.

³⁸⁸ *Kimbrough*, 552 US at 109 (clarifying, however, that in the case of the crack-powder sentencing disparity, the Commission based its Guidelines ranges not on “empirical data and the national experience” but instead on the mandatory minimum sentences set by Congress in the Anti-Drug Abuse Act of 1986) (quotation marks omitted). See also Comment, *Deviations Based on Policy Disagreements*, 122 Harv L Rev 326, 331–36 (2008).

³⁸⁹ Indeed, *Kimbrough* strongly implies that judges should give greater deference to the policy judgments of the Sentencing Commission than those of Congress itself. Consider *Kimbrough*, 552 US at 108–09 (recognizing that the Sentencing Commission “fills an important institutional role” in that it is staffed by experts who rely on data in making sentencing recommendations).

³⁹⁰ 552 US 38 (2007).

³⁹¹ See note 356.

abandoned involvement with drugs three-and-one-half years before his indictment, graduated from college, and become a productive member of the community.³⁹² Based on Gall's voluntary withdrawal from the drug conspiracy and his post-offense conduct, the district court imposed a sentence of thirty-six months probation instead of a term within the applicable Guidelines range of thirty to thirty-seven months imprisonment.³⁹³ The Eighth Circuit reversed. It invoked a general rule that a sentence imposed within a properly calculated Guidelines range is presumptively reasonable, while one outside the Guidelines range must be justified by one or more considerations exterior to the Guidelines and "proportional to the extent of the difference between the advisory range and the sentence imposed."³⁹⁴ It ruled that Gall's probationary sentence was a "100% downward variance" from the Guidelines, which must be, but was not, justified by "extraordinary circumstances."³⁹⁵

The Supreme Court reversed.³⁹⁶ Had the Court limited itself to finding that Gall was an ideal candidate for probation and that the Eighth Circuit should, under an abuse of discretion standard, have deferred to the district court, no one could reasonably have disagreed. However, its purpose in *Gall* was not to right an individual wrong, but to further develop *Blakely-Booker* doctrine—and so it stepped into the Twilight Zone.³⁹⁷ Justice Stevens, writing for a 7-2 majority, insisted

³⁹² *Gall*, 552 US at 41–42.

³⁹³ *Id.* at 44.

³⁹⁴ *United States v. Gall*, 446 F3d 884, 889 (8th Cir. 2006) (explaining that the farther away from the Federal Guidelines a sentence is, the more exceptional the circumstances must be), quoting *Claiborne*, 439 F3d at 481.

³⁹⁵ *Gall*, 446 F3d at 889–90.

³⁹⁶ *Gall*, 552 US at 59–60 (holding that "it is not for the Court of Appeals to decide de novo whether the justification for a variance is sufficient or the sentence reasonable" and finding that the district court reached a "reasoned and reasonable decision" that a sentence of probation was justified).

³⁹⁷ The first peculiar aspect of *Gall* is that neither the Guideline applied to Gall nor the sentence imposed on him violated the *Blakely* rule. This was a drug case in which the applicable Guideline was USSG § 2D1.1. Therefore, as explained above—see notes 291, 316, and accompanying text—the mere fact of conviction generated no base offense level and no Guidelines range, and hence conviction exposed Gall to a sentence up to the traditional statutory maximum. No fact thereafter found by a judge could increase Gall's maximum sentencing exposure and thus the Guideline at issue did not violate *Blakely*. Moreover, Gall admitted to a drug amount as part of his plea colloquy, so the range from which the judge departed was not based on a post-conviction judicial finding of fact, but on facts admitted by the defendant in the process of entering a plea. Regardless of how one defines "statutory maximum sentence," it was not increased here by any post-conviction judicial finding of fact. Finally, the dispute in this case arose because the district court departed *downward* and imposed a sentence that was not only below the statutory maximum, however defined, but below the Guideline minimum. In sum, the case arose, not because the Guideline employed or the sentence imposed violated the *Blakely* rule, but because

that an appellate rule “requiring ‘proportional’ justifications for departures from the Guidelines is not consistent with” *Booker*.³⁹⁸

Stevens’s first contention is that a rule of proportionality comes “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”³⁹⁹ In this, Stevens echoes Justice Breyer’s insistence in *Rita* that an appellate presumption of reasonableness for a within-range sentence does not imply a presumption of unreasonableness for an out-of-range sentence.⁴⁰⁰ The problem is that, as Stevens repeatedly admits, district judges are legally obliged to explain sentences imposed outside the range and appellate courts are obliged to reverse if no explanation is offered.⁴⁰¹ Perhaps this explanation requirement need not be characterized as a “presumption of unreasonableness,” but it does mean that within-range and out-of-range sentences will be treated differently on review.

The Guidelines correlate specified facts to particular sentencing ranges. In order for a Guideline range to be assigned, specified facts—call them Facts A, B, and C—must be established by verdict, defendant admission, or post-conviction judicial determination. For a post-*Booker* appellate court to presume that a sentence within range is reasonable is for the court to say that the work of the Sentencing Commission in correlating facts to sentencing ranges carries sufficient legal weight that no fact other than Facts A, B, and C need be shown to establish the reasonableness of the sentence. The necessary logical corollary to this conclusion is that in a case where Facts A, B, and C are proven, but the district court imposes a sentence outside the range, some special explanation other than the presence of Facts A, B, and C is required. Logically, that explanation can come in only one of two forms—either the sentencing judge found and relied upon some non-element, non-Guideline fact that rationally supports an out-of-range sentence, or as in *Kimbrough*, the judge disagreed with the policy judgments of the Commission and Congress embodied in the Guidelines.

the Supreme Court in *Booker* had invalidated the Guidelines in toto, even those portions and applications that did not violate *Blakely*. This fact was not lost on Justice Thomas, who in dissent in *Kimbrough* rescinded his earlier acceptance of *Booker* on stare decisis grounds, *Kimbrough*, 552 US at 114–16 (Thomas dissenting), and dissented in *Gall* because “the District Court committed statutory error when it departed below the applicable Guidelines range.” *Gall*, 552 US at 61 (Thomas dissenting).

³⁹⁸ *Gall*, 552 US at 46.

³⁹⁹ *Id.* at 47–48.

⁴⁰⁰ See *Rita*, 551 US at 354–55 (“The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness”).

⁴⁰¹ *Gall*, 552 US at 46, 50.

Although Stevens dissented from the *Booker* remedy of advisory Guidelines,⁴⁰² in *Rita*, he accepted the *Booker* remedy as a matter of stare decisis,⁴⁰³ and in *Gall*, he took up the task of defending it. Therefore, he had to deny that a post-*Booker*, within-Guidelines-range sentence enjoys any presumption of correctness, however mild, or indeed that a within-range sentence is to be legally preferred to any degree over other outcomes. To admit that within-range sentences enjoy any legal preference is to concede Alito's point that there will be some out-of-range sentences that can be rationally justified only by reference to a judicially found, non-element fact. And if that is so, then the *Booker* remedy violates the *Blakely* rule. But this dogged insistence that within-range sentences enjoy no privileged status and out-of-range sentences are not legally disfavored is not only incompatible with an appellate presumption of reasonableness for within-range sentences, but represents an about face for Stevens himself. In *Rita*, Stevens wrote of the appellate presumption of reasonableness that, "*presumptively* reasonable does not mean *always* reasonable; the presumption, of course, must be genuinely rebuttable."⁴⁰⁴ In short, in *Rita*, Stevens implicitly recognized the inescapable point that his new role as defender of advisory Guidelines forces him to deny in *Gall*: a presumption of reasonableness for within-range sentences (whether trial or appellate) confers a privileged status on such sentences *in the absence of some rebutting non-element, non-Guidelines fact*, and the district court must find such a fact for it to become part of the appellate record and thus a proper consideration in reasonableness review.

Stevens's denial that the Guidelines have presumptive effect becomes even less convincing in the segment of his opinion rejecting the Eighth Circuit's holding that a district court's justification for an out-of-range sentence must be "proportional to the extent of the difference between the advisory range and the sentence imposed"⁴⁰⁵ as an impermissibly "mathematical approach."⁴⁰⁶ As Justice Alito notes in dissent,⁴⁰⁷ Stevens mischaracterizes the Eighth Circuit's position as requiring some rigid arithmetic relationship between the strength of the justification and degree of variance,⁴⁰⁸ when the court of appeals

⁴⁰² *Booker*, 543 US at 272–303 (Stevens dissenting in part).

⁴⁰³ *Rita*, 551 US at 360–67 (Stevens concurring).

⁴⁰⁴ *Id.* at 366–67.

⁴⁰⁵ *Gall*, 446 F3d at 889, quoting *Claiborne*, 439 F3d at 481.

⁴⁰⁶ *Gall*, 552 US at 47–48.

⁴⁰⁷ *Id.* at 71 (Alito dissenting).

⁴⁰⁸ "[T]he mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications." *Id.* at 49.

plainly meant only that the extent of the variance from the range must be considered in assessing the adequacy of the justification.⁴⁰⁹ But the most remarkable feature of Stevens's opinion is that, having rejected the Eighth Circuit's rule of proportionality, he then embraces the exact same rule recast in slightly more opaque language. Stevens writes that a district court must properly calculate the Guidelines range, must take that range into account when setting a sentence, must explain why a sentence deviates from the Guideline range, and "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."⁴¹⁰ He goes on to say, "We find it uncontroversial that *a major departure should be supported by a more significant justification than a minor one.*"⁴¹¹ As for the reviewing court, Stevens instructs that a district court's failure "to adequately explain a sentence—including an explanation for any deviation from the Guidelines range" constitutes reversible procedural error.⁴¹² Appellate courts are then to review the substantive reasonableness of the sentence "including the extent of any variance from the Guidelines range."⁴¹³ If these passages do not amount to an embrace of at least a mild rebuttable presumption of the correctness of a within-range sentence at both the trial and appellate levels, and of a rough proportionality standard for the review of out-of-range sentences, then language has no meaning.

One can reasonably draw three conclusions from this double-talk. First, the majority of the Court now understands perfectly well that it is perpetuating a federal sentencing regime that accords the Guidelines some presumptive effect in contravention of the *Blakely* rule. Second, the Court refuses to admit the obvious because doing so would endanger the whole Sixth Amendment house of cards that now rests on *Blakely*. Third, the Court is satisfied enough with the mildly presumptive federal system that has emerged from its thrashings (and sufficiently weary of the whole subject) that it is deeply reluctant to invest any additional intellectual capital in straightening out the mess it has made of Sixth Amendment doctrine. This perhaps cynical view seemed to be confirmed by the Court's two 2009 federal sentencing opinions, *Spears v United States*⁴¹⁴ and *Nelson v United States*.⁴¹⁵

⁴⁰⁹ Id at 71.

⁴¹⁰ *Gall*, 552 US at 50–51.

⁴¹¹ Id at 50 (emphasis added).

⁴¹² Id at 51 (emphasis added).

⁴¹³ Id (emphasis added) (emphasizing that the "fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal").

⁴¹⁴ 129 S Ct 840 (2009) (per curiam).

3. The 2009 federal sentencing cases: *Nelson* and *Spears*.

In *Nelson*, the Court issued a per curiam decision, the sole point of which was to reiterate that a sentencing judge may not say or suggest that he presumed a within-range sentence to be reasonable, even if he is in a circuit like the Fourth which applies an appellate presumption of reasonableness to within-range sentences.⁴¹⁵

Spears, a notably cranky and peremptory per curiam opinion,⁴¹⁷ summarily reversed the Eighth Circuit and held that a district judge can sentence a crack defendant based on a crack-powder ratio personally devised by the judge and applied to all defendants in his court, but different than the ratio adopted by the Sentencing Commission.⁴¹⁸ *Spears* has been hopefully viewed in the defense community as a suggestion from the Court that district judges are now at liberty to substitute their policy predilections for those of the Commission whenever it suits them.⁴¹⁹ But, read closely, the Court's opinion leaves open the most difficult problem raised by *Kimbrough*—whether district courts are equally free to disagree with the Commission in all classes of cases, or whether crack cases are sui generis because the 100-to-1 crack-powder ratio remained in the Guidelines due to congressional intransigence and despite the Commission's expert judgment that it should be changed.⁴²⁰ The Court repeated its observation in *Kimbrough* that the general question of whether a non-Guidelines sentence based on a policy disagreement with the Guidelines “may be entitled to less respect” than a non-Guidelines sentence based on factors peculiar to the

⁴¹⁵ 129 S Ct 890 (2009) (per curiam).

⁴¹⁶ Id at 891–92.

⁴¹⁷ 129 S Ct at 845. Justices Roberts and Alito dissented on the ground that the petition presented a genuinely difficult question inappropriate for plenary review. Two other circuits supported the Eighth Circuit's interpretation and there was no circuit split. Id at 846 (Roberts dissenting). Roberts noted,

There is at least some language in *Kimbrough* that seems to support the Court of Appeals' holding. In *Kimbrough*, we noted with apparent approval that the District Court “did not purport to establish a ratio of its own.” Rather, we held, the District Court “appropriately framed its final determination in line with § 3553(a)'s overarching instruction to impose a sentence sufficient, but not greater than necessary to accomplish the sentencing goals advanced in § 3553(a)(2).”

Id at 845.

⁴¹⁸ Id at 843–44.

⁴¹⁹ See, for example, Clare Freeman, *Spears v. U.S. — Getting the Kimbrough Point Across*, Sixth Circuit Blog (Jan 22, 2009), online at http://circuit6.blogspot.com/2009_01_01_archive.html (visited Dec 11, 2009). Others have been more cautious. See Paul M. Rashkind, *Spears v. United States: Kimbrough Means What It Says*, U.S. Supreme Court Blog (Jan 21, 2009) online at <http://ussc.blogspot.com/2009/01/spears-v-united-states-kimbrough-means.html> (visited Dec 11, 2009).

⁴²⁰ See Part IV.D.1.

particular case need not be addressed in the crack-powder context because the crack guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.”⁴²¹ Accordingly, we really do not know what authority district courts have to disagree with Guidelines the Commission has not merely enacted, but continues to believe in. And the Court gives no guidance on the critical question of the sort of record a district court must create when grounding a sentence on disagreement with the government’s expert sentencing agency.

However perfunctory their reasoning, *Spears* and *Nelson* seem to signal the Court’s determination to soldier on with the advisory federal system it created in *Booker*.

4. *Oregon v Ice*: It really was all about the Federal Guidelines.

But just when you have concluded that the Supreme Court has reached a point of intellectual equilibrium, however awkward, you read *Ice*—decided on January 14, 2009, a week before *Spears*—and your head explodes. *Ice* raises the question of whether the rule of *Apprendi* applies to imposition of consecutive sentences for separate counts of conviction. Many jurisdictions confer unrestricted discretion on trial judges to impose either consecutive or concurrent sentences.⁴²² Some jurisdictions presume that sentences for multiple counts of conviction should run consecutively absent a judicial finding of cause for imposing concurrent sentences.⁴²³ And some jurisdictions, including Oregon, “constrain judges’ discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.”⁴²⁴

Eugene Ice was convicted by a jury of six felony counts in connection with two incidents of sexual assault on a minor. At sentencing, the judge found statutorily enumerated factors permitting him to impose consecutive sentences, and then did so.⁴²⁵ Ice appealed, arguing that the *Apprendi* line of cases required a jury rather than a judge to find facts permitting imposition of a sentence longer than the maxi-

⁴²¹ *Spears*, 129 S Ct at 843.

⁴²² 129 S Ct at 714 (asserting that the majority of states fall into this category). See, for example, Conn Gen Stat § 53a-37 (2005); Neb Rev Stat § 29-2204 (1995).

⁴²³ See *Ice*, 129 S Ct at 714. The Court also notes that some jurisdictions presume that sentences for multiple counts of conviction should run concurrently, but allow a judge to order consecutive sentences in “almost all” cases. See id at 715 (identifying Florida, Kansas, and Mississippi as falling into this category). See, for example, Fla Stat § 921.16(1) (2007); Kan Stat Ann § 21-4608 (2007); Miss Code Ann § 99-19-21(2) (2007).

⁴²⁴ *Ice*, 129 S Ct at 714.

⁴²⁵ Id at 716.

mum for any single count.⁴²⁶ One would have thought that this case would be a slam-dunk winner for *Ice*. In *Cunningham*, Justice Ginsburg's majority opinion voided California's sentencing system because it violated the rule that, "under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge."⁴²⁷ Oregon law on consecutive sentencing unambiguously offended the same rule. Yet, astonishingly, in *Ice*, Justice Ginsburg, writing for a five-justice majority including Stevens, Kennedy, Breyer, and Alito, upheld the Oregon statute.⁴²⁸

If one were innocent of any exposure to the Court's journey from *Blakely* to *Spears* and *Nelson*, the result in *Ice* would seem unremarkable. No one had previously suggested that the Sixth Amendment placed any limitation on states' power to systematize judicial decisions to impose consecutive or concurrent terms of imprisonment. The strangeness of the opinion flows both from the rationales it advances for its result and from the composition of the five-member majority.

According to Justice Ginsburg, the key distinction between *Ice* and all the other cases in the *Apprendi* line is that all the previous decisions "involved sentencing for a discrete crime, not—as here—for multiple offenses different in character or committed at different times."⁴²⁹ This declaration is peculiar in at least two ways. First, the consistent theme of the voting block that gave us *Blakely*, the *Booker* merits majority, and *Cunningham*—a block that included Justices Ginsburg and Stevens—was that jury involvement in factfinding should be based on the effects of particular facts on sentencing outcomes, rather than on the names legislatures gave facts or clusters of facts.⁴³⁰ But in *Ice*, Ginsburg and Stevens vote to reintroduce legislative nomenclature as a decisive factor in Sixth Amendment analysis.⁴³¹ Legislatures are now effectively precluded from structuring judicial discretion within the range assigned to a single "discrete crime," but are appar-

⁴²⁶ *Id.*

⁴²⁷ 549 US at 281.

⁴²⁸ 129 S Ct at 714–15.

⁴²⁹ *Id.* at 717.

⁴³⁰ For example, in his *Booker* merits majority opinion, Justice Stevens wrote: "In *Ring v Arizona*, we reaffirmed our conclusion that the characterization of critical facts is constitutionally irrelevant." *Booker*, 543 US at 231 (citation omitted). As Justice Scalia observed in his *Ice* dissent, "We have taken pains to reject artificial limitations upon the facts subject to the jury-trial guarantee. We long ago made clear that the guarantee turns upon the penal consequences attached to the fact, and not to its formal definition as an element of the crime." 129 S Ct at 720 (Scalia dissenting).

⁴³¹ See 129 S Ct at 714, 717.

ently at liberty to structure judges' control over the interaction between sentences for different "discrete crimes."⁴³²

Assume, for example, a defendant convicted of robbery, assault, and possession of a firearm by a convicted felon. *Blakely* and *Booker* make it extraordinarily difficult, and perhaps practically impossible, for a legislature to create legally binding guidelines based on judicial findings of fact for sentencing these offenses.⁴³³ However, *Ice* would apparently permit legislative imposition of detailed, legally binding guidelines circumscribing a judge's discretion on whether and to what extent sentences for each of these separate crimes should run consecutively to one another. Such guidelines might, for example, prescribe that the assault sentence *may* be imposed consecutively if the victim suffered bodily injury, but *must* be imposed consecutively if the victim suffered severe bodily injury.⁴³⁴ Or they might prescribe that the sentence for the felon-in-possession charge should be imposed concurrently to all other sentences unless the firearm was flourished during the course of another offense, in which case it may be imposed consecutively to the sentence for the particular offense in which the flourishing occurred, but that if the firearm was discharged during the course of another offense, then the felon-in-possession sentence must be imposed consecutively to all other sentences imposed on the defendant.⁴³⁵ An almost infinite variety of even more complicated rules can be imagined. And given the prevalence of cases with multiple counts, such rules could be crafted to drive sentencing outcomes for a substantial fraction of defendants.⁴³⁶

Justice Ginsburg is sufficiently alert to the complications that might ensue from a renewed reliance on legislative categories to define Sixth Amendment rights that she tries to distinguish *Ice*, which involved "multiple offenses different in character or committed at different times,"⁴³⁷ from previous cases in the *Apprendi* line, which, she asserts, dealt only with limits on sentences for a "discrete crime."⁴³⁸ But this dis-

⁴³² *Id.* at 717.

⁴³³ As noted above, see notes 243–46 and accompanying text, guidelines based on judicial factfinding can be written to comply with *Blakely*; however, the contortions necessary to make such guidelines *Blakely*-compliant make most available means of doing so practically undesirable.

⁴³⁴ Consider USSG § 2A2.1(b).

⁴³⁵ Consider USSG § 2A2.2(b)(2).

⁴³⁶ Particularly if rules governing imposition of consecutive sentences were combined with rules requiring minimum sentences, as permitted by *Harris*, 536 US at 567–68, one could create a substantial web of constraint on judicial discretion.

⁴³⁷ *Ice*, 129 S Ct at 717.

⁴³⁸ *Id.*

tion implies that there may still be a right to jury determination of facts necessary to the imposition of consecutive sentences for offenses that are not different in character or are not committed at different times. It thus raises a whole new set of questions. How “different in character” must two crimes be before a legislature is free to create rules based on judicial factfinding governing the imposition of consecutive sentences for them? If legislatures can regulate imposition of consecutive sentences for crimes committed at different times, but not at the same time, when are two crimes committed at the same time? Must they be simultaneous? Part of the same transaction? Part of the same scheme or conspiracy? In seeking to avoid one pothole, Justice Ginsburg condemns the Court to traverse a new definitional morass.⁴³⁹

As potentially troublesome as Justice Ginsburg’s rule is, the most jaw-dropping feature of the *Ice* opinion is the list of justifications for its result.⁴⁴⁰ As Justice Scalia takes obvious pleasure in noting in dissent,⁴⁴¹ the explanatory section of the *Ice* opinion is little more than a compilation of the arguments rejected by the majority opinions in *Apprendi*, *Blakely*, and *Cunningham*—all opinions joined (*Blakely*) or written by Justices Ginsburg (*Cunningham*) and Stevens (*Apprendi*). Ginsburg contends that traditionally judges, not juries, controlled imposition of consecutive or concurrent sentences and, therefore, regulating judicial discretion in this area is constitutionally permissible.⁴⁴² But, as Justice Scalia correctly notes, in *Blakely*, the Court voided Washington’s sentencing guidelines and proclaimed irrelevant the fact that judges, not juries, had traditionally controlled determination of sentence length within the prescribed statutory maximum.⁴⁴³ Justice Ginsburg reminds us that “the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status,” parades the chestnut about states being “laboratories for devising solutions to difficult legal problems,” and cautions against federal judicial incursions into this traditionally state concern.⁴⁴⁴ But this solicitude for state sovereignty was completely absent when Stevens

⁴³⁹ For a discussion of the complications involved in determining whether a criminal incident ought to be charged as one or multiple crimes, see Jeffrey Chemerinsky, Note, *Counting Offenses*, 58 Duke L. J. 709, 711–30 (2009).

⁴⁴⁰ *Ice*, 129 S. Ct. at 717–20.

⁴⁴¹ *Id.* at 721–22 (Scalia dissenting).

⁴⁴² *Id.* at 717–18.

⁴⁴³ *Id.* at 721–22 (Scalia dissenting).

⁴⁴⁴ *Ice*, 129 S. Ct. at 718–19.

and Ginsburg voted to void New Jersey, Washington, and California sentencing statutes in *Apprendi*, *Blakely*, and *Cunningham*.⁴⁴⁵

Justice Ginsburg then defends the Oregon consecutive-concurrent sentencing scheme on policy grounds. She writes:

It bears emphasis that state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will. Limiting judicial discretion to impose consecutive sentences serves the "salutary objectives" of promoting sentences proportionate to "the gravity of the offense," and of reducing disparities in sentence length.⁴⁴⁶

But, of course, reining in unfettered judicial discretion, promoting sentences proportional to offense seriousness, and reducing sentencing disparities were precisely the objectives of the state and federal structured sentencing regimes voided by the Supreme Court in *Blakely*, *Booker*, and *Cunningham*. Finally, Ginsburg worries about the potentially disruptive consequences of voiding the Oregon statute, observing that "it is unclear how many other state initiatives would fall under" such a new rule, and fretting that such a new rule would "be difficult for States to administer."⁴⁴⁷ Surveying the nationwide festival of confusion that has been the primary product of the Court's Sixth Amendment jurisprudence since *Apprendi*, one does not know whether to laugh or cry.

V. THE MESS THEY'VE MADE . . . AND HOW JUSTICE SOTOMAYOR MIGHT HELP THEM FIX IT

A. Assessing the Court's Sixth Amendment Sentencing Work

Has the Supreme Court's labyrinthine journey from *McMillan* to *Ice* accomplished anything of value or has it been the debacle my title suggests? And if, as I think, it has been a nearly unmitigated failure, how might a "wise Latina"⁴⁴⁸ help guide the Court to a better place?

⁴⁴⁵ The Washington legislators who worked long and hard to devise that state's truly innovative guidelines system must find Ginsburg's faux-federalist platitudes in *Ice* particularly galling.

⁴⁴⁶ *Id.* at 719 (citations omitted).

⁴⁴⁷ *Id.*

⁴⁴⁸ Sonia Sotomayor, *A Latina Judge's Voice*, 13 Berkeley La Raza L J 87, 92 (2002):

Justice O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. . . . I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

The core task the Court set itself beginning in *McMillan* was to articulate a simple, logical, constitutionally grounded rule for identifying facts that are “elements” of crimes and thus subject to the requirement that they be found by a jury beyond a reasonable doubt. The current status of nearly twenty-five years of work towards this goal amounts to this: (1) The Sixth Amendment Jury Clause requires that a jury must find beyond a reasonable doubt, or the defendant must admit, any fact that, if proven, exposes the defendant to an increase in his maximum theoretically possible sentence, unless (a) the fact relates to criminal history,⁴⁴⁹ or (b) the fact increases the maximum sentence by empowering a judge to impose consecutive sentences on counts of conviction arising from conduct different in character or committed at separate times (but the jury right may still apply to facts permitting consecutive sentences for counts relating to conduct similar in character or committed at the same time).⁴⁵⁰ (2) The defendant has no right to jury determination either of facts that increase his required minimum sentence or of facts that reduce his possible maximum sentence.⁴⁵¹ (3) Legislatures or sentencing commissions may create guidelines or other rules that correlate judge-found facts to sentencing ranges within the space between statutory minimum and statutory maximum sentences, if they meet the following conditions: (a) If these rules can increase the maximum sentence above that legally authorized based purely on the fact of conviction, then the rules must be “advisory,” rather than “mandatory” or “presumptive,”⁴⁵² which means that the ranges the rules prescribe can be of sufficient legal consequence that a sentence imposed outside such a range may be reversed on appeal unless accompanied by a rational explanation for the deviation,⁴⁵³ but a trial judge may not refer to such a range as “presumptively correct,”⁴⁵⁴ even though a court of appeals may treat a sentence within it as “presumptively reasonable”;⁴⁵⁵ (b) If these sentencing rules are drafted so that their application does not increase the maximum sentence above that legally authorized based purely on the fact of conviction—as, for example, by writing guidelines that only raise or lower minimum sentences, or by assigning no intermediate range based purely on conviction to the typical offender so that judicial factfinding

⁴⁴⁹ See Part II.C.1.

⁴⁵⁰ See Part IV.D.4.

⁴⁵¹ See Part III.A.

⁴⁵² See Part IV.A.

⁴⁵³ See Part IV.D.2.

⁴⁵⁴ See Part IV.C.2.

⁴⁵⁵ See text accompanying notes 354–59.

never increases maximum exposure—then mandatory or presumptive guidelines appear constitutionally unobjectionable.

This tangle of rules and exceptions is obviously neither simple nor, as illustrated at length above, logical. Nonetheless, a line of cases supposedly rooted in the Sixth Amendment's Jury Trial Clause might be deemed a success if it had achieved Justice Scalia's stated objective of reasserting the centrality of the jury to determination of facts essential to the determination of criminal punishments.⁴⁵⁶ But it has done nothing of the kind.

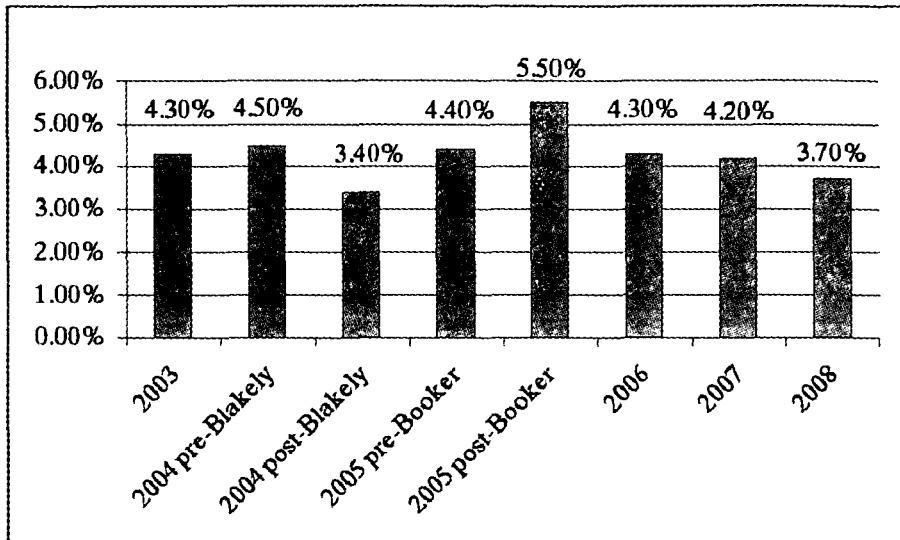
So far as can be determined, the advent of the *Blakely-Booker* sentencing era has neither increased the number of criminal jury trials nor materially expanded the number of sentence-affecting facts decided by juries in those trials that do occur. In the federal system, as indicated in Figure 1, the percentage of federal criminal cases resolved by trial has actually decreased since *Blakely* was decided, and the 2008 trial rate was the third lowest recorded since the Federal Guidelines became effective in 1987.⁴⁵⁷ As for sentence-affecting facts, in federal cases, virtually the only class of facts now pleaded and proven to juries that was not always pleaded and proven is drug quantity in cases involving amounts that trigger simultaneous increases in statutory maximum and minimum sentences under Title 21—and the Justice Department made that change in charging practices back in 2000 in response to *Apprendi*.⁴⁵⁸ In short, all of the Court's agonized thrashing in the nine years and more than a dozen Sixth Amendment cases decided since *Apprendi* has not enhanced the influence of federal juries on federal sentencing one iota.

⁴⁵⁶ See *Blakely*, 542 US at 305. See also text accompanying note 234.

⁴⁵⁷ United States Sentencing Commission, 2008 *Sourcebook of Federal Sentencing Statistics* 22 figure C; United States Sentencing Commission, 2003 *Sourcebook of Federal Sentencing Statistics* 22 figure C; United States Sentencing Commission, 1998 *Sourcebook of Federal Sentencing Statistics* 20 figure C; United States Sentencing Commission, 1993 *Annual Report* 68 figure C. For discussion of the decline in federal criminal trials, see Frank O. Bowman, III, *American Buffalo: Vanishing Acquittals and the Gradual Extinction of the American Trial Lawyer*, 156 U Penn L Rev PENNumbra 226, 239–40 (2007), online at <http://www.pennumbra.com/responses/11-2007/Bowman.pdf> (visited Dec 11, 2009).

⁴⁵⁸ *United States v Swartzie*, 228 F3d 1278, 1282 (11th Cir 2000), cert denied, 533 US 953 (2001) (noting a change in the Justice Department charging policies in 2000 in response to *Apprendi*).

FIGURE 1: FEDERAL TRIAL RATE



Source: United States Sentencing Commission, 2008 *Sourcebook of Federal Sentencing Statistics* 22 figure C; United States Sentencing Commission, 2003 *Sourcebook of Federal Sentencing Statistics* 22 figure C.

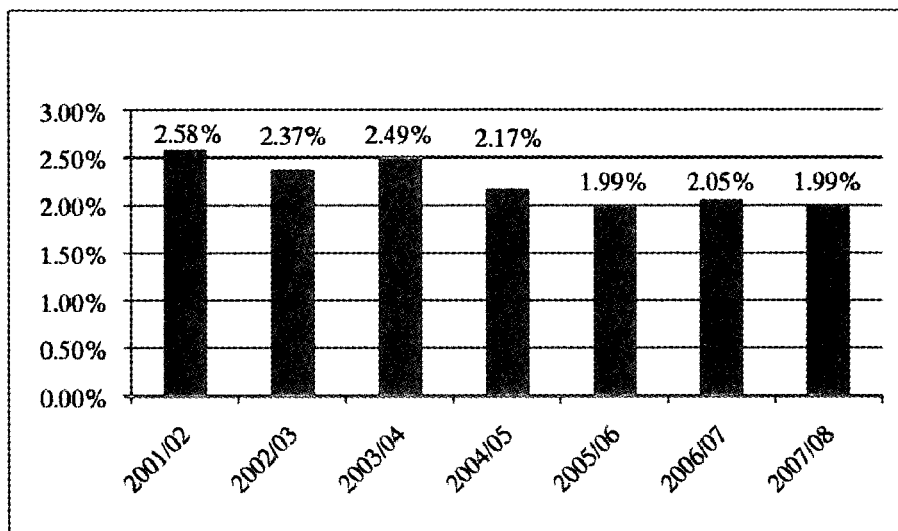
In the states, the effect of *Blakely* and *Cunningham* on the sentencing influence of juries has been comparably minimal. According to a recent survey by Professors Stephanos Bibas and Susan Klein, all or parts of the sentencing schemes of nineteen or twenty states ran afoul of *Blakely*;⁴⁵⁹ however, only nine of these states have modified their systems by judicial interpretation or legislative enactment to require jury determination of aggravating sentencing facts for some or all offenses.⁴⁶⁰ The others have either returned to systems of discretionary judicial sentencing or made their guidelines advisory. Among the nine that altered their sentencing regimes, the real world effects on jury participation seem to be de minimis. Where statistics are availa-

⁴⁵⁹ Stephanos Bibas and Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 Cardozo L Rev 775, 797 table 1 (2008) (reporting that all or parts of the sentencing systems of Alaska, Arizona, California, Colorado, Connecticut, Hawaii, Illinois, Indiana, Kansas, Maine, Minnesota, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Tennessee, Vermont, Washington, and possibly New York have been found to violate *Blakely*). See also Barbara Tombs and Jeffrey R. Edblad, *The Application of Blakely v. Washington in Minnesota: An Analysis of State v. Shattuck and State v. Houston*, 32 Wm Mitchell L Rev 1263, 1266–67, 1275–79 (2006) (discussing how the state courts and legislatures in Minnesota, Kansas, North Carolina, Oregon, and Tennessee have responded to *Blakely*).

⁴⁶⁰ Bibas and Klein, 30 Cardozo L Rev at 801 table 4 (cited in note 459) (reporting that Alaska, Arizona, Illinois, Kansas, Minnesota, North Carolina, Oregon, Vermont, and Washington changed their statutes to require aggravating facts that raise a defendant's maximum sentence must be proved to a jury).

ble, they show no observable effect on jury-trial rate in these states from the enactment of measures making sentencing *Blakely*-compliant. For example, North Carolina enacted a change to its guidelines requiring jury determination of aggravating facts in 2005,⁴⁶¹ but as shown in Figure 2, the jury trial rate actually declined slightly in succeeding years.

FIGURE 2: NORTH CAROLINA TRIAL RATE



Source: The data in Figure 2 is derived from the 2001–2002 through 2007–2008 editions of North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors* table 2, online at <http://www.nccourts.org/Courts/CRS/Councils/spac/Publication/Statistical/Annual/Default.asp> (visited Dec 11, 2009). The absolute number of jury trials was also unaffected by the legislation. Beginning in 2001–2002, the annual numbers of jury trials in North Carolina were 2001–2002: 743; 2002–2003: 684; 2003–2004: 693; 2004–2005: 633; 2005–2006: 604; 2006–2007: 634; 2007–2008: 629. *Id.*

Not only did *Blakely* have no observable effect on the number of jury trials, but when jury trials occur, only a few of such trials appear to involve sentence-affecting facts that would not have been decided by juries before *Blakely*. For example, Minnesota’s guidelines system was always configured so that fewer than 10 percent of all felony cases might theoretically involve sentence enhancements subject to the *Blakely* rule, and both before and after *Blakely*, more than 90 percent

⁴⁶¹ Act of June 30, 2005, NC Sess Laws 145, codified at NC Gen Stat Ann § 15A-1340.16(a)(1) (changing the statute to require proof beyond a reasonable doubt of all aggravating circumstances and the submission of these aggravating circumstances to a jury in a bifurcated hearing).

of such cases resulted from pleas.⁴⁶² Since *Blakely*, the number of aggravated departures has declined slightly while the percentage of such cases resulting from plea bargains has increased.⁴⁶³ By 2007, only 859, or 5.3 percent, of all felony convictions resulted in aggravated departures and only 27 of those cases, or 0.16 percent, resulted from trials.⁴⁶⁴ Thus, in Minnesota, *Blakely*'s "product" is jury findings of sentence-affecting facts in perhaps twenty-seven cases per year.

The story in North Carolina is similar. In North Carolina, *Blakely* had one immediate statistically observable effect—in 2004–2005, the (already small) proportion of defendants receiving prison time who were sentenced in the aggravated range promptly fell by more than one-half.⁴⁶⁵ But as shown in Figure 3, despite the July 2005 law setting forth a procedure for juries to find aggravating factors, the number of aggravated sentences has never materially rebounded and prosecutors are apparently using the new jury procedures to obtain "aggravated" sentences only in rare cases. Instead, it appears that North Carolina prosecutors either use other mechanisms to achieve higher sentences, such as seeking consecutive non-aggravated sentences on multiple counts, or forego the modest increases authorized by the aggravated range altogether.⁴⁶⁶ Given that the North Carolina guilty plea rate is around 98 percent, the number of cases in which North Carolina juries

⁴⁶² Minnesota Sentencing Guidelines Commission, *The Impact of Blakely v. Washington on Sentencing In Minnesota: Short Term Recommendations* 6 (Aug 6, 2004), online at http://www.msgc.state.mn.us/data_reports/blakely_shortterm.pdf (visited Dec 11, 2009) (reporting that in 2002 there were 1,002 aggravated departures potentially subject to the *Blakely* rule out of a total of 12,978 cases, or 7.7 percent of the total, and that only 79 of the 1,002 aggravated departure cases went to trial).

⁴⁶³ Beginning in 2004, the total number of cases with aggravated departures and the number of those cases tried to a jury were as follows: 2004: 968 departures, 59 trials; 2005: 978 departures, 48 trials; 2006: 904 departures, 31 trials; 2007: 859 departures, 27 trials. Minnesota Sentencing Guidelines Commission, *Data on Aggravated Departures: 2004–2007* (on file with author).

⁴⁶⁴ In 2007, there were 16,168 felony convictions in Minnesota. Minnesota Sentencing Guidelines Commission, *Sentencing Practices: Annual Summary Statistics for Felony Offenders Sentenced in 2007* 12 figure 1 (2008), online at http://www.msgc.state.mn.us/data_reports/2007/data_summary_2007.pdf (visited Nov 20, 2009).

⁴⁶⁵ According to Professor Ronald F. Wright, who interviewed a number of North Carolina prosecutors in the wake of *Blakely*, in the year between the 2004 *Blakely* decision and the 2005 legislation requiring jury findings of aggravating factors, prosecutors responded to the decision by seeking fewer aggravated sentences and many judges instituted local procedures calling for special interrogatories to juries seeking findings of facts authorizing aggravated sentences. Telephone interview with Ronald F. Wright, Professor of Law at Wake Forest University (July 22, 2009).

⁴⁶⁶ See Ronald F. Wright, *Blakely and the Centralizers in North Carolina*, 18 Fed Sent Rptr (Vera) 19, 19–20 (2005) (describing the interaction of North Carolina sentencing actors following the *Blakely* decision, noting that the number of aggravated sentences fell after *Blakely*, and describing ease of using consecutive sentences to enhance penalties).

now determine sentence-affecting facts they would not have addressed before *Blakely* cannot exceed a few dozen per year.⁴⁶⁷

FIGURE 3: NORTH CAROLINA AGGRAVATED SENTENCES IN CASES WHERE PRISON IMPOSED

	Total Prison Cases	# Sentences in Aggravated Range	% Sentences in Aggravated Range	Overall Jury Trial Rate
2007/08	11,114	365	3.3%	1.99%
2006/07	10,567	303	2.8%	2.05%
2005/06	10,004	285	2.8%	1.99%
2004/05	9,471	292	3.1%	2.17%
2003/04	9,254	655	7.1%	2.49%
2002/03	9,229	619	6.7%	2.37%
2001/02	8,930	621	7.0%	2.58%

Source: The data in the first three columns of Figure 3 is derived from the 2001–2002 through 2007–2008 editions of North Carolina Sentencing and Policy Advisory Commission, *Structured Sentencing Statistical Report for Felonies and Misdemeanors* Appendix D table 2, online at <http://www.nccourts.org/Courts/CRS/Councils/spac/Publication/Statistical/Annual/Default.asp> (visited Dec 11, 2009). The data in the fourth column of Figure 3 is derived from Table 2 of the same publications.

Even though the *Blakely-Booker* line of Sixth Amendment jury right cases is neither simple nor logical and has effected no appreciable increase in the influence of actual juries on sentencing, perhaps it could be defended as a solution to the “tail-wags-the-dog” problem—the complaint that structured sentencing systems accord disproportionate sentencing influence to facts found by judges with minimal due process protections. But it is the tail-wags-dog problem that illustrates most graphically the Court’s conceptual and practical failures.

Structured sentencing systems create the tail-wags-dog concern, not because judges in such systems necessarily identify and consider more sentence-related facts than they would in a purely discretionary

⁴⁶⁷ There is no published data on the percentage of North Carolina aggravated sentences resulting from plea bargains; however, there is no reason to think that North Carolina differs from other jurisdictions in which agreement to an aggravated sentence is a common condition of a plea. Even if the trial rate for cases with aggravated sentences were an improbable five times higher than the overall rate, in 2007–2008, only thirty-nine such cases would have gone to trial. See Figure 3 (showing that in 2007–2008, there were 365 sentences in the aggravated range and an overall trial rate of 1.99 percent).

system, but because the rules of structured systems assign legal weight—in the form of mandatory or preferred sentencing effects—to certain judge-found facts. The tails-wags-dog complaint originated from an ill-defined combination of the intuition that the individual or cumulative legal effect of these judge-found facts on sentencing outcomes ought not exceed the effects of jury-found element facts, and the pragmatic observation that structured sentencing regimes customarily accorded defendants minimal due process rights in connection with those judge-found sentencing facts that had newly acquired sentencing force. In constitutional terms, the tail-wags-dog issue combines (1) the Sixth Amendment jury trial question of what facts are of sufficient sentencing consequence to be deemed “elements” reserved to juries with (2) the Fifth and Fourteenth Amendment due process question of what due process rights attach to the determination of sentence-affecting facts not reserved to juries. The fatal flaw in the Court’s work from *McMillan* forward has been its failure to acknowledge that it faced not one, but two interlocking constitutional issues and that there is a separate due process component to the structured sentencing problem. The result has been to trap the Court into a binary choice—a fact is either of a type that triggers the full panoply of procedural protections that comes with the Sixth Amendment jury trial right, or it is of no constitutional consequence and can be found and relied on by a judge with virtually no procedural safeguards at all.

The consequences of the Court’s framing the constitutional problem this way are clear. Justices Rehnquist, Breyer, O’Connor, and Kennedy were afraid that according full jury trial rights even to strongly sentence-affecting rules would place the Court on a slippery slope that would in time destroy the structured sentencing movement. And so they voted to deny Sixth Amendment protection even to facts that placed hard constraints on judicial sentencing discretion and created legally binding negative sentencing consequences for defendants, such as those facts that triggered mandatory minimum sentences (*McMillan* and *Harris*),⁴⁶⁸ or criminal history facts that raised real statutory maximums (*Almendarez-Torres*).⁴⁶⁹ Justice Alito now seems to have replaced O’Connor in this camp. Conversely, Justices Stevens, Souter, and Ginsburg, whose various concerns included a genuine solicitude for defendants’ procedural rights in structured sentencing regimes, were initially seduced by the apparent simplicity of

⁴⁶⁸ See Parts II.B and III.A.

⁴⁶⁹ See Part II.C.1.

Justice Scalia's *Blakely* test. But as its essential incoherence has become clear, they have had no graceful avenue of retreat and no alternative constitutional ground on which to construct a sensible regime of intermediate due process protections for the factfinding necessary to structured sentencing regimes. For Justice Scalia, who dislikes anything that smacks of balancing tests or sliding scales,⁴⁷⁰ the fact that his ostensibly simple rule effectively precludes the introduction of intermediate forms of due process protection for judicial findings of non-element sentencing factors is, as they say, a feature not a flaw.⁴⁷¹

Because of the Court's fragmentation and the resultant conceptual failures, the constitutional jury right is now both too narrow and too broad. On the one hand, the Court denies defendants jury trials on facts that plainly call for them—most saliently, facts triggering mandatory minimum sentences. On the other hand, the Court insists on jury trials for many facts that merely create presumptions regarding the exercise of judicial discretion within statutory limits, with the result that by judicial construction or legislative enactment, most such presumptive rules have been rendered “advisory” or abandoned altogether. There exists a vocal body of opinion that applauds the effects of the jury right's new overbreadth, particularly the transformation of the Federal Sentencing Guidelines into an “advisory” system.⁴⁷² But considered dispassionately, the current federal regime is the best illustration of the Court's failure.

The pre-*Booker* federal system was Exhibit A in the tail-wags-dog debate. Judge-found facts drove a complex system of mandatory minimum sentences and guidelines ranges, which influenced sentencing outcomes to a degree that rivaled or exceeded the crime of conviction itself. But essentially the same description applies to the post-*Booker* advisory system. The fact-dependent rules governing manda-

⁴⁷⁰ See, for example, *Department of Revenue of Kentucky v Davis*, 128 S Ct 1801, 1821 (2008) (Scalia dissenting) (expressing disdain for a Dormant Commerce Clause test that asks whether a law “imposes burdens on interstate commerce that clearly outweigh the law's local benefits” and arguing that such weighing should be left to the legislature).

⁴⁷¹ Chief Justice Roberts's primary interest seems to be promoting institutional continuity by maintaining the stare decisis effect of the *Blakely-Booker* rule he inherited. And Justice Thomas may currently have the most intellectually coherent position of anyone on the Court. After changing his mind several times, he would now insist on the right to jury determination of any fact that increases maximum or minimum sentences, including facts related to criminal history. See *Kimbrough*, 552 US at 114–15 (Thomas dissenting).

⁴⁷² See, for example, W. David Ball, *Heinous, Atrocious, and Cruel: Apprendi, Indeterminate Sentencing, and the Meaning of Punishment*, 109 Colum L Rev 893, 924–32 (2009) (arguing that juries should be involved in all findings of fact that lead to increased sentences given that juries are the “moral representatives” of society).

tory minimum sentences were unaffected by *Booker*. The Guidelines, though advisory, remain in effect, requiring judges to make the same factual findings and the same determinations of Guidelines ranges as always. To all this, *Booker* added a new layer—determination of facts relevant to any § 3553(a) factors not fully accounted for by the Guidelines.⁴⁷³ Thus, *Booker*'s "solution" to the tail-wags-dog problem was not to eliminate or even reduce the tail of sentence-affecting facts identified in federal statutes and the Guidelines, but was instead to imagine that, by declaring the Guidelines advisory and thus theoretically legally nugatory, those facts would no longer move the dog of sentencing outcomes. And yet the dog still moves.⁴⁷⁴

As shown in Figure 4, the percentage of federal cases sentenced within the applicable Guidelines range dropped by 10 percent in the quarter following the January 2005 *Booker* decision, from 72 percent to 62 percent, and drifted slightly further down over the next three years to 58 percent. Nonetheless, the fact-driven Guidelines rules continue to determine the sentence for six out of ten federal defendants. This judicial behavior is hardly surprising. Judges are trained to abide by the law. The Federal Guidelines look and feel like law. They are passed by an administrative agency whose expertise the Court continues to praise⁴⁷⁵ and are approved by Congress. Their use remains mandatory.⁴⁷⁶ They assign preferred outcomes to identified facts. Although the Supreme Court says they cannot have presumptive weight, it allows adherence to them to be a safe harbor from appellate reversal. In consequence, regardless of what the Court may say, district judges still treat Guidelines facts as creating a presumptively valid sentencing zone, albeit a zone with perhaps 10 to 15 percent less gravitational pull than before.

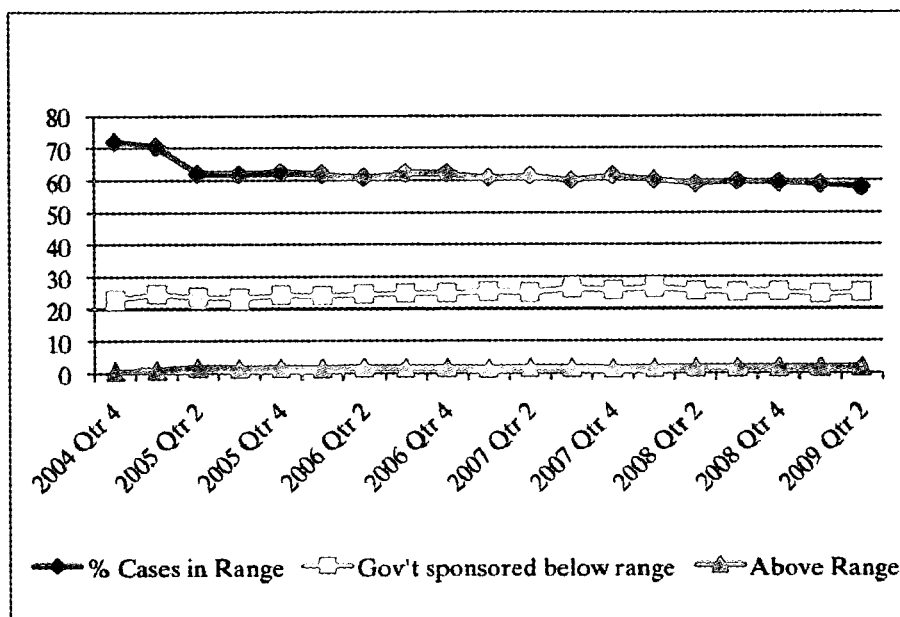
⁴⁷³ 543 US at 259–60.

⁴⁷⁴ With apologies to Galileo. After being forced by the Inquisition to recant his heliocentric view of the solar system that held the Earth moved around the Sun, Galileo is supposed to have muttered, "*Eppur si muove*," meaning "But it does move." See Elizabeth Knowles, ed, *The Oxford Dictionary of Quotations* 338 (Oxford 6th ed 2004).

⁴⁷⁵ See, for example, *Rita*, 551 US at 347–52; *Kimbrough*, 552 US at 108–09.

⁴⁷⁶ See text accompanying note 329.

FIGURE 4: SENTENCES RELATIVE TO GUIDELINE RANGE (2005-2009)



Source: United States Sentencing Commission, *Third Quarter FY09 Quarterly Sentencing Update* 12 table 4 (2009), online at <http://www.ussc.gov/linktojp.htm> (visited Dec 11, 2009).

But because the Guidelines are now formally “advisory,” the due process component of the tail-wags-dog argument has less traction than ever, or to put it more formally, the constitutional argument for heightened due process rights for determination of the Guidelines facts that continue to drive federal sentencing outcomes is deeply compromised, if not completely demolished. Defendants are poorly placed to demand new procedural protections for the determination of Guidelines facts the Court insists have no legal consequence. If anything, the effect of *Booker* and its progeny will surely be to diminish due process protections in federal sentencing as trial and appellate judges become less and less concerned about accuracy in an “advisory” system. For anyone seriously concerned about the tail-wags-dog problem, *Booker* has created the worst of all worlds—a complex system of fact-dependent rules, which in truth heavily influence outcomes, but in which judges are cavalier about facts because the rules have no formal legal force.

Moreover, despite the Guidelines’ reduced gravitational pull and the increased percentage of sentences below the Guidelines range, actual sentence lengths have scarcely budged. As shown in Figure 5, the mean sentence for a federal defendant actually rose after *Booker*, and despite a downtick in 2008 (almost surely due in large measure to

the Sentencing Commission's November 2007 amendment to the crack guideline and its January 2008 decision to make that amendment retroactive⁴⁷⁷), the mean remains higher than it was before *Blakeley* and *Booker*. The current stringency of federal sentencing rules may moderate slightly over the next several years in response to congressional action on issues like crack cocaine.⁴⁷⁸ And regardless of changes in the formal rules, sentences imposed may decline fractionally if judges reassert themselves a bit more in the new advisory world and if the Obama administration's prosecutors relax their approach to sentencing in the same way the Clinton-era Justice Department did.⁴⁷⁹ But so long as the current Federal Guidelines remain in effect, advisory or not, they will discourage any rapid or pronounced general decline in sentencing severity while retaining their potential as a political vehicle to increase sentences for whatever crimes enrage the public and inflame Congress.⁴⁸⁰ To the extent any members of the Court hoped the Sixth Amendment would be a vehicle for a general softening of crime policy, they are likely to be disappointed.

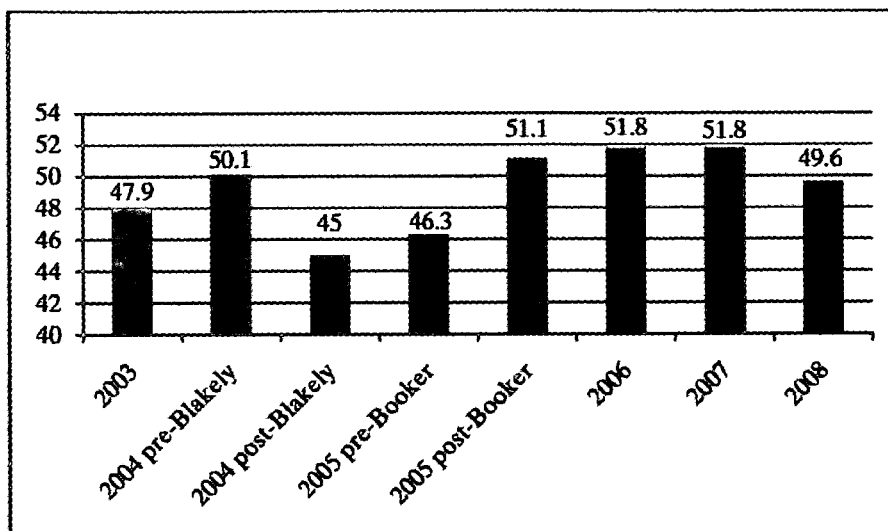
⁴⁷⁷ USSG Appendix C, Amend 715 (Supp 2009) (reducing the base offense level for crack cocaine by two, mandating that one gram of crack would be equivalent to twenty kilograms of marijuana, and making all reduced prison sentences retroactive for previous offenders). See Office of Defender Services, *Crack Cocaine Sentencing: Guideline Amendments and the Elimination of the Crack/Powder Disparity*, online at http://www.fd.org/odstb_CrackCocaine.htm (visited Dec 11, 2009).

⁴⁷⁸ Memorandum from David W. Ogden, Deputy Attorney General, to All Federal Prosecutors *1-2 (May 1, 2009) (instructing federal prosecutors to inform their courts that the Obama administration and Attorney General believe Congress and the Commission should eliminate the crack-powder disparity but that until Congress acts, courts should exercise their discretion to fashion a sentence consistent with 18 USC § 3553(a)).

⁴⁷⁹ Frank O. Bowman, III, and Michael Heise, *Quiet Rebellion II: An Empirical Analysis of Declining Federal Drug Sentences Including Data from the District Level*, 87 Iowa L Rev 479, 560-61 (2002) (describing and analyzing the decline in federal drug sentences from 1991-2000); Bowman, 43 Houston L Rev at 312 figure 7 (cited in note 326) (noting the upturn in federal drug sentences with the advent of the Bush administration in 2001).

⁴⁸⁰ Bowman, 105 Colum L Rev at 1316-20, 1350 (cited in note 251) (describing the structural and political factors that make the Federal Guidelines a one-way upward ratchet).

FIGURE 5: FEDERAL MEAN SENTENCE LENGTH



Source: United States Sentencing Commission, 2008 *Sourcebook of Federal Sentencing Statistics* table 13.

Finally, while reducing disparity may have been overemphasized by the designers and defenders of the Federal Guidelines to the detriment of other values, judicial sentencing disparity is surely undesirable. Yet *Kimbrough*, *Gall*, *Nelson*, and *Spears* have so thoroughly denatured appellate review that the federal system's ability to control regional and judge-to-judge sentencing disparity has been effectively eliminated.⁴⁸¹

That anyone maintains the belief that *Booker* represents even a qualified success is a testament both to the virulent dislike harbored by many for the Federal Guidelines and to the surpassing importance of professional psychology. The additional increment of flexibility accorded judges by *Booker* may have made relatively little difference to average outcomes, but it has relieved judges who felt that the former system provided them insufficient leeway in extraordinary cases and has given defense lawyers the sense that their sentencing advocacy can now affect results. These are not frivolous reactions, but it is difficult to justify a constitutional revolution on the ground that it affords

⁴⁸¹ See, for example, United States Sentencing Commission, *Third Quarter FY09 Quarterly Sentencing Update* 2–8, table 2 (showing that across circuits, there are vast differences between the percentage of sentences being given within the Federal Guidelines range—for example, 71.8 percent of the Fifth Circuit's sentences are within-range, while approximately 41 percent of the Ninth Circuit's sentences are within-range).

peace of mind to the relatively few judges and lawyers who populate the federal criminal system.

Where does this leave the structured sentencing movement that Justices Rehnquist, O'Connor, and Breyer fought to save and even Justice Scalia claimed to view with at least benevolent neutrality? Probably the fairest way to put it is that *Blakely* and *Booker* did not kill structured sentencing, but they have severely wounded it. Not only have structured sentencing regimes in roughly a dozen states been abandoned or downgraded to advisory status,⁴⁸² but more importantly, the sheer incoherence and probable instability of the Court's Sixth Amendment jurisprudence represents a daunting obstacle to any prudent legislator who might be considering adopting a structured system. The Court effectively prohibited the most sensible structured sentencing architectures. And even if one were disposed to try to draft around the peculiar outcroppings of Justice Scalia's Sixth Amendment, one could never be entirely sure that the Court will not suddenly add another bizarre wrinkle or come to its senses and give the whole business up as a bad job.

The deep uncertainty the Court has created comes at a particularly bad time. One lesson that several decades of national experience with structured sentencing teaches is that, while institutional structures and relationships are very important,⁴⁸³ the best-designed system is ultimately at the mercy of the broader political culture. If the public and the political classes demand punitive sentences, structured sentencing mechanisms will be employed to deliver just such sentences.⁴⁸⁴ But it is, I think, equally true that structured sentencing systems can both mitigate the effects of periods of political hysteria and, when calmer heads are in the ascendant, be used to moderate severity and allocate resources wisely. There are hopeful signs that we are entering a more moderate period.⁴⁸⁵ Yet the Court's regrettable misconstruc-

⁴⁸² See notes 459–67 and accompanying text.

⁴⁸³ See Frank O. Bowman, III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing after Booker*, 2005 U Chi Legal F 149, 210–11 (describing the importance of system architecture and institutional relationships to building a sound sentencing system).

⁴⁸⁴ See, for example, Bowman, 105 Colum L Rev at 1345–46 (cited in note 251).

⁴⁸⁵ There are several signs of moderation at the federal level. A bill was passed out of the House Judiciary Committee on July 29, 2009, to eliminate the crack-powder disparity. See Fairness in Cocaine Sentencing Act of 2009, HR 3245, 111 Cong, 1st Sess (July 16, 2009). Senator Richard Durbin introduced a similar measure in the Senate. See Fair Sentencing Act of 2009, S 1789, 111 Cong, 1st Sess (Oct 15, 2009). The House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security recently considered the problem of overcriminalization of conduct. See Hearing on Over-Criminalization of Conduct/Over-Federalization of Criminal Law before the Subcommittee on Crime, Terrorism, and Homeland

tions of the Sixth Amendment have withdrawn useful tools from the reformer's workbench.

B. Glimmers of Hope: A Plan and Justice Sotomayor

Can anything be done? Or has the Court traveled so far into the tortured terrain of *Blakely* Land that it can never return? Recovery would require two things: first, an intellectually coherent and practically workable alternative to the current Sixth Amendment mishmash, and second, a new voice in the inner counsels of the Court. Fortunately, both are available.

As will doubtless be clear by now, I believe that the solution to the sentencing problems that have vexed the Court requires a combination of Sixth Amendment jury trial and procedural due process principles. The Court should adopt essentially the following rules:

1. An "element" of a crime is a fact that, when proven alone or in combination with other facts: (a) exposes the defendant to criminal liability; (b) sets hard limits on judicial sentencing discretion; and (c) increases the defendant's punishment in the sense that it increases either the penalty a court may impose or the penalty it must impose.
2. An "element" must either be proven beyond a reasonable doubt to a jury or, if the defendant waives jury trial, be proven beyond a reasonable doubt to a judge, or admitted by the defendant.
3. Within the impermeable upper and lower limits on judicial sentencing discretion created by proof of elements, legislatures may create rules that channel or guide, but do not eliminate, judicial sentencing discretion. Such rules may be either voluntary, advisory, or presumptive. However, presumptive limits on judicial sentencing discretion must be genuinely rebuttable and must provide reasonable leeway for the exercise of judicial discretion to vary from the presumptive limits, so

Security of the House Judiciary Committee, 111 Cong, 1st Sess (July 22, 2009), online at http://judiciary.house.gov/hearings/hear_090722_2.html (visited Dec 11, 2009). The same Subcommittee also recently considered measures to eliminate or reduce the effect of mandatory minimum sentences. See Hearing on HR 2937, HR 834, and HR 1466 before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee, 111 Cong, 1st Sess (July 14, 2009), online at http://judiciary.house.gov/hearings/hear_090714.html (visited Dec 11, 2009). Finally, a task force was created within the Department of Justice to reexamine the Department's approach to sentencing policy. See Ogden, Memorandum at *1 (cited in note 478).

long as the variation remains within the hard limits created by proof of elements.

4. Flexible constitutional due process protections should apply to the proof of the facts used in the application of guidelines.⁴⁸⁶ The precise constitutionally required procedures for proof of such facts will be determined by the Supreme Court and will, in general, depend on the degree to which the guidelines constrain judicial sentencing discretion. Facts necessary to application of purely voluntary guidelines (such as those in Virginia that judges are at liberty to ignore completely⁴⁸⁷) should probably be subject to minimal procedural requirements. Advisory guidelines should probably be subject to requirements akin to those now applicable to the Federal Guidelines.⁴⁸⁸ Presumptive guidelines should probably trigger enhanced procedural protections in areas such as discovery and confrontation rights, and perhaps burden of proof.
5. Federal Guidelines that trigger excessively narrow restrictions of judicial sentencing discretion upon the proof of specified facts would be deemed to violate the Sixth Amendment inasmuch as the guidelines facts in such a system would too closely approximate true “elements.”

This model has several notable advantages over the *Blakely-Booker* muddle. First, it would require jury determination both of facts triggering mandatory minimum sentences and of facts raising maximum sentences that happen to relate to criminal history. Thus it requires reversal of both *Harris* and *Almendarez-Torres*. Abandon-

⁴⁸⁶ There is plain Supreme Court precedent for this approach. See *Mathews v Eldridge*, 424 US 319, 334 (1976) (holding that due process is not a “technical conception with a fixed content unrelated to time, place and circumstances” but rather is “flexible and calls for such procedural protections as the particular situation demands”).

⁴⁸⁷ See Va Code Ann § 19.2-298.01 (mandating that a sentencing court’s decision not to follow the guidelines “shall not be reviewable on appeal or the basis of any other post-conviction relief”).

⁴⁸⁸ See, for example, *United States v Fisher*, 502 F3d 293, 306–07 (3d Cir 2007) (noting that the Supreme Court has yet to fully define the relationship between “due process protections applicable at sentencing and *Booker* reasonableness review” but holding that conduct relevant to sentencing enhancements must be proven by a preponderance of the evidence); *United States v Ausburn*, 502 F3d 313, 322 (3d Cir 2007) (“[D]ue process in criminal sentencing requires that a defendant receive notice of, and a reasonable opportunity to comment on, (a) the alleged factual predicate for his sentence, and (b) the potential punishments which may be imposed at sentence.”); *United States v Silverman*, 976 F2d 1502, 1511–12 (6th Cir 1992) (recognizing that while hearsay evidence may be considered at sentencing, due process requires that this evidence possess “some minimal indicia of reliability”).

ment of those cases is essential if Sixth Amendment jurisprudence is to be both intellectually coherent and genuinely respectful of the role juries should play in setting criminal sentences. Second, it would readmit law to the interval between true statutory maximum and minimum sentences by allowing legislatures and appellate courts to create rules—either through the legislative process or by common law methods—that would regularize, though not eliminate, the exercise of judicial discretion in that interval. Third, the readmission of law to the discretionary interval, coupled with a constitutional prohibition on the complete or near-complete elimination of discretion in that interval, would promote a healthy interaction between the institutions properly concerned with criminal punishment. Fourth, and relatedly, it would permit resumption of the beneficial use of structured sentencing mechanisms to reduce unwarranted disparity, focus correctional resources, and enlarge procedural protections for defendants at sentencing.

The most obvious objection to this regime is that it provides no bright-line rule for determining the boundary between permissibly presumptive guidelines and guidelines so restrictive of judicial discretion that they become the *de facto* equivalent of elements that must be decided by juries. One of the reasons the Court found Justice Scalia's *Blakely* formulation so seductive in the first place was surely that it seemed to offer a means of avoiding this difficult boundary question. But, as we have seen, the Court's quest for a bright-line rule has produced not certainty, but confusion and absurdity. And in the end, the Court has been forced to answer the boundary question anyway, but its answer—that there can be guidelines which are presumptive in fact, but which must be treated as nullities in law—is logically ridiculous and pragmatically counterproductive. Rather than maintaining this silly fiction, the Court should acknowledge that some reasonable legislative guidance of judicial sentencing discretion is constitutionally legitimate and practically beneficial, and devote its future energies to the task of maintaining a reasonable balance between legislative, judicial, executive, and citizen-jury control over sentencing outcomes.

Similarly, those of Justice Scalia's turn of mind will doubtless object that introducing a flexible due process standard to sentencing factfinding would commit the Supreme Court to an inevitably protracted project of creating, and then policing, a set of graduated due process models correlating to more and less restrictive structured sentencing systems. But if the abortive effort to create a "bright line" test for Sixth Amendment jury rights shows anything, it is that simplistic rules rarely survive contact with real world complexity and are, if anything, more likely to generate work for the Court than careful, patient,

incremental development of doctrine in response to the subtleties presented by individual cases.

Assuming one finds the foregoing model attractive, could the Court be convinced to move toward it? A truism of the national conversation about Justice Sonia Sotomayor's appointment to the Supreme Court has been that replacing the moderate liberal Souter with another moderate liberal is unlikely to change the balance of the Court on most issues. But sentencing may be the exception to that generalization. Justice Souter, despite occasional expressions of doubt about the value of the enterprise, has remained the most reliable vote for maintaining Justice Scalia's *Blakely* rule in its pure form. By contrast, as a federal judge on either the district or appellate court bench throughout the period since *Apprendi*, Justice Sotomayor has been personally involved in trying to navigate the sea of troubles the Court's work has created for lawyers and courts.⁴⁸⁹ One suspects she would at least be open to change, as she has no personal investment in the *Blakely* adventure and considerable experience in its practical deficiencies.

More to the point, although as an inferior court judge she has not been in a position to say how she views the *Blakely-Booker* approach to sentencing, at least one of her opinions, her dissent from the en banc Second Circuit opinion in *United States v Cavera*,⁴⁹⁰ strongly suggests that she views the move to nearly unfettered trial court sentencing discretion as a bad thing. In *Cavera*, the Second Circuit addressed the question of how much deference is due a district judge who varies from the Guideline range based on disagreement with the Sentencing Commission's policy choices in the wake of *Kimbrough*.⁴⁹¹ The majority concluded, in effect, that appellate deference ought to be nearly

⁴⁸⁹ As a district or appellate judge, Justice Sonia Sotomayor wrote opinions or dissents in at least nineteen cases construing the *Apprendi-Blakely-Booker* line of cases. See *United States v Draper*, 553 F3d 174, 184 (2d Cir 2009); *United States v Cavera*, 550 F3d 180, 216–24 (2d Cir 2008) (Sotomayor concurring in part and dissenting in part); *United States v Ganim*, 510 F3d 134, 141 (2d Cir 2007); *United States v Capoccia*, 503 F3d 103, 116 n 18 (2d Cir 2007); *Dulal-Whiteway v United States Dept of Homeland Security*, 501 F3d 116, 125 (2d Cir 2007); *United States v Parker*, 469 F3d 57, 59 n 2 (2d Cir 2006); *Burrell v United States*, 467 F3d 160, 170 (2d Cir 2006); *Brown v Miller*, 451 F3d 54, 56–58 (2d Cir 2006); *United States v Sheikh*, 433 F3d 905, 906 (2d Cir 2006); *United States v Hamdi*, 432 F3d 115, 121 (2d Cir 2005); *United States v Avello-Alvarez*, 430 F3d 543, 545–46 (2d Cir 2005); *United States v Vaughn*, 430 F3d 518, 524–27 (2d Cir 2005); *United States v Estrada*, 428 F3d 387, 390–91 (2d Cir 2005); *United States v Martinez*, 413 F3d 239, 243–44 (2d Cir 2005); *United States v Maloney*, 406 F3d 149, 151–55 (2d Cir 2005); *United States v Outen*, 286 F3d 622, 634–41 (2d Cir 2002); *United States v Santiago*, 268 F3d 151, 153–57 (2d Cir 2001); *United States v Moreno*, 2000 WL 1843232, *2–11 (SDNY). She has also served on panels considering innumerable other such cases.

⁴⁹⁰ 550 F3d 180, 216 (2d Cir 2008) (Sotomayor dissenting).

⁴⁹¹ *Id.* at 186–87.

absolute.⁴⁹² Then-Judge Sotomayor disagreed vigorously, saying that the “closer review” of judicial disagreements with the Commission called for in *Kimbrough*

must amount to more than the majority’s excessive deference to the district court’s decision, which risks a regression of the sentencing process to the “greatest deficiencies of the pre-Guidelines regime,” namely “its failure to provide for review of the decisions of sentencing judges and its failure to ensure that the sentencing judge’s exercise of discretion was informed by authoritative criteria and principles.”⁴⁹³

One should not read too much into this opinion, but I find it suggestive of a healthy skepticism of what the Court has wrought.

At a bare minimum, it is fair to conclude that Justice Souter’s replacement is resistant to the more extreme implications of *Blakely* and *Booker*. Particularly at a moment when, as evidenced by *Ice*, enthusiasm for Justice Scalia’s confounding simplicities may be waning in Justices Stevens and Ginsburg, Justice Sotomayor’s arrival could start a discussion that, if we are all very lucky, will take the Court down a new and more productive path. Perhaps, if that discussion begins, the analysis in the preceding pages may be of some value.

⁴⁹² *Id.* at 191 (emphasizing that appellate courts should not consider what weight they would have given a particular sentencing factor but should rather determine whether a sentencing “factor, as explained by the district court, can bear the weight assigned to it under the totality of circumstances”).

⁴⁹³ *Cavera*, 550 F3d at 217 (Sotomayor concurring in part and dissenting in part), quoting Kate Stith and José A. Cabranes, *Judging under the Federal Sentencing Guidelines*, 91 Nw U L Rev 1247, 1253–54 (1997).

