Debacle: How the Supreme Court Has Mangled American Sentencing Law and How Justice Sotomayor Might Help Fix It

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and
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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 distributed 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, de-emphasizing 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 fact-finding. 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 U.S. 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, particularly at the state level, the Court had, at best, only an indirect warrant to address. 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 U.S. 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 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 v. New Jersey. The section focuses particular attention on McMillan v. Pennsylvania 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 and Blakely v. Washington, a Court obsessed with the interbranch struggle over federal sentencing fell under the spell of Justice 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

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\(^1\) 477 U.S. 79 (1986).
\(^2\) 530 U.S. 466 (2000).
\(^3\) 542 U.S. 296 (2004).
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particularly to the Federal Sentencing Guidelines in United States v. 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 section offers a comprehensive alternative model applying both Sixth Amendment jury trial and due process clause principles, and suggest 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.

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 which emphasized individualized sentences, rehabilitation of offenders, and judicial and administrative discretion. 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. 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 offender after weighing a variety of recognized sentencing

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8 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.”).

objectives, among which rehabilitation was at least theoretically predominant. The judge’s choice of sentence within the statutory parameters for the crime(s) of conviction was largely unconstrained by either procedural rules or appellate review.

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. 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. 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. In 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, 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-20th Century’s experience of and assumptions about

10 Id. at 684. 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 (1981).
11 Koon v. United States, 116 S.Ct. 2035, 2045 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”).
12 See, e.g., Ronald F. Wright, Counting the Cost of Sentencing in North Carolina, 29 CRIME & JUSTICE 39 (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”).
13 Beginning in 1910, federal prisoners became eligible for parole release after serving one-third of the term imposed by the court. Release was discretionary with parole boards. PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 6 (2002).
14 See infra notes 304-305, and accompanying text.
the 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, 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, confrontation, and compulsory process, and the Fifth and Fourteenth Amendments’ due process guarantee of proof beyond a reasonable doubt, 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. Because a “trial” is, at its core, a mechanism for determining the existence of facts, 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 geographic exceptions) an American “trial” did not include the determination of the punishment appropriate for a particular offender. Thus, constitutional trial rights attached only to legal proceedings for determining elements. In post-conviction sentencing proceedings, defendants not only had no trial rights, but had, at best, only minimal rights to any form of procedural due process.

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15 U.S. Constitution, amend. V.
18 E.g., Miranda v. Arizona, 384 U.S. 436 (1969) (extending to the setting of police interrogation of the Fifth Amendment right not to be compelled to be a “witness” against oneself and the Sixth Amendment right to counsel)
19 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 a given congeries of behavior and attendant circumstances amounts 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.
22 See, e.g., Williams v. New York, 337 U.S. 241, 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).
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, “A 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. 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. 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. 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. After all, 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 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

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23 To say that late Twentieth Century judges had become used to substantial front-end sentencing discretion is not the same thing as saying, as Justice Stevens and others sometimes do, that largely unfettered judicial discretion has been the nearly invariable practice in Anglo-American law since the founding. To the contrary, the center of gravity of sentencing discretion among judges, juries, and legislatures has varied considerably from time to time and jurisdiction to jurisdiction. See Bowman, Fear of Law, supra note 20, at 311-15. Some members of the Court persist in the common error of confusing the familiar with the eternal.


25 PAMALA L. GRISET, DETERMINATE SENTENCING: THE PROMISE AND REALITY OF RETRIBUTIVE JUSTICE 11 (1991) (discussing the rise of the rehabilitative juggernaut” between 1877 and 1970 and noting that “[a] medical analogue was frequently invoked”).

26 See STITH AND CABRANES, FEAR OF JUDGING, supra note 24, at 78-79. See also, Bowman, Fear of Law, supra note 20, at 319-26 (critiquing the Stith and Cabranes discussion of moral reasoning by sentencing judges).
In the 1960s and 1970s, crime increased, and the United States witnessed social upheavals caused by the civil rights movement, the anti-war movement, changes in sexual mores, and the arrival on the American scene of widespread use and abuse of non-alcoholic recreational drugs. The real increase in crime in tandem with more general social upheaval unsettled and frightened voters and their representatives, who demanded more social controls. That demand produced a national movement toward tougher, more definite, less discretionary criminal sentences for both traditional crimes against persons and property and drug offenses.

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, and urged that sentences be based more on considerations of 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 conscious or unconscious racial and other biases. They argued that the back-end release authority of parole boards was too arbitrary and too shielded from public view, providing yet another avenue

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31 Bowman, Quality of Mercy, supra note 7, at 688-89.

32 Id. at 686-88.
for unjust and unreviewable disparity. These and other concerns 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 which seek to guide the exercise of judicial sentencing discretion within the range of punishments made available by the fact of conviction of 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, 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 guidelines that judges are at liberty to accept or reject. 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.

B. Mandatory minimum sentences and other legislative factual add-ons

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33 Id. at 688.
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. Id. at 686-89.
35 See, e.g., the Colorado sentencing scheme described and then invalidated in part in Lopez v. People, 113 P.2d 713, 723-25 (2005).
36 See, e.g., Va. Code § 19.2-298.01 (describing use of discretionary sentencing guidelines).
37 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 (2005).
At the same time the structured sentencing movement was gaining national traction, legislatures grew increasingly fond of two other kinds of sentencing mechanisms 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.”

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 10-20 years imprisonment, 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 statutes imposing 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 0-10 years, but in a separate provision required that the defendant be sentenced to not less than 5 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.

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

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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, but 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.

39 See, e.g., 21 U.S.C. § 841(b) (setting penalty range for manufacturing, distributing, dispensing, or possessing with intent to distribute a Schedule I or II controlled substance at 0-20 years, but increasing the penalty range to 5-40 years where specified amounts were involved, and to 10 years – life imprisonment where larger specified amounts were involved).
or within a specified distance of particular kinds of facilities, gun and injury enhancements, and recidivist enhancements. Some such statutes increase maximum sentences. Some impose or increase minimum sentences. Some do both. And sometimes they require the imposition of an additional punishment to run consecutive to the punishment imposed for the underlying offense.

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. 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,” was felt by some to be suspect and perhaps illegitimate.

40 Federal law doubles the maximum penalty for distributing, manufacturing, or possessing controlled substances on or within 1,000 feet of all public and private schools, colleges, public housing authority playground, public swimming pool, or video arcade facility. 21 U.S.C. § 860(a). Federal law also doubles the maximum punishment for drug offenses committed 1,000 feet of a truck stop or safety rest area. 21 U.S.C. § 849. Proof of the requisite proximity sometimes also triggers a minimum sentence in addition to the enhanced maximum. See, e.g., 21 U.S.C. § 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, e.g., McMillan v. Pennsylvania, 477 U.S. 79 (1986) (upholding Pennsylvania statute imposing five-year mandatory minimum sentence for “visible possession” of a firearm in connection with certain enumerated offenses).

42 E.g., so-called “three strikes” laws that impose substantial minimum sentences on defendants convicted of a specified number of prior offenses. See Ewing v. California, 538 U.S. 11, 15 (describing and upholding California “three strikes” statute imposing sentence of twenty-five years to life for theft of three golf clubs).

43 See, e.g., Colo. Rev. Stat. 18-1.3-406 Mandatory sentences for violent crimes (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).

44 See, e.g., 18 U.S.C. § 924(c) (imposing 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”).

45 See infra notes 304-305, and accompanying text.


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

II. Winship through Apprendi: 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 v. Washington, but the story begins in 1970 with the Court’s holding in In re Winship that due process requires the government to
prove each and every element of a crime beyond a reasonable doubt. 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 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. The Court first confronted the problem of legislative circumvention in Mullaney v. Wilbur, 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. The jury was instructed that, if the prosecutor proved that the defendant killed unlawfully and intentionally, they should find him guilty of murder unless the defendant proved by a preponderance of the evidence that he acted in the heat of passion. 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 defendant’s conviction by construing the statutory requirement of an unlawful killing to mean a killing not in the heat of passion. Thus, absence of heat of passion became an “element” the government bore the burden of proving under Winship.

54 In re Winship, 397 U.S. 358 (1970). Because Winship was a juvenile case, it did not implicate the Sixth Amendment jury trial right.
55 See United States v. McMillan, 477 U.S. 79, 93 (1986) (rejecting petitioners’ argument that they were entitled to jury trial on question of “visible possession” which triggered five-year mandatory minimum sentence because this fact was a sentencing factor and not an element of a crime).
Two years later, in *Patterson v. New York*, the Court reversed field. In *Patterson*, the New York statute defined murder as an intentional killing, and designated “extreme emotional disturbance” (the Model Penal Code terminology for common law heat of passion) as an affirmative defense which, if proven by the defendant, reduced the homicide to manslaughter. 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.”

Many, including Justice Powell in dissent, have found this formalistic distinction logically unsatisfactory and unduly deferential to legislatures. But the Court’s retreat in *Patterson* is unsurprising. The Court recognized both that affirmative defenses have a long tenure in Anglo-American law—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, self-defense, insanity, etc.). *Mullaney* placed affirmative defenses in constitutional jeopardy. Accordingly, the *Patterson* court allowed legislatures to impose evidentiary burdens on defendants through affirmative

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59 Id. at 542.
60 Patterson, 432 U.S. at 221-25 (1977) (Powell, J., dissenting) (deriding the Court’s jurisprudence concerning affirmative defenses as indefensibly “formalistic”).
62 Patterson, 432 U.S. at 202-203, 211.
65 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 U.S. at 207.
defenses designated as such, with the caution that “there are obviously constitutional limits beyond which the States may not go in this regard.”

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/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 v. Pennsylvania*, 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 generate the defendant’s penalty range has no special name and is not immediately recognizable as a separate “crime.” McMillan was convicted in a bench trial of the felony of aggravated assault which carried a maximum ten-year sentence. At sentencing, the government asked the judge to apply Pennsylvania’s Mandatory Minimum Sentencing Act 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. 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.

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66 *Id.* at 210.
68 *Id.* at 82. McMillan’s appeal was consolidated with those of three other similarly situated defendants. *Id.*
69 *Id.* at 87.
70 *Id.*
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. Justice Rehnquist’s majority opinion not only gets the immediate issue 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 had already demonstrated how tricky it could be to apply the tenets of the criminal procedure revolution even to traditional sentencing systems in which conviction of 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 1984 was on the books, the U.S. Sentencing Commission was hard at work writing guidelines for federal judges, and across the country structured sentencing was the coming thing – new, 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. *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.

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 fact-finding to guide judicial

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71 *Id.* at 89.
73 Rehnquist repeatedly alludes to the difference between element facts and facts relevant only to sentencing. *McMillan*, 477 U.S. at 89-93.
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,74 and to the fact that “[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all.”75 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,76 and he emphasized that the Pennsylvania legislature “expressly provided that visible possession of a firearm is not an element.”77 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,78 and thus was obliged to decide the question of whether Pennsylvania exceeded those limitations in the present case.

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.79 Rehnquist rejects their argument by baldly mischaracterizing it. He writes:

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74 Williams v. New York, 337 U.S. 241 (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 Rehnquist rejected Justice Stevens’ proposed rule that if a fact will “give rise both to a special stigma and a special punishment,” it “must be treated as ‘fact necessary to constitute the crime’ within the meaning of our holding in Winship,” McMillan, 477 U.S. at 103, 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.

75 Id. at 91.

76 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 generally, see 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); Marci A. Hamilton, What Is Rehnquist Federalism?, 155 U. PENN L. REV. PENNUMBRA 8 (2007).

77 McMillan, 477 U.S. at 85.

78 Id. at 86.

79 Id. at 92. The Court does not disagree with petitioners’ characterization of the statute. Justice Rehnquist writes in the second paragraph of his opinion that, “The 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).
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.80

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.81 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, 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. In both Mullaney and Patterson, heat of passion (or its absence) is plainly one of the facts that

80 Id. (italics in original, underlining added).
81 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.
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. Apparently, the government is 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. Rehnquist refused to acknowledge that, for purposes of identifying “elements” and allocating burdens of proof, there is a dispositive difference between mitigating and aggravating facts. 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. But the result in Patterson was supported by history and constitutional logic, the result in McMillan by neither.

Anglo-American criminal law has long placed the burden of proving some mitigating facts on defendants, but has no history of allowing a fact not proven by the government beyond

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82 Id. at 96-98.
83 Id. at 84 (noting that in Patterson v. New York, “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”).
84 “We believe that the present case is controlled by Patterson, our most recent pronouncement on this subject, rather than by Mullaney.” Id. at 85.
85 Even in modern law, defendants bear the burden of production with respect to virtually all affirmative defenses, DRESSLER, supra note 58, at 64 (“Almost always, the defendant has the burden of producing evidence pertaining to
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. In the context of penalty-related facts, due process logic suggests that the government should be obliged 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 not a fact that makes the defendant’s sentencing position better.

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.” 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. 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

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any affirmative defense she wishes to raise.”), and bear the burden of persuasion as to some such defenses, Model Penal Code § 2.13 (allocating to defendant burden of proving defense of entrapment).

86 U.S. Const., Amends. V and XIV.

87 McMillan, 477 U.S. at 88.

88 Id. at 88 (“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.”).
years, Rehquist wrote, “The statute gives no impression of having been tailored to permit the visible possession finding to a tail which wags the dog of the substantive offense.” 89

The obvious criticism of the McMillan rule is that it accords due process protections to determination of facts that increase the sentence a defendant might get and no protection to determination 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 0-5 years in prison, while Statute B provides that the judge may impose a sentence of 0-10 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.

Likewise, if Statute C provides for a sentence of 0-10 years upon conviction, while Statute D provides a sentence of 5-10 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 0-5 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 is 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.

89 Id. at 88.
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,” 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, and they 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, those discretionary choices will necessarily be based on non-element facts – what Rehnquist labeled “sentencing factors.” In traditional discretionary sentencing regimes, judicial determination of sentencing factors was attended by no due process protection because no particular fact had 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 raised a defendant’s minimum sentence. 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

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90 Id. at 91 (noting “our inability to lay down any ‘bright line’ test”).
91 See infra notes 304-305, and accompanying text.
92 McMillan, 477 U.S. at 86.
93 Id. at 91-92.
This was a critical turn. I will 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. For now, it is sufficient to note that by categorically rejecting the option of some enhanced due process at least for sentencing factors legally correlated to constraints on judicial sentencing discretion, Rehnquist moved the Court away from considering sentencing fact-finding as a due process problem with a variety of possible practical solutions and toward viewing sentencing as a binary Sixth Amendment choice – either a fact commands full jury trial rights or no constitutionally based procedural rights at all.

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 Almendarez-Torres v. United States. 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 federal judges, both trial and appellate, the Federal Sentencing Guidelines, adopted in 1987, had become an ever-present feature of their daily lives. At the Supreme Court, the panel which decided Almendarez-Torres included two critical new players, Justices Scalia and Breyer.

Justice Antonin Scalia joined the Court in the fall of 1986, 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 often aggressively, even contemptuously, uninterested in the systemic consequences of the simple rules he espouses. He has never been a fan of the

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94 Justice Rehnquist cited Williams v. New York, 337 U.S. 241 (1949) for the proposition that, “Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all,” id. at 91, and 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.
95 See Section V(B) below.
98 One of the most striking Scalian expressions of disregard for the real-world consequences of his constitutional stylings appears in Blakely v. Washington, 542 U.S. 296, 313 (2004), where he writes, “Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice.”
Debacle: How the Supreme Court Has Mangled American Sentencing Law -- Bowman

Federal Sentencing Guidelines, having filed a caustic dissent from the Court’s ruling in Mistretta v. United States\(^9\) upholding the constitutionality of the Guidelines.

By contrast, Justice Stephen Breyer, who joined the Court in 1994,\(^10\) is an administrative law specialist with a nuanced and evolutionary philosophy of constitutional interpretation,\(^11\) tolerant of complexity and ambiguity in the Court’s rulings, and acutely conscious of the practical consequences of the Court’s work. Critically, Breyer came to the Court after serving as a member of the first United Sentencing Commission and thus as one of the drafters of the Federal Sentencing Guidelines.\(^12\)

In Almendarez-Torres, petitioner was convicted of violating 8 U.S.C. § 1326(a), which prohibits reentering the United States after deportation. Violation of this section carries a sentence of up to two years in prison.\(^13\) 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.”\(^14\) Petitioner admitted his illegal reentry and that his deportation was subsequent to three convictions for aggravated felonies. However, at sentencing, he argued 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, pursuant to Hamling v. United States,\(^15\) had to be alleged in the indictment.\(^16\) The district court rejected his argument and imposed a sentence of 85 months imprisonment, more than triple the 24-month statutory maximum of his offense of conviction.\(^17\)

Writing for a 5-4 majority, Justice Breyer also rejected petitioner’s claim, finding that his prior convictions were not elements, but mere “sentencing factors” of the McMillan sort and thus need not have been alleged in the indictment.\(^18\) Breyer’s objective was plain. He, like Justice

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\(^13\) Almendarez-Torres. 523 U.S. at 226.
\(^14\) Id.
\(^15\) 418 U.S. 87 (1974) (holding that, in federal cases, the Sixth Amendment requires all elements of a crime to be alleged in the indictment).
\(^16\) Id.
\(^17\) Id.
\(^18\) Id. at 226-27, 235.
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Rehnquist before him, 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 fact-finding procedures less cumbersome – or, as Justice Scalia would later say, less protective of constitutional rights\(^{109}\) – 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 argues, 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 U.S.C. § 1326 Congress intended prior convictions to be sentencing factors, not elements. 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, § 1326 was silent on the question. Breyer’s effort to find evidence of legislative intent in a threadbare record is both labored\(^{110}\) and largely beside the point. *Patterson* and *McMillan* 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 tension with precedent in other ways.\(^{111}\) Most notably, *Patterson* is only reconcilable with *Mullaney* if there is a constitutional difference between aggravating and mitigating factors. In *McMillan*, although Justice Rehnquist refused to explicitly concede the general principle that directionality matters, he was forced to admit that petitioners’ case would have been stronger “if a finding of visible possession exposed them to greater or additional punishment.”\(^{112}\) In *Almendarez-Torres*, Breyer evades the obvious implication of the differing results in *Patterson* and *Mullaney*, ignores Rehnquist’s concession in *McMillan*, and then goes

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\(^{110}\) Justice Breyer’s parsing of 8 U.S.C. § 1326 and its legislative history, *id*. at 230-39, 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.

\(^{111}\) 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 knowledge of defendant, and hard for the government to disprove. 432 U.S. at 211 n. 13. In striking contrast, *Almendarez-Torres* 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.

\(^{112}\) McMillan, 477 U.S. at 88.
Debacle: How the Supreme Court Has Mangled American Sentencing Law -- Bowman

Rehnquist one better by holding that even a fact which increases a defendant’s maximum sentence tenfold is not an element.\(^\text{113}\) According to Breyer, whether a fact is an element has no necessary relation whatever to the \textit{effect} that proving it has on a judge’s sentencing power or a defendant’s sentence.

Like Justice Rehnquist before him, Breyer offers no generally applicable test for identifying an element. He justifies 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,”\(^\text{114}\) and second, by denying that the statute at issue amounts to improper legislative manipulation of elements to evade constitutional protections (in \textit{McMillan}’s phrase, the tail wagging the dog).\(^\text{115}\)

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 that are sometimes made elements by legislatures and sometimes not.\(^\text{116}\) In any event, the question is not whether judges have traditionally relied upon a bad criminal history to increase a defendant’s sentence, but whether a judge can increase a defendant’s sentence \textit{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 adduces no evidence that any such tradition exists. Indeed, the authorities he cites suggest the reverse. For example, he cites \textit{Graham v. West Virginia}\(^\text{117}\) and \textit{Oyler v.}

\(^{113}\) \textit{Almendarez-Torres}, 523 U.S. at 245.
\(^{114}\) \textit{Id.} at 243.
\(^{115}\) \textit{Id.} at 246.
\(^{116}\) 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, \textit{Petit Larceny, Jury Lenity, and Parliament}, in \textit{THE DEAREST BIRTH RIGHT OF THE PEOPLE OF ENGLAND: THE JURY IN THE HISTORY OF THE COMMON LAW} 47 (John Cairns & Grant MacLeod eds., 2002) (describing elements of grand and petit larceny); Model Penal Code §§ 223.1(2)(a)-(b) (setting 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, Model Penal Code §§ 223.1(2)(a)-(b) (setting dividing line between ordinary or petty misdemeanor theft at $50). In these cases, loss amount is plainly an “element.” On the other hand, the U.S. Sentencing Guidelines use loss as a mere sentencing factor to determine the now-advisory sentencing range for federal economic criminals. U.S.S.G. §2B1.1(b)(1) (2008) (loss table).
\(^{117}\) 224 U.S. 616, 624 (1912).
Boles\textsuperscript{118} for the proposition that recidivism need not be alleged in the indictment in cases where proof of prior record would enhance a sentence, but (as Breyer admits) the state statutes in both cases required jury determination of disputed convictions.\textsuperscript{119} 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.\textsuperscript{120}

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 \textit{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.\textsuperscript{121} One might have thought that a statute providing that a post-conviction finding of fact raised the defendant’s statutory maximum sentence from two years to twenty was about 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-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, Souter, and Ginsburg.\textsuperscript{122} 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 \textit{McMillan} that facts which increase maximum sentences are elements, while facts that merely narrow the range of permissible punishments by increasing minimum sentences are

\textsuperscript{118} 368 U.S. 448, 452 (1962).
\textsuperscript{119} \textit{Almendarez-Torres}, 523 U.S. at 243-44.
\textsuperscript{120} 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.” \textit{Id.} at 256-57, 261-62 (Scalia, J., dissenting).
\textsuperscript{121} \textit{Id.} at 246.
\textsuperscript{122} \textit{Id.} at 248-71.
not. \(^{123}\) Scalia is not only dismissive of both the majority’s results and its reasoning, but decries the absence of any clear standard for lower courts to employ when trying to identify an “element.” \(^{124}\) Because he thought the question not squarely presented in \textit{Almendarez-Torres}, Scalia took no definitive position on whether the implication of \textit{McMillan} should become a constitutional rule. \(^{125}\) However, three months later, in \textit{California v. Monge}, \(^{126}\) he took the plunge, opining that a fact which increases the statutory maximum sentence is necessarily an “element” triggering constitutional pleading and proof requirements. \(^{127}\)

Although Justice Scalia was in the minority in both \textit{Almendarez-Torres} and \textit{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 \textit{Almendarez-Torres}, he did so on the basis that Breyer was deviating from what Scalia took to be the rule of \textit{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 \textit{McMillan} and \textit{Almendarez-Torres} are wrong. In both cases, the facts in 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 permitting the judge to impose high sentences that would otherwise be prohibited. In the decade since \textit{Monge}, Justice Scalia has never seriously wavered in his allegiance to \textit{McMillan}, a fact that, as we will see, ultimately had disastrous consequences.

2. \textit{Jones v. United States}

The year after \textit{Almendarez-Torres} and \textit{Monge}, Justice Breyer’s majority was already beginning to crack. In \textit{Jones v. United States}, \(^{128}\) the Court considered the claim that the federal carjacking statute, which imposed a fifteen-year maximum sentence for conviction of the offense

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\(^{123}\) “[N]o one can read \textit{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, \textit{rather than} substantially increasing the available sentence.” Id. at 256. (Emphasis in original.)

\(^{124}\) \textit{Almendarez-Torres}, 523 U.S. at 262.

\(^{125}\) \textit{Id.} Justice Scalia argues that, because the statute in \textit{Almendarez-Torres} is so unclear on the question of whether the enhancements 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.


\(^{127}\) \textit{Id.} at 740-41.

simpliciter, a twenty-five-year maximum if serious bodily injury resulted, and up to life if 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.\footnote{Id. at 229-31.} The Court, in an opinion by Justice Souter, found that it was the latter.

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 is Souter’s conclusion that a contrary reading would raise serious doubt about the constitutionality of the statute.\footnote{Id. at 239. (‘‘Any doubt that might be prompted by the arguments for [a reading of the statute interpreting it as describing one crime with two penalty-enhancing provisions] should, however, be resolved against it under the rule, repeatedly affirmed, that ‘where 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 ex rel. Attorney General v. Delaware & Hudson Co., 213 U.S. 366, 408 (1916)).} As he put it, “It is as 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.”\footnote{Id. at 233.} As tentative as this statement seemed, it turned \textit{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. In \textit{Jones}, Justice Thomas, who had voted with Breyer in \textit{Almendarez-Torres}, switched sides. Although \textit{Jones} decided nothing definitively, its prevailing coalition of Justices Souter, Ginsburg, Stevens, Scalia, and 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.\footnote{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 U.S. at 252-253 (Stevens, J., concurring), with \textit{id.} at 253 (Scalia, J., concurring).}

3. \textit{Apprendi v. New Jersey}

The \textit{Jones} majority wasted little time. The very next term, the Court decided \textit{Apprendi v. New Jersey}.\footnote{530 U.S. 466 (2000).} The case arose when Mr. Apprendi was charged in New Jersey state court with a bundle of felony firearms charges for shooting at the house of his African-American
neighbors. He pled guilty to three of these charges. 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. 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. 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.

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 clause of the Fourteenth Amendment and the Sixth Amendment guarantee of trial by jury. Justice Stevens, writing for the Court, held that, “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.” Stevens not only left Almendarez-Torres intact, but declined to overrule McMillan’s holding regarding mandatory minimum sentences. Justices Scalia and Thomas added concurrences, Thomas arguing that the necessary implication of the Court’s ruling was abandonment of both Almendarez-Torres and McMillan. Both Justice O’Connor and Justice Breyer wrote dissents.

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134 Id. at 469.
135 “[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 § 2C:44-3(e).” Id. at 470.
136 Id.
137 Id. 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.
138 Id. at 490.
139 Id. at 489-90.
140 Id. at 487, n. 13 (“We do not overrule McMillan.”).
141 Id. at 498.
142 Id. at 499. Justice Thomas’s opinion is in many respects the best of the Apprendi menagerie. 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. REP. 79, 80-81 (2002).
143 Id. at 523. Justice O’Connor was joined by Justices Rehnquist, Breyer, and Kennedy.
144 Id. at 555.
Justice Stevens’ 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 begins 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. Stevens follows his history lesson with a revisitation of the Court’s cases from Winship to Monge. 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.

The problem with Stevens’ opinion is its waffles. First, Stevens emphasizes repeatedly that elements are facts that set limits on judicial sentencing discretion. Yet he declines to overrule Almendarez-Torres, a case in which a judge-determined fact dramatically expanded the judge’s sentencing authority. Although he labels Almendarez-Torres “a narrow exception” to the general rule announced in Apprendi, he justifies it by repeating Breyer’s diversionary claim that recidivism is a “traditional” basis for increasing sentences, and by noting (not once, but twice) that recidivism is a fact that relates not to the offense but to the offender. The result is to cast doubt on what seemed to be Stevens’ 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.

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145 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’ concurrence augments Stevens’ historical argument with a lengthy disquisition on American law from the founding to the Civil War. Id. at 499-520 (Thomas, J., concurring).
146 Id. at 484-90.
147 Id. 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.”).
148 Id. at 488.
149 Id. at 488, 496 (rejecting New Jersey’s reliance on Almendarez-Torres because, “Whereas recidivism ‘does not relate to the commission of the offense’ itself [citation omitted], New Jersey’s biased purpose inquiry goes precisely to what happened in the ‘commission of the offense.’”)
150 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 of Justice Kennedy, see Cunningham v. California, 549 U.S. 270, 297 (2007) (Kennedy, J., dissenting) .
Second, despite leaving *Almendarez-Torres* standing, Stevens finally prevails on the basic point he made in dissent in *McMillan*\(^{151}\) – 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.\(^{152}\) Unfortunately, Stevens then artfully obfuscates what is meant by increasing a defendant’s punishment. Stevens’ 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.\(^{153}\) If this view is right, then a fact that raises a mandatory minimum sentence must be an element and *McMillan* was wrongly decided. Yet Stevens expressly declines to overrule *McMillan*.\(^{154}\)

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.\(^{155}\) 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.”\(^{156}\)

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”

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\(^{151}\) See supra note 82, and accompanying text.

\(^{152}\) *Id.* at 490.

\(^{153}\) *McMillan*, 477 U.S. at 95-104 (Stevens, J., dissenting); United States v. Jones, 526 U.S. 227, 253 (1999) (“In my view, a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence”).

\(^{154}\) *Apprendi*, 530 U.S. at 487 n. 13.

\(^{155}\) *Id.*

\(^{156}\) *Id.* at 490, quoting United States v. Jones, 526 U.S. at 252-53 (emphasis added).
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necessarily has both a top and a bottom, Stevens’ general rule certainly seems inconsistent with McMillan’s survival.

The explanation for all these elaborate head fakes on McMillan is plain – Justice Scalia, whose vote Stevens needed 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. 157 So, to keep Scalia 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’ approach would hamstring the beneficial reforms of the structured sentencing movement. 158 But they provide no persuasive counter to the majority’s arguments and no useful alternative to its rule. Justice O’Connor nitpicks Stevens’ and Thomas’ historical analysis, 159 but as Justice Thomas pointedly observes, offers no historical evidence of her own. 160 She argues that the majority’s conclusion is a departure from the Court’s own precedent, 161 but the only prior decision involving non-capital sentencing with which Apprendi really conflicts is Justice Breyer’s ineffectual effort in Almendarez-Torres. 162 As for Justice Breyer, his Apprendi dissent correctly points out the

157 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 which 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. 526 U.S. at 253. Scalia filed a separate concurrence saying the same thing, with the conspicuous omission of Stevens’ embellishment on the meaning of “range.” Id. 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.” Id. at 498-99.

158 See, id. at 549-52 (O’Connor, J., dissenting) and id. at 565 (Breyer, J., dissenting).

159 Justice O’Connor quibbles with Justice Stevens’ quotation to a particular treatise, id. at 526-27, and denigrates Justice Thomas’ 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.

160 Id. at 502 n. 2.

161 Id. at 529-39.

162 Justice O’Connor’s best argument from precedent rests on Walton v. Arizona, 497 U.S. 639 (1990), in which the Court upheld against a Sixth Amendment challenge the Arizona practice of requiring that a judge determine whether a death-eligible capital murder defendant should receive the death penalty based on a weighing of post-conviction judicial findings of aggravating and mitigating facts. 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
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.\textsuperscript{163}

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 50+ 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, they 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’ majority opinion is 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 emphasizes the importance in defining an “element” of the restrictions it places on judicial sentencing discretion. But he denigrates the concept of a “sentencing factor”\textsuperscript{164} and blithely insists that Apprendi does not affect judicial sentencing discretion within ranges.\textsuperscript{165} Yet he knows judges have to find facts as a precondition of an intelligent exercise of discretion within range, and he knows that some structured sentencing schemes uses post-conviction judicial fact-finding to place varying degrees of constraint on that discretion. Because he never grapples squarely with the subtler problems presented by structured sentencing, or even admits

\textsuperscript{163} Justice Breyer describes 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 one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing statutes any differently.” Id. at 559.

\textsuperscript{164} See, id. at 494 (referring to “the constitutionally novel and elusive distinction between “elements” and “sentencing factors”).

\textsuperscript{165} 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 \textit{within the range} prescribed by statute.” Emphasis in original).
their existence, he cannot draw the dissenters into his majority (or even into a meaningful dialogue) and he has to make his devil’s bargain with Scalia. The result is a confusing opinion, pregnant with the potential for future mischief.

III. After *Apprendi*: The Court Loses Its Way in *Harris* and *Blakely*

A. *Harris v. United States*

The mischief began in *Harris v. United States*. *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, but increased the mandatory minimum to seven years if the firearm was “brandished.” 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*.

The Supreme Court ruled 5-4 for the government. The key vote was cast by Justice Scalia, who joined 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*.” He answers the question equally squarely – with a yes – but his justifications for that answer are serpentine and unconvincing. Kennedy argues 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, then the Constitution must also permit legislatures to *set lower limits on the ranges* within which judicial discretion may be exercised *also based on facts not subject to trial-like procedural protections*. That simply does not follow. There is a categorical difference between granting authority to judges to

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166 536 U.S. 545 (2002).
168 18 U.S.C. § 924(c)(1)(A)(ii). Under either subsection, the maximum possible sentence remained the same.
169 Id. at 551.
170 Harris, 536 U.S. at 550.
171 Kennedy characterizes *McMillan*’s result as stemming from “certain historical and doctrinal understandings about the role of the judge at sentencing,” Id. at 558, and contends that because Nineteenth Century criminal statutes commonly provided judges with sentencing discretion within a permissible range, “Judicial factfinding 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.” Id.
exercise discretion and setting the boundaries within which that discretion is to be exercised. Indeed, Kennedy seems to endorse just this view when he writes, “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.”

Yet somehow, for Kennedy, a fact that sets a lower limit on judicial power to impose sentences does not count. He says, “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.” 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 is so painfully conscious of the weakness of his argument that, like Justice Rehnquist in McMillan, he tries to blur 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 imposed. That a fact affects the defendant’s sentence, even dramatically so, does not by itself make it an element.

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

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172 Id. at 567 (emphasis added).
173 Id. at 560 (emphasis added).
174 See supra note 80, and accompanying text.
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. 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. In the end, unable to formulate a coherent effects-based distinction between elements and non-elements that will accommodate the result he wants, Kennedy simply repudiates the very idea that elements can be identified by their effects on either judicial discretion or outcomes for defendants.

Having eschewed effects, Kennedy intimates 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.” 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. But, as we have seen, Scalia’s position remained consistent, from his dissents in Almendarez-Torres and Monge through his carefully worded concurrences in Jones and Apprendi. He liked the rule he derived from McMillan – facts that increase maxima are elements, facts that increase minima

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175 Apprendi, 530 U.S. at 486.
176 Harris, 536 U.S. at 565-66.
177 Kennedy writes: “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).
178 Id. at 566 (quoting Apprendi, 530 U.S. at 498 (Scalia, J., concurring) (emphasis in original).
are not – and he has never deviated from it. 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.  

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

One of the peculiarities of the *McMillan*-to-*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, 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 which a judge could exercise discretion. 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; however, the judge’s decision about what sentence to impose within those boundaries was constrained by the Washington State Sentencing Guidelines. These statutory guidelines were similar to (though simpler than) the Federal

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180 Harris, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment).
181 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.
Sentencing Guidelines. They were based on a “sentencing grid.” 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. 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.” However, the judge had the “discretion” to impose a sentence above or below this range (an “exceptional sentence”), 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.” The Act provided lists of aggravating and mitigating factors that would justify exceptional sentences, but emphasized that these lists are “illustrative only and are not intended to be exclusive reasons for exceptional sentences.” The judge’s exercise of discretion in imposing an exceptional sentence was reversible on appeal only if “clearly erroneous.”

Blakely was convicted of second degree kidnapping, which, by statute, carried a maximum sentence of ten years. Under the Washington guidelines, the kidnapping conviction, plus a special jury finding that Blakely committed the crime with a firearm triggering 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. However, the judge also found that Blakely had committed the crime with “deliberate cruelty,” a factor enumerated in the

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184 Id.
191 See WASH. REV. CODE ANN. § 9A.20.021(1)(b) (2000) (defining the crime of second degree kidnapping and classifying it as a Class B felony), and § 9A.20.021(1)(b) (2000) (specifying the maximum punishment for a Class B felony as imprisonment for a term of ten years, a fine of $20,000, or both).
192 See § 9.94A.320 (seriousness level V for second-degree kidnapping); App. 27 (offender score two based on § 9.94A.360); § 9.94A.310(1), box 2-V (standard range of thirteen to seventeen months); § 9.94A.310(3)(b) (thirty-six-month firearm enhancement).
guidelines that permitted imposition of a sentence above the standard range\textsuperscript{193} and imposed a sentence of ninety months.\textsuperscript{194} In an opinion by Justice Scalia, joined by the other members of the \textit{Apprendi} gang, Justices Thomas, Stevens, Souter, and Ginsburg, the U.S. Supreme Court found that imposition of the exceptional sentence violated the defendant’s Sixth Amendment right to a trial by jury.\textsuperscript{195}

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. \textbf{The Missing Due Process Analysis in Blakely v. Washington}

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 judicial discretionary 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

\textsuperscript{193} See § 9.94A.390(2)(h)(iii).
\textsuperscript{195} Id. at 313-14.
the sentencing hearing by a preponderance of the evidence.196 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 U.S. 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 utterly 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.197 It is true that in Williams v. New York the Supreme Court upheld wholly discretionary judicial sentencing against a procedural due process challenge.198 However, it did so based on the historical claim that American judges had exercised such standardless power since the early days of the Republic199 and the assertion that imposition of due process protections would impede the operation of “the prevalent modern philosophy” of individualized rehabilitative sentencing.200

It is one thing to say, as Williams did, that deference to tradition and a prevailing rehabilitative model of sentencing make 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,

197 U.S. Const., Amends. V and XIV.
198 337 U.S. 241 (1949).
199 Id. at 245-46.
200 Id. at 247-48.
ordinary due process analysis suggests heightened procedural protections should certainly be permitted, and perhaps ought to be required.\textsuperscript{201}

In \textit{Blakely}, another of Justice Rehnquist’s \textit{McMillan} chickens came home to roost. \textit{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. Justice O’Connor and Breyer in dissent bewailed the fact that \textit{Blakely}’s result had the perverse effect of diminishing the due process rights afforded Washington criminal defendants.\textsuperscript{202} 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.

\textbf{2. Justice Scalia in the Sixth Amendment Vise}

In \textit{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 \textit{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.”\textsuperscript{203} But Blakely’s sentence presented no necessary conflict with the \textit{Apprendi} rule because, before \textit{Blakely}, “statutory maximum sentence” was universally understood to mean the maximum sentence a statute defining a crime allowed a judge to impose on a defendant convicted of it, regardless of the number or severity of aggravating facts found by the judge post-conviction.\textsuperscript{204} Indeed, we

\textsuperscript{201}See Matthews v. Eldridge, 424 U.S. 319, 334 (1976) (identifying three factors that determine the applicable level of due process: (1) the private interests affected by the proceeding, (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, \textit{Elements and Sentencing Factors: A Reassessment of the Alleged Distinction}, 12 FED. SENT. REP. 203, 204 (2000) (discussing the application of enhanced burdens of proof in criminal sentencing).

\textsuperscript{202}Blakely, 542 U.S. at 316-17 (O’Connor, J., dissenting), 343-44 (Breyer, J., dissenting).

\textsuperscript{203}Blakely, 542 U.S. at 301 (\textit{quoting} Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

\textsuperscript{204}It seems clear, for example, that Justice Stevens understood the term in just this way when writing the \textit{Apprendi} opinion. He denigrates the distinction between “elements” and “sentencing factors,” but is at
know that this is 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.” Thus, until *Blakely* was decided, the “prescribed statutory maximum” for the Class B felony of second-degree kidnapping to which Blakely pled guilty was the maximum sentence of ten years prescribed for Class B felonies by the Washington legislature. And Blakely was sentenced to a term less than ten years.

Not only was Blakely’s particular sentence consistent with plain language of the *Apprendi* rule, but the Washington guidelines system as whole exhibited no necessary conflict with the vision of the Sixth Amendment Justice Scalia articulates in *Blakely*. According to Justice Scalia, the principle upon which *Blakely* rests is 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.” What Scalia presumably means by this ringing encomium is 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 guidelines merely formalized the commonsense 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 pre-existing 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 hodge-podge that the Guidelines amounted to a de facto recodification of federal criminal law.\(^{208}\) 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.\(^ {209}\) 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


\(^ {209}\) *Apprendi*, 530 U.S. at 490 n. 16. See also, Blakely, 542 U.S. at 322 (O’Connor, J., 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….").
for identifying “crimes” and “elements” that set constitutional limits on legislative authority regardless 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.*”\(^\text{210}\)

As many have observed (beginning with Justice O’Connor in dissent\(^\text{211}\), 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. Yet Scalia’s rule does not apply to facts that establish or increase minimum sentences,\(^\text{212}\) those that reduce maximum or minimum sentences,\(^\text{213}\) or those relating to criminal history.\(^\text{214}\) Thus, none of the facts that determine how much time a defendant *must* serve and many of the facts that determine how much he *may* serve need never be considered by a jury. And as to the rest, 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.\(^\text{215}\) Alternatively, *Blakely* would be satisfied by guidelines identifying facts that, when found by a judge post-conviction, triggered presumptive minimum, but not maximum, sentences

\(^{210}\) *Blakely*, 542 U.S. at 303 (emphasis in original).
\(^{211}\) *Blakely*, 542 U.S. at 321 (O’Connor, J., dissenting) (“It is difficult for me to discern what principle besides doctrinaire formalism motivates today’s decision.”)
\(^{212}\) *Harris v. United States*, 536 U.S. at 568-69.
\(^{214}\) *Almendarez-Torres v. United States*, 523 U.S. at 226-27.
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.\(^{216}\)

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.\(^{217}\) 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 fact-finding. 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.\(^{218}\) So long as there were 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 had 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


\(^{217}\) 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*.

\(^{218}\) 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 defendant 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 not violate *Blakely*. 
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 regime. 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.  

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. 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 uncompelled by the text and requiring a tortured redefinition of a well-understood term of art, the 


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219 Dissenting in Rita v. United States, 127 S.Ct. 2456, 2486-87 (2007), Justice Souter recognized precisely this point, but justified the result in Blakely on the frankly bizarre ground that, had the Court decided otherwise, legislatures might “bypass Apprendi by providing an abnormally spacious sentencing range for any basic crime (theoretically exposing a defendant to the highest sentence just by the jury’s verdict), then leaving it to a judge to make supplementary findings not only appropriate but necessary for a sentence in a subrange at the high end.” Why Justice Souter thought it good jurisprudential practice to write a weird rule striking down a sensible legislative enactment to forestall future legislatures from doing something no legislature had ever even thought of doing must remain a mystery.

220 The Washington Sentencing Reform Act 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. § 9A.20.010 (2000).
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, 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.” 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 in the next three subsections, the 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 of structured sentencing to judicial power**

All forms of structured sentencing shift power away from judges and towards 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. 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 Reform Act of 1984 (SRA) were, and were perceived by federal judges to be, more profound than anything experienced in the states.

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221 See *supra* notes 72-73, and accompanying text.
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.\footnote{See infra notes *-*.*} In 1984, the SRA\footnote{Pub. L. 98-473.} abolished parole\footnote{See § 218(a)(5) of the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 stat. 2027 (repealing chapter 311 of title 18, United States Code, relating to parole).} and created the U.S. Sentencing Commission. The Anti-Drug Abuse Act of 1986 (ADAA)\footnote{Pub. L. 99-570.} increased drug penalties across the board, and most importantly, created a regime of unprecedentedly tough quantity-based mandatory minimum sentences for most illegal drugs.\footnote{See, e.g., 21 U.S.C. § 841(b) (imposing mandatory minimum sentences for possession with intent to distribute a variety of illegal drugs).} In 1987, the Commission promulgated and Congress approved the Federal Sentencing Guidelines. With this sequence of enactments, Congress and the U.S. Sentencing Commission erected the most complicated, fact-dependent, and restrictive set of sentencing mechanisms ever devised. Although the new regime never came near to stripping judges of all discretion as the Guidelines’ harshest critics sometimes claimed, 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 sentencing.\footnote{As federal judge Marvin Frankel, one of the first and most influential critics of pre-Guidelines federal sentencing, wrote, “the 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.” \textsc{Marvin E. Frankel}, \textit{Criminal Sentences: Law Without Order} (1973).} 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.\footnote{Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, \textit{Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning}, 73 N.Y.U. L. REV. 1377, 1430 (1998) (finding that in 1988, 61% of the nearly 300 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).}

Nonetheless, after the Supreme Court upheld the Guidelines’ constitutionality in \textit{Mistretta} in 1989\footnote{\textit{Mistretta} v. United States, 488 U.S. 361 (1989).}, 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. However, by the mid-1990s the Guidelines were settling in as an accepted, if never universally admired, feature of the federal legal landscape. Yet even as familiarity slowly increased judicial acceptance of the Guidelines, a complex array of factors was coming together to imperil that acceptance and to place the judiciary once again at odds with those who made federal sentencing policy.

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. 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. The legislation was accompanied by ever-sharper rhetoric asserting congressional hegemony over sentencing and attacking judges as soft on crime. The high-water mark of this trend was the Feeney Amendment to the PROTECT Act of 2003, 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 Koon decision liberalizing the law governing

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233 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 U.S. 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.

234 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.


departures from the Guidelines, and directly amended the Guidelines to restrict departures. 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.

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. 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. The number of mandatory minimums and factual add-ons in federal law has crept steadily upward. The Guidelines and accompanying commentary and policy statements started out long in 1987 and have more than doubled in size since. 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 v. Washington and the later case of Cunningham v. California provide an illustrative comparison. Washington sentencing

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238 Koon v. United States, 518 U.S. 81, 95-100 (1996) (changing the standard of appellate review for departures from the applicable guideline range 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).
240 See Bowman, Train Wreck, supra note 216, at 260-62.
241 McMillan, 477 U.S. at 87-88.
244 Cunningham v. California, 542 U.S. __, 127 S.Ct. 856 (2007). For further discussion of Cunningham, see infra notes **, and accompanying text.
guidelines prescribed a “standard range” of 49-53 months for Blakely’s crime of second degree kidnapping with a firearm.\(^{245}\) California statutes prescribed a “middle term” sentence of twelve years for Cunningham’s conviction of sexual abuse of a child under fourteen.\(^{246}\) 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 which were enumerated in a non-exhaustive list created by the state sentencing commission (Washington) or Judicial Council (California).\(^{247}\) 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 non-standard 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 guidelines. A finding of forty grams of powder cocaine equates to a fourteen-level increase in offense level, while three hundred grams generates a 22-level increase.\(^{248}\) A timely guilty plea reduces the offense level by three,\(^{249}\) while a finding of minimal role in a multi-defendant offense provides a four-level reduction.\(^{250}\)

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. 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. Once federal guidelines facts are found, their prescribed quantitative values must be added and subtracted according to detailed Guidelines rules.

\(^{245}\) The standard range for the offense of second degree kidnapping alone for someone with Blakely’s criminal history was 13-17 months, with a 36 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, 124 S.Ct. at 2535.

\(^{246}\) Cunningham, 127 S.Ct. at 860.

\(^{247}\) Blakely, 124 S.Ct. at 2535; Cunningham, 127 S.Ct. at 861-62. In Washington, the higher term could be chosen from a range. In California, each crime has only a single lower, middle, and upper term.

\(^{248}\) U.S.S.G. §2D1.1(c) (Drug Quantity Table) (2008).


\(^{250}\) U.S.S.G. §3B1.2(a) (2008).
Fourth, the federal guidelines are a so-called “modified real offense system.”\textsuperscript{251} That is, they require the sentencing judge to take account not only of the facts of the offense(s) of conviction, but also of all “relevant conduct,” which includes unconvicted crimes and misconduct aided and abetted by the defendant or committed by co-conspirators during the offense of conviction\textsuperscript{252} or as part of the same course of conduct or common scheme or plan as the offense of conviction.\textsuperscript{253} The judge must factor relevant conduct into his guideline calculation so long as it is proven to a preponderance of the evidence.\textsuperscript{254} 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.\textsuperscript{255}

Fifth, the pre-\textit{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 minimum mandatory sentences that interact 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

\begin{footnotesize}
\begin{enumerate}
\item Conduct of co-conspirators is attributable to the defendant only if reasonably foreseeable. U.S.S.G. §1B1.3(a)(1)(B) (2006).
\item U.S.S.G. §1B1.3(a) (2006).
\item \textit{Id}.
\item United States v. Watts, 519 U.S. 148 (1997).
\end{enumerate}
\end{footnotesize}
produces a very low base offense level\textsuperscript{256} (or in the case of most drug offenses no base offense level at all\textsuperscript{257}), 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 216,000 to 1.5 million.\textsuperscript{258} In the same period, the rate of imprisonment more than tripled, from 149 inmates to 488 inmates per 100,000 population.\textsuperscript{259} From 1977 to 2004, the number of federal inmates increased six-fold, from 32,088 to 180,328.\textsuperscript{260} 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 plainly uneasy about the punitive trend of American criminal law,\textsuperscript{261} and it is

\begin{itemize}
\item \textsuperscript{256} For example, conviction of an economic crime sentenced under U.S.S.G §2B1.1 (2006) (which governs most federal theft and fraud cases) generates a base offense level (BOL) of either 6 or 7. For a first-time offender, the guideline range associated with a BOL of 6 or 7 is 0-6 months. U.S.S.G. §5A (Sentencing Table).
\item \textsuperscript{257} U.S.S.G. §2D1.1 (2008).
\item \textsuperscript{259} Compare BJS, PREVALENCE, supra note 261, with BJS, Midyear 2005, supra note 261, at 4.
\end{itemize}
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, the simultaneous evolution of structured sentencing and a more punitive national crime policy has given many to assume a causal relation between the two. Second, criminal justice hardliners 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 the least very strongly urging, judges to impose ever higher sentences. Third, the federal system with guidelines at its center has become a one-way upward ratchet in which penalty levels are raised easily and often, but lowered only rarely and with the utmost difficulty. Since the advent of the Guidelines, the number of federal prisoners has exploded. 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. Nonetheless, the federal Guidelines experience has cemented the correlation between structured sentencing and long sentences in the minds of federal judges for whom the Guidelines are a daily preoccupation.

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262 See, e.g., ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (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).

263 Bowman, Failure of Guidelines, supra note 223 (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).


266 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
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In sum, by the summer of 2004 when *Blakely* was decided, for federal judges, including, I suspect, those on the Supreme Court, the era of structured sentencing had come to be associated 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,\textsuperscript{267} 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.

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 after changes in control of both Congress and the White House, in 2004, federal judges felt themselves under relentless assault. And the 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 the dog-wagging guidelines interlocked with proliferating mandatory minimum sentences were the mechanism employed by Congress 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

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express disavowal of the federal guidelines and a detailed explanation of how the federal experience is an atypical outlier among structured systems. Id.

\textsuperscript{267} Kennedy, ABA Speech, supra note 261.
discretion without using the jury as a factfinder. 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.” 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 who ordinarily have no affinity for Scalia’s interpretive methods. It seems to me more probable that those justices thought that 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 think through the implications of Scalia’s formula.

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 elsewhere the story of the confusion that reigned in federal courts in the sixth months between *Blakely* and the January 2005 decision in *United States v. Booker*. During the interregnum, some observers were distressed. Others were jubilant. 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, but that the defection of Justice Ginsburg allowed Justice Breyer and the *Apprendi/Blakely* dissenters to fashion the remedy for the constitutional violation. The remedial majority transformed the Guidelines...
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into what it deemed a constitutionally acceptable system in three steps. It excised two statutory subsections -- 18 U.S.C. § 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),”276 and 18 U.S.C. § 3742(e), which sets forth standards of review on appeal for sentences imposed under the Guidelines277 -- and then substituted its own standard of appellate review – that of “reasonableness” – for the standard in excised Section 3742(e).278

The Booker opinions have been dissected at length.279 I will not repeat the more commonly expressed criticisms. Rather, I want to explore 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 Booker and Fanfan, it was possible to determine a guideline range based purely on the facts found by the jury at trial,280 and the Guidelines required a judge to find additional facts to justify

276 Id. at 259.
277 Id. at 258-62.
278 Id. at 260-62.
280 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, e.g., U.S.S.G. §2B1.1(a)(1) (2008) (assigning base offense levels to economic crimes), and §2B1.1(b) (2008) (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. U.S.S.G. 1B1.1 (Application Instructions) (2008). 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, U.S.S.G. §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
a sentence above the top of that range. Therefore, per Blakely, the Guidelines were unconstitutional as applied.281 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.282 Justice Stevens’ 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.283

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. The SRA made the original guidelines fairly strongly presumptive by requiring in Section 3553(b) 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 Commission in formulating the guidelines that should 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.284

By chance or design, the Solicitor General sought review of two drug cases which 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 SG missed his chance.

281 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 U.S. at 237-39, that none of its prior cases upholding various provisions of the 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 Guidelines against separation of powers challenges, id. at 241-43.

282 Booker, 543 U.S. 233-35.

283 Id.
result” in a sentence outside the range.\textsuperscript{284} Over time, the Commission strengthened the presumption favoring a within-range sentence by including more and more facts in the offense level calculation\textsuperscript{285} 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.\textsuperscript{286} The Supreme Court made the guidelines slightly less binding with its 1996 \textit{Koon} decision holding that the standard of review for departures was abuse of discretion.\textsuperscript{287} 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.\textsuperscript{288} Hence, by 2005, the Guidelines were very strongly presumptive, both in theory and in practice.\textsuperscript{289}

Unlike the \textit{Booker} merits majority, the remedial opinion does not denude the guidelines of all presumptive weight. Section 3553(a) remained in effect, and although it merely lists factors the court “shall consider” in imposing a sentence, the guidelines loom large on that list. Sections 3553(a)(4) and (a)(5) \textit{require} judges to consider the sentencing range established by the Guidelines and any policy statements issue by the Sentencing Commission. And since the Guidelines were written by the Commission with the objective of incorporating 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 Section 3553(a) means anything at all, it means that the Guidelines are supposed to carry significant, even if perhaps not absolutely determinative, weight in the sentencing decision of the district court. Moreover, as Justice Breyer was at pains to observe, the “reasonableness”

\textsuperscript{284}18 U.S.C. § 3553(b).
\textsuperscript{286}See generally, U.S.S.G. Ch. 5H (2008) (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).
\textsuperscript{287}Koon v. United States, 518 U.S. 81, 99-100 (1996).
\textsuperscript{288}See supra note 237, and accompanying text.
\textsuperscript{289}In 2004, 72% of all federal sentences imposed were within the applicable guideline range. Frank O. Bowman, III, \textit{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 fig. 2 (2006). Of those not imposed within the range, roughly 22% were the beneficiaries of a government-requested downward departure, and only 5.2% received non-guidelines sentences as a result of departures unsanctioned by the government. \textit{Id.} at 306 fig. 3A.
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 Section 3553(a). 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 Section 3553(b) and replacing the de novo standard of review in Section 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 Sentencing Reform Act deserves all the scorn that the dissenters and innumerable subsequent commentators have heaped upon it. Nonetheless, I am disposed to forgive the use of extraordinary measures in a rear-guard 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 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 fact-finding 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

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290 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 U.S. at 261.

291 *Id.* at 271-304 (Stevens, J., dissenting); *id.* at 304-13 (Scalia, J., dissenting).

292 See, e.g., 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. REP. 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”).

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question was whether the Court would explore the path suggested by Breyer or cling to Scalia’s seductive simplicity. In January 2007, in *Cunningham v. California*, 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. 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." 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." The rules went on to provide a non-exhaustive 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." 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 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 Associate Justice Samuel Alito, who during the two years since *Booker* had taken the seats of Justices Rehnquist and O’Connor. 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.

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294 Cal. Rules of Ct. 4.405 (Criminal Cases)(West2006).
295 Cunningham v. California, 127 S.Ct. at 862
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. In California, a sentencing judge only acquires the discretionary authority to imposed an upper-term sentence if he finds a non-element aggravating fact. Therefore, said Ginsburg, the California law violates the Sixth Amendment. 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. Accordingly, contends Alito, the California sentencing scheme is not constitutionally distinguishable from the federal remedial regime prescribed in Booker and thus should not be voided unless the Court is also prepared to abandon the Booker remedy.297

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, where judicial sentencing discretion exists, the exercise of that discretion cannot be subjected to the rule of law.298 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

297 "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 881 (Alito, J., dissenting).
298 See Carissa Byrne Hessick and F. Andrew Hessick, Appellate Review of Sentencing Decisions, 60 ALA. L. REV. 1, 36 (2008). Professors Hessick and Hessick argue, correctly, that in its Rita and Kimbrough 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.” 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.
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, quantity of drugs, amount of loss, role in the offense, and so forth). 299 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. 300 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 decision making 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

299 See, e.g. Cunningham, 127 S.Ct. at 856 (Kennedy, J., dissenting) (citing Douglas Berman & Stephanos Bibas, Making Sentencing Sensible, 4 OHIO ST. J. CRIM. L., 37, 55-57 (2006) (arguing for a constitutional distinction between offense and offender facts)).

300 As Justice Breyer noted in Blakely, 542 U.S. at 339-40, 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.
guidelines, or common-law judicial rule making. 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 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 (e.g., "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 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 choice to impose it was unreasonable.

2. **The Blakely Rule vs. 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. 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 decision making. 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 decision making 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. Section 3553(c) requires that the court provide a statement of the "specific reason for the imposition of a sentence" outside the guideline range, a requirement that obliges the court to find non-element facts to justify a sentence above the guideline range but below the statutory maximum. 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 U.S.C. §
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 Sentencing Reform Act's so-called parsimony provision provides that the sentencing court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in [18 U.S.C. § 3553(a)(2)]." 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.”

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. 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

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302 Cunningham v. California, 127 S.Ct. at 880.
303 “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 881 (Alito, J., dissenting).
made by a sentencing judge and not by a jury.\textsuperscript{304} 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 \textit{Booker}, or the \textit{Booker} remedy is fatally inconsistent with the Sixth Amendment as interpreted in \textit{Blakely}, or there is some constitutionally critical distinction between the pre- and post-\textit{Booker} guidelines that invalidates the former and preserves the latter.

The basic distinction between the pre- and post-\textit{Booker} guidelines is obvious. The pre-\textit{Booker} guidelines were very strongly presumptive while the \textit{Booker} remedial opinion made them dramatically less so. Or to phrase the point in terms of judicial discretion, the pre-\textit{Booker} guidelines severely constrained judicial sentencing discretion, while the \textit{Booker} remedial opinion markedly relaxed controls on that discretion. Justice Ginsburg’s \textit{Cunningham} opinion vigorously denies that generous grants of judicial sentencing discretion can save a system that violates the “bright line” rule of \textit{Blakely}.\textsuperscript{305} Given that Ginsburg was the sole justice in both \textit{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 \textit{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: either (a) reverse \textit{Blakely}, or (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.

\textbf{C. \textit{Rita v. United States: Just When You Thought It Couldn’t Get Wierder}}

In \textit{Rita v. United States}, the Court began trying to deal with the contradictions exposed by Justice Alito in \textit{Cunningham}. In \textit{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

\textsuperscript{304} \textit{Id.} at 880 (Alito, J., dissenting).
\textsuperscript{305} “We cautioned in \textit{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.” \textit{Id.} at 869.
properly calculated guideline range ... is presumptively reasonable." 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. 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. 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 refuses to resolve the split. Instead, he defines the question in a way that permits him to weasel out of a definitive answer. He writes: “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*.” He emphasizes that his ruling merely “permits” appellate courts to adopt a presumption of reasonableness, but does not require them to do so. In short, the Court holds that courts of appeals are at liberty to presume the reasonableness of within-range sentences or not, as suits them.

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 guideline sentence if it feels like it, but whether, after *Booker*, the legal

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307 *Rita* v. United States, 127 S.Ct. 2456, 2459 (2007). The Supreme Court originally granted certiorari in *Rita* intending that it comprise one of a pair of cases, along with *Claiborne* v. United States, No. 06-5618, presenting two aspects of the central question of the legal weight to be accorded properly calculated the federal guideline ranges. However, the petitioner in *Claiborne* died during the pendency of the appeal, see *Gall* v. United States, 128 S.Ct. 586, 591 (2007), leaving only Mr. Rita’s case for decision by the Court. The issues raised in *Claiborne* were decided in the next term in *Gall*. For a description of the issues presented by *Claiborne*, see Bowman, *Which Is to Be Master*, supra note 292, at 158-59.
308 *Rita*, 127 S.Ct. at 2459.
309 Id. at 2462 (emphasis added).
310 Id. at 2467 (“The fact that we permit courts of appeals to adopt a presumption of reasonableness…”).
nature of the Guidelines is such that they command such a presumption. 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 vs. 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.\(^{311}\) 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 Section 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.” 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 with the range recommended
by the Sentencing Commission.\(^{312}\)

Interestingly, Justice Breyer strongly implies, but never quite says, that sentencing judges
may not accord guidelines ranges presumptive weight.\(^{313}\) 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 correctness.\(^{314}\) 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:

\(^{311}\) *Id.* at 2465 (“We repeat that the presumption before us is an *appellate* presumption.” Emphasis in original.)
\(^{312}\) *Id.* at 2468.
\(^{313}\) *Id.* at 2466-68
\(^{314}\) *Id.* at 2465-67.
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 factfinding in disparagement of the jury right and will sentence within the high subrange. 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 factfinding to justify a sentence outside the Guidelines range.315

3. Justice Scalia’s Dissent 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,316 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.317 He then argues that because the Booker remedial structure as described by Justice Breyer in Rita envisions substantive appellate review, it must also violate the Sixth Amendment.318 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.”319 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

315 Id. at 2488 (Souter, J., dissenting).
316 Id. at 2475.
317 Id. at 2475-76 ("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.")
318 Id. at 2475-78.
319 Id. at 2476.
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. Scalia’s Sixth Amendment comes to this: a legislature can make sentencing rules triggered by jury fact-finding 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 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. Nor can he ban them from relying on those facts to determine the proper sentence. Nor, one presumes, would he even 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);

320 “[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.” Id. at 2479.
321 “To be clear, I am not suggesting that the Sixth Amendment prohibits judges from ever finding any facts.” Id. at 2477.
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.” 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 for a district court’s failure to provide an explanation of his 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, i.e., 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’ argument that “a district court which discriminates against Yankee fans is acting in a procedurally ‘impeccable’ way.” 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 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

322 Id. at 2482-83.
323 Id. at 2483 n. 6.
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. 324
Squirm how he will, Scalia cannot escape from his own logical box.

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

The Supreme Court has decided five more Sixth Amendment sentencing cases in the two
years since 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, 325 which dealt
with the degree to which a district court is obliged to defer to the policy judgments by 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. 326 He
was therefore subject to a ten-year mandatory minimum sentence based on the quantity of crack
he possessed, 327 plus a consecutive five-year mandatory minimum term for possessing a firearm
in connection with a drug crime. 328 However, his guidelines range was even higher -- 228-270
months, or 19 to 22.5 years. 329 The district judge determined that a sentence in the guideline
range would be “greater than necessary,” in large measure because the high guideline range was
driven by the controversial 100-1 powder-to-crack weight ratio that prescribes far harsher
punishments for crack defendants than for those who possess an equivalent amount of powder
cocaine. 330 Accordingly, the court sentenced Kimbrough to the fifteen-year statutory

324 Id. at 2479-80.
326 Kimbrough v. United States, 128 S.Ct. at 564-65.
327 Possession with intent to distribute more than 50 grams of crack cocaine carries a mandatory minimum sentence
328 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 U.S.C. § 924(c)(1)(A).
329 Kimbrough v. United States, 128 S.Ct. at 565.
330 Id.
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minimum. 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.”

The question presented to the Supreme Court was whether a district court could justify a downward variance from a properly calculated guideline 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. 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, then 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 insists that, “While rendering the Sentencing 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.’” She then sets up a differential standard of review for different types of variance from the guidelines. She quotes 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,” but observes 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.” Moreover, the Kimbrough opinion seems to rely heavily on the peculiar history of the crack-powder disparity. To make a long story

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331 Id.
333 Kimbrough v. United States, 128 S.Ct. at 564.
334 Id. at 574 (quoting Rita v. United States, 127 S.Ct. 2456, 2465 (2007)).
335 Id. at 574-75 (quoting Rita v. United States, 127 S.Ct. 2456, 2465 (2007)).
336 Id. at 575.
short, the Court plainly implies 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 100-1 ratio. The opinion exudes 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.\(^{337}\)

2. **Gall v. United States**

On the same day it issued Kimbrough, the Court also decided *Gall v. United States*,\(^{338}\) which addressed the weight a court of appeals can accord a properly calculated guidelines range as part of reasonableness review.\(^{339}\) 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 abandoned involvement with drugs three-and-one-half years before his indictment, graduated from college, and become productive member of the community.\(^{340}\) Based on Gall’s voluntary withdrawal from the drug conspiracy and his post-offense conduct, the district court imposed a sentence of 36 months probation instead of a term within the applicable guideline range of 30-37 months imprisonment.\(^{341}\) The Eighth Circuit reversed. It invoked a general rule that a sentence imposed within a properly calculated guideline range is presumptively reasonable, while one outside the guideline 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.”\(^{342}\) 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.”\(^{343}\)

\(^{337}\) Indeed, *Kimbrough* strongly implies that judges should give greater deference to the policy judgments of the Sentencing Commission than those of Congress itself.


\(^{339}\) The Court had intended to address this issue in Claiborne v. United States, 551 U.S. __, 127 S.Ct. 2245 (2007), a companion case to Rita v. United States, 551 U.S. __, 127 S.Ct. 2456 (2007); however, the case was mooted by Claiborne’s death during the pendency of the appeal. The Court granted certiorari in *Gall* to address the question left unanswered by the mooting of *Claiborne*. Gall v. United States, 128 S.Ct. 586, 591 (2007). *Kimbrough* v. United States, 128 S.Ct. 558 (2007), raised a variant of the same problem, Gall v. United States, 128 S.Ct. at 591-92.

\(^{341}\) Id. at 593.

\(^{342}\) United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) (*quoting* Claiborne v. United States, 439 F.3d, 479, 481 (8th Cir. 2006)).

\(^{343}\) Gall v. United States, 128 S.Ct. at 594.
The Supreme Court reversed. 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 develop *Blakely-Booker* doctrine -- and so it stepped into the Twilight Zone.\(^{344}\) Justice Stevens, writing for a 7-2 majority, insisted that an appellate rule “requiring ‘proportional’ justifications for departures from the Guidelines is not consistent with” *Booker*.\(^{345}\)

Stevens’ first contention is that a rule of proportionality comes “too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range.”\(^{346}\) 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.\(^{347}\) 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.\(^{348}\) 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

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\(^{344}\) 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 U.S.S.G. §2D1.1. Therefore, as explained above, *supra* note 284, the mere fact of conviction generated no base offense level and no guideline 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 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*, 128 S.Ct. at 577 (Thomas, J., dissenting), and dissented in *Gall* because “the District Court committed statutory error when it departed below the applicable Guidelines range.” *Gall v. United States*, 128 S.Ct. at 603 (Thomas, J., dissenting).

\(^{345}\) *Gall v. United States*, 128 S.Ct. at 594.

\(^{346}\) *Id.* at 595.

\(^{347}\) *Rita v. United States*, 127 S.Ct. at 2467 (“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.”).

\(^{348}\) *Gall v. United States*, 128 S.Ct. at 594, 597.
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.

Although Stevens dissented from the *Booker* remedy of advisory guidelines, in *Rita*, he
accepted the *Booker* remedy as a matter of *stare decisis*, and in *Gall*, he takes up the task of
defending it. Therefore, he has 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 logically incompatible with an appellate presumption of reasonableness for
within-range sentences, but represents a *volte 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.”

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* which must necessarily be found by

351 Id. at 2474 (emphasis in original).
the district court for it to become part of the appellate record and thus a proper consideration in reasonableness review.

Stevens’ 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”352 as an impermissibly “mathematical approach.”353 As Justice Alito notes in dissent,354 Stevens mischaracterizes the Eighth Circuit’s position as requiring some rigid arithmetic relationship between the strength of the justification and degree of variance,355 when the court of appeals plainly meant only that the extent of the variance from the range must be considered in assessing the adequacy of the justification. But the most remarkable feature of Stevens’ 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.”356 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.”357 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.358 Appellate courts are then to review the substantive reasonableness of the sentence “including the extent of any variance from the Guidelines range.”359 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,

352 United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006) (quoting Claiborne v. United States, 439 F.3d , 479, 481 (8th Cir. 2006)).
353 Gall v. United States, 128 S.Ct. at 595-96.
354 Id. at 609 (Alito, J., dissenting).
355 “[T]he mathematical approach assumes the existence of some ascertainable method of assigning percentages to various justifications.” Id. at 596.
356 Id. at 597.
357 Id. (Emphasis added.)
358 Id. (Emphasis added.)
359 Id. (Emphasis added.)
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 which 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 and Nelson v. United States.

3. The 2009 Federal Sentencing Cases: Nelson and Spears

In Nelson v. United States, 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.

Spears v. United States, a notably cranky and peremptory per curiam opinion, 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. 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 preditions for those of the

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363 Justices Roberts and Alito dissented on the ground that the petition presented a genuinely difficult question inappropriate for plenary review. 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).’” Spears v. United States, 129 S.Ct. at 845.
364 Id. at 843-44.
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Commission whenever it suits them.\textsuperscript{365} 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 \textit{sui generis} because the 100-1 crack-powder ratio remained in the guidelines due to congressional intransigence and despite the Commission’s expert judgment that it should be changed. 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 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.”\textsuperscript{366} 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. \textit{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 \textit{Oregon v. Ice}\textsuperscript{367} -- 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.\textsuperscript{368} Some jurisdictions presume that sentences for multiple counts of conviction should run consecutively absent a judicial finding of cause for imposing concurrent


\textsuperscript{366} Spears, 129 S.Ct. at 843.

\textsuperscript{367} 129 S.Ct. 711 (Jan. 14, 2009).

\textsuperscript{368} \textit{Id.} at 714 (asserting that the majority of states fall into this category).

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sentences. And some jurisdictions, including Oregon, “constrain judges’ discretion by requiring them to find certain facts before imposing consecutive, rather than concurrent, sentences.”

Mr. 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. 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 maximum for any single count. One would have thought that this case would be a slam-dunk winner for Ice. In Cunningham v. California, 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….” 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.

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. But read in the context of the Blakely line, Ice feels like an excursion into a judicial version of Bizarro World of old Superman comics, a planet inhabited by inverted doppelgangers of Earth people and governed by the rule that, “Us do opposite of all Earthly things.” 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.” This

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369 Id. (identifying Florida, Kansas, and Mississippi as falling into this category).
370 Id.
371 Id. at 716.
372 Id.
373 Cunningham, 549 U.S. at 863-64.
375 Ice, 129 S.Ct. at 717.
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 fact-finding should be based on the effects of particular facts on sentencing outcomes, rather than on the names legislatures gave facts or clusters of facts.\(^{376}\) But in *Ice*, Ginsburg and Stevens vote to reintroduce legislative nomenclature as a decisive factor in Sixth Amendment analysis. Legislatures are now effectively precluded from structuring judicial discretion within the range assigned to a single “discrete crime,” but are apparently at liberty to structure judges’ control over the interaction between sentences for different “discrete crimes.”

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.\(^{377}\) 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. 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. An almost infinite variety of even more complicated rules can be imagined. And

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\(^{376}\) 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.” Id. at 720 (Scalia, J., dissenting).

\(^{377}\) As noted above, guidelines based on judicial fact finding 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.
given the prevalence of cases with multiple counts, such rules could be crafted to drive sentencing outcomes for a substantial fraction of defendants.\textsuperscript{378}

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 \textit{Ice}, which involved “multiple offenses different in character or committed at different times,”\textsuperscript{379} from previous cases in the \textit{Apprendi} line, which, she asserts, dealt only with limits on sentences for a “discrete offense.” But this distinction implies that there may still be a right to jury determination of facts necessary to the imposition of consecutive sentences for offenses which 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 fact finding 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.\textsuperscript{380}

As potentially troublesome as Justice Ginsburg’s rule is, the most jawdropping feature of the \textit{Ice} opinion is the list of justifications for its result. As Justice Scalia takes rather malicious pleasure in noting in dissent,\textsuperscript{381} the explanatory section of the \textit{Ice} opinion is little more than a compilation of the arguments rejected by the majority opinions in \textit{Apprendi}, \textit{Blakely}, and \textit{Cunningham} – all opinions joined or written by Justices Ginsburg (\textit{Cunningham}) and Stevens (\textit{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.\textsuperscript{382} But, as Justice Scalia correctly notes, in \textit{Blakely}, the Court voided Washington’s sentencing guidelines and proclaimed irrelevant the fact that judges, not juries, had

\textsuperscript{378} Particularly if rules governing imposition of consecutive sentences were combined with rules requiring minimum sentences, as permitted by Harris v. United States, 536 U.S. 545 (2002), one could create a substantial web of constraint on judicial discretion.

\textsuperscript{379} \textit{Ice}, 129 S.Ct. at 717.

\textsuperscript{380} For a discussion of the complications involved in determining whether a criminal incident ought to be charged as one or multiple crimes, \textit{see} Jeffrey Chemerinsky, Note, \textit{Counting Offenses}, 58 DUKE L.J. 709 (2009).

\textsuperscript{381} \textit{Id}. at 721-22.

\textsuperscript{382} \textit{Id}. at 717-18.
traditionally controlled determination of sentence length within the prescribed statutory maximum. 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. But this solicitude for state sovereignty was completely absent when Stevens and Ginsburg voted to void New Jersey, Washington, and California sentencing statutes in Apprendi, Blakely, and Cunningham. (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.)

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.” 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.” Surveying the nationwide festival of confusion that has been the primary product of the Court’s Sixth Amendment jurisprudence since Apprendi, one doesn’t know whether to laugh or cry.

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383 Id. at 721.
384 Id. at 718-19.
385 Id. at 719 (internal citations omitted).
386 Id.
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 help guide the Court to a better place?

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 25 years of work 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, 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). (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. (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 application of 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,” 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, but a trial judge may not refer to such a range as “presumptively correct,” even though a court of appeals may treat a sentence within it as “presumptively reasonable.” (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 fact-finding 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. 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 sentencing-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 Guidelines became effective in 1987. As for sentence-affecting facts, in federal cases, virtually the only class of facts now pled and proven to juries that was not always pled and proven is drug quantity in cases involving amounts triggering simultaneous increases in statutory maximum and minimum sentences under Title 21 – and the Justice Department made that change in charging practices in 2000 in response to Apprendi. 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.

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387 The data in Figure 1 is derived from U.S. SENTENCING COMMISSION, 2008 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 22, fig C (hereinafter “2008 SOURCEBOOK”); and U.S. SENTENCING COMMISSION, 2003 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at 22, fig. C (hereinafter “2003 SOURCEBOOK”).
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 Bibas and Klein, all or parts of the sentencing schemes of nineteen or twenty states ran afoul of *Blakely*; 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. 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 available, 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, but as shown in Figure 2, the jury trial rate actually declined slightly in succeeding years.

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391 Id. at 801 tbl. IV (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).


393 The data in Figure 2 is derived from the 2001-2002 through 2007-2008 editions of the NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES.
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 sentencing-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% of all felony cases might theoretically involve sentence enhancements subject to the *Blakely* rule, and both before and after *Blakely*, more than 90% of such cases resulted from pleas. Since *Blakely*, the number of aggravated departures has declined slightly while the percentage of such cases resulting from plea bargains has increased. By 2007, only 859 or 5.3% of all felony convictions resulted in aggravated departures.

Fig. 2: North Carolina Trial Rate


**MINNESOTA SENTENCING GUIDELINES COMMISSION, THE IMPACT OF BLAKELY V. WASHINGTON ON SENTENCING IN MINNESOTA: SHORT TERM RECOMMENDATIONS**, 6 (Aug. 6, 2004) ([http://www.msgc.state.mn.us/data_reports/blakely_shortterm.pdf](http://www.msgc.state.mn.us/data_reports/blakely_shortterm.pdf)) (reporting that in 2002 there were 1002 aggravated departures potentially subject to the Blakely rule out of a total of 12,978 cases, or 7.7% of the total, and that only 79 of the 1002 aggravated departure cases went to trial).

Beginning in 2004, the numbers of 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 Commission, Data on Aggravated Departures, prepared by Jacqueline Kraus, Minnesota Sentencing Commission (on file with author).
departures and only 27 of those cases, or 0.16% resulted from trials. Thus, in Minnesota, Blakely’s “product” is jury findings of sentence-affecting facts in 27 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. But as shown in Figure 3, despite the July 2005 law setting forth a procedure for juries to find of 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. Given that the North Carolina guilty plea rate is around 98%, the number of cases in which North Carolina juries now determine sentence-affecting facts they would not have addressed before Blakely cannot exceed a few dozen per year.

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396 In 2007, there were 16,168 felony convictions in Minnesota. MINNESOTA SENTENCING GUIDELINES
COMMISSION, SENTENCING PRACTICES: ANNUAL SUMMARY STATISTICS FOR FELONY OFFENDERS SENTENCED IN

397 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. Phone conversation with Ronald Wright, July 22, 2009.

(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).

399 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 39 such cases would have gone to trial.
Figure 3: North Carolina Aggravated Sentences in Cases Where Prison Imposed

<table>
<thead>
<tr>
<th>Year/Year</th>
<th>Total Cases</th>
<th>Prison Cases</th>
<th># Sentences in Aggravated Range</th>
<th>% Sentences in Aggravated Range</th>
<th>Overall Jury Trial Rate</th>
<th>Jury Trial Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2007/08</td>
<td>12,011</td>
<td>387</td>
<td>3.22%</td>
<td>1.99%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006/07</td>
<td>11,515</td>
<td>333</td>
<td>2.89%</td>
<td>2.05%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005/06</td>
<td>10,874</td>
<td>302</td>
<td>2.72%</td>
<td>1.99%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004/05</td>
<td>10,217</td>
<td>314</td>
<td>3.07%</td>
<td>2.17%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003/04</td>
<td>9,938</td>
<td>693</td>
<td>6.97%</td>
<td>2.49%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002/03</td>
<td>9,229</td>
<td>649</td>
<td>7.03%</td>
<td>2.37%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001/02</td>
<td>9591</td>
<td>660</td>
<td>6.88%</td>
<td>2.58%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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 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 tail-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 a Sixth Amendment jury trial problem –
what facts are of sufficient sentencing consequence to be deemed “elements” reserved to juries? – with a Fifth and Fourteenth Amendment due process problem – 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 triggered mandatory minimum sentences (McMillan and Harris) or criminal history facts raising real statutory maximums (Almendarez-Torres). 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 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 fact-finding necessary to structured sentencing regimes. For Justice Scalia, who dislikes anything that smacks of balancing tests or sliding scales, 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.400

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400 As for the other two members of the current Court. Chief Justice Roberts’ 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
Because of the Court’s fragmentation and 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 which applauds the effects of the jury right’s new overbreadth, particularly the transformation of the Federal Sentencing Guidelines into an “advisory” system. 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 mandatory 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. 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 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.401

As shown in Figure 4, the percentage of federal cases sentenced within the applicable guideline range dropped by roughly 10% in the quarter following the January 2005 Booker decision, from roughly 72% to roughly 62%, and has drifted slightly further down in the ensuing

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401 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, “E pur si muove,” meaning “and yet it moves.” http://en.wikipedia.org/wiki/E_pur_si_muove!. 
three years to roughly 58%. 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 Guidelines look and feel like law. They are passed by an administrative agency whose expertise the Court continues to praise and approved by Congress. Their use remains mandatory. 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 10-15% less gravitational pull than before.

Figure 4: Sentences Relative to Guideline Range (2005-2009)

But because the Guidelines are now formally “advisory,” the due process component of the tail-wags-dog argument now has less traction than ever, or to put it more formally, the constitutional argument for heightened due process rights for determination of the 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

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402 Data in Figure 4 is drawn from U.S. SENTENCING COMMISSION, SECOND QUARTER FY09 QUARTERLY SENTENCING UPDATE, at 12 tbl. 4 (2009) (http://www.uscc.gov/linktojp.htm).
403 See, e.g., Rita v. United States, 127 S.Ct. at 2463-65; Kimbrough v. United States, 128 S.Ct. at 574-75.
Debacle: How the Supreme Court Has Mangled American Sentencing Law -- Bowman

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 retroactive⁴⁰⁴), the mean remains higher than it was before *Blakely* 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. 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 Obama Administration prosecutors relax their approach to sentencing in the same way as did the Clinton-era Justice Department.⁴⁰⁵ But so long as the current Guidelines remain in effect, advisory or not, they will discourage any general decline in sentencing severity while retaining their potential as a political vehicle for increasing sentences on whatever crimes enrage the public and inflame Congress.⁴⁰⁶ 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.

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⁴⁰⁶ Bowman, *Failure of Guidelines*, supra note 223 (describing the structural and political factors that make the federal guidelines a one-way upward ratchet).
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.

That anyone maintains the conviction that *Booker* represents even a qualified success is a testament 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 could affect results. These are not frivolous reactions, but it is difficult to justify a constitutional revolution on the ground that it affords 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
Debacle: How the Supreme Court Has Mangled American Sentencing Law -- Bowman

regimes in roughly a dozen states been abandoned or downgraded to advisory status, 407 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’ national experience with structured sentencing teaches is that, while institutional structures and relationships are very important, 408 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. 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. 409 Yet the Court’s regrettable misconstructions 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.

407 See supra notes 395-397, and accompanying text.
408 See Frank O. Bowman, III, Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After Blakely, 2005 U. CHI. LEG. FORUM 149 (describing the importance of system architecture and institutional relationships to building a sound sentencing system).
409 Signs of moderation at the federal level include a bill passed out of the House Judiciary Committee on July 29, 2009, to eliminate the crack powder disparity, see http://judiciary.house.gov/news/090729.html; consideration by the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security of the problem of over-criminalization of conduct, see http://judiciary.house.gov/hearings/hear_090722_2.html, and of measures to the eliminate or reduce the effect of mandatory minimum sentences, see http://judiciary.house.gov/hearings/hear_090714.html; and the creation of a task force within the Department of Justice to reexamine the Department’s approach to sentencing policy.
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 long as the variation remains within the hard limits created by proof of elements.

4. Proof of the facts upon which the application of guidelines depend is subject to flexible constitutional due process protections. 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 completely) 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. Presumptive guidelines should probably trigger enhanced procedural

410 There is plain Supreme Court precedent for this approach. See Matthews v. Eldridge, 424 U.S. 319, 334 (1976).
protections in areas such as discovery and confrontation rights, and perhaps burden of proof.

5. Guidelines in which proof of specified facts triggered rules too narrowly restrictive of judicial sentencing discretion would be deemed to violate the Sixth Amendment inasmuch as the guidelines facts in such 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 requiring reversal of both Harris and Almendarez-Torres. But abandonment 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.

Similarly, those of Justice Scalia’s turn of mind will doubtless object that introducing a flexible due process standard to sentencing fact-finding 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 Judge Sonia Sotomayor’s nomination 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 recent 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 an appellate judge on the Second Circuit throughout the period since Apprendi, Justice Sotomayor has been personally involved in trying to sort through the sea of troubles the Court’s work has created for lawyers and trial and appellate courts. Having no personal investment in the Blakely adventure and considerable experience of its practical deficiencies, one suspects she would be open to change.

More to the point, although as an inferior court judge, she has not been in a position to say how she views the the Blakely-Booker approach to sentencing, her opinions, particularly her dissent from the en banc Second Circuit opinion in United States v. Cavera,\textsuperscript{412} strongly suggest that she views the move to nearly unfettered trial court sentencing discretion as a bad thing. In

\textsuperscript{412} 550 F.3d 180, 216 (2008).
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. The majority concluded, in effect, that appellate deference ought to be nearly absolute. 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.’”

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

The replacement of Justice Souter by a Blakely-Booker skeptic, particularly at a moment when, as evidenced by Ice, enthusiasm for Justice Scalia’s confounding simplicities may be waning in Justices Stevens and Ginsburg may start a discussion that could, if we are all very lucky, 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 use.

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413 Kimbrough, 128 S.Ct. at 574-75.