The Canine Metaphor and the Future of Sentencing Reform: Dogs, Tails, and the Constitutional Law of Wagging

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THE CANINE METAPHOR AND THE FUTURE OF SENTENCING REFORM: DOGS, TAILS, AND THE CONSTITUTIONAL LAW OF WAGGING

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The statute gives no impression of having been tailored to permit the [sentencing] finding to be a tail which wags the dog of the substantive offense.[1]

When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."[2]

What this means in operation is that the law must not go too far—it must not exceed the judicial estimation of the proper role of the judge.[3]

I. INTRODUCTION

OVER the last seven years, in what is commonly referred to as the *Apprendi* line of cases, the United States Supreme Court has promulgated an audacious and controversial constitutional law of sentencing characterized by thinly veiled disdain for legislative sen-

1. McMillan v. Pennsylvania, 477 U.S. 79, 88 (1986). The unaltered quote reads: "The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." The challenged statute, upheld as constitutional by the Supreme Court, required imposition of a mandatory minimum penalty pursuant to the sentencing judge's finding that McMillan had "visibly possessed a firearm" during an aggravated assault offense. *See id.* at 81-82 & n.1. Actually, McMillan had done much more than simply visibly possess the gun; in fact he had fired it, shooting his victim in the buttocks. *See id.* at 82.

2. Apprendi v. New Jersey, 530 U.S. 466, 495 (2000) (quoting *McMillan*, 477 U.S. at 88).

3. Blakely v. Washington, 542 U.S. 296, 306-07 (2004).

tencing reform measures and high regard for judicial discretion in punishing offenders.[4] The Court's opinions have asserted that its newfound constitutional principle is necessary to safeguard defendants' Sixth Amendment right to trial by jury against legislative encroachment. In truth, the only interest being preserved is judges' assessment of their own importance.

The doctrinal and practical effects of the new sentencing doctrine have been profound. Although the Court has sustained the validity of some sentencing measures, including a statutory mandatory minimum punishment in *Harris*,[5] the broader course of its decisions has invalidated most forms of common and politically popular sentencing laws that limit judicial sentencing discretion, such as a statutory sentence enhancement in *Apprendi* and a system of mandatory state sentencing guidelines in *Blakely*.[6] In 2005 the doctrine culminated in a "coup de grace" against legislative authority: the ruling in *Booker* that the application of sentence-enhancement provisions in calculating punishment under the Federal Sentencing Guidelines is unconstitutional unless the Guidelines are given only advisory, rather than mandatory, effect on the decisions of sentencing judges.[7]

Blakely and *Booker* in particular have exposed just how hopelessly flawed and analytically bankrupt the proffered Sixth Amendment analysis is. The principle set forth by the Court has become absurdly formalistic to the point that when it is applied to the determination of individual sentences, it now produces divergent outcomes in otherwise identical cases. The Court's expressed justifications for its constitutional analysis cannot explain this troubling development, but examining the true constitutional interests at stake does.

Deciding upon an individual offender's particular sentence is not a unitary exercise, but in fact consists of three separate and distinct decisions: the adjudication of offense element facts, the adjudication of additional punishment facts, and the determination of the punishment value of those facts. Different constitutional interests are implicated by each kind of determination, yet too often the necessary analytical precision is lacking in the Court's opinions. The tripartite analytical framework reveals that beneath the superficial camouflage of its Sixth Amendment analysis, the Court in fact has decreed as constitutional law a specific, contestable, and highly controversial normative vision of the nature of criminal sentencing.

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4. In order of decision, those cases are: Almendarez-Torres v. United States, 523 U.S. 224 (1998); Monge v. California, 524 U.S. 721 (1998); Jones v. United States, 526 U.S. 227 (1999); *Apprendi*, 530 U.S. 466; United States v. Cotton, 535 U.S. 625 (2002); Harris v. United States, 536 U.S. 545 (2002); Ring v. Arizona, 536 U.S. 584 (2002); *Blakely*, 542 U.S. 296; United States v. Booker, 543 U.S. 220 (2005).

5. *See Harris*, 536 U.S. at 568-69.

6. *Blakely*, 542 U.S. 296; *Apprendi*, 530 U.S. at 497.

7. *Booker*, 543 U.S. at 227, 245.

On one level the Court's vision has pronounced a new balance of power between legislatures and judges concerning the adjudication of offense elements and additional punishment factors. The Court has reduced legislative and prosecutorial power, but it has not shifted that power to the trial jury; instead it has shifted that power to the sentencing judge. Seen in this light, the real function played by the Court's principle is not protection of the jury's province in criminal cases, but instead the protection of the sentencing judge's authority to pass judgment on individual offenders. At this level alone the Court's conclusions are subject to numerous critiques. It is far from clear that anything in the Constitution, much less the Sixth Amendment, mandates the Court's conclusions about this aspect of the nature of sentencing.

But the Court's vision of the nature of sentencing is not limited to issues of institutional balance of power in adjudicating facts. It strikes at an even deeper theoretical controversy concerning the most basic objectives of criminal sentencing. Imposing a sentence upon a convicted offender also requires the determination of the punishment values of the facts and circumstances that exist in any given case. That is, it must be decided how much weight each proven fact carries in assessing the severity or leniency of the punishment appropriate to the particular offense and offender.

Beneath all discussions of sentencing reform lurk two fundamentally irreconcilable normative positions regarding the objective to be pursued in making determinations of the punishment value of facts. One maintains that justice is served by ensuring that the appropriate degree of individualized punishment is imposed based on the particular facts and circumstances of each case. The other, a prominent legacy of contemporary sentencing reform debates, maintains that justice is served by ensuring systemic equality across all cases so that similarly situated defendants are given similar sentences. Just as it has imposed a certain vision of the institutional balance between judges and legislatures, so too the Court has restricted attempts to reconcile these competing normative positions.

For all its silliness, then, the Court's canine metaphor—that the sentencing "tail" must not "wag" the offense "dog"—nonetheless successfully isolates the fundamental issue of constitutional criminal procedure involved in the *Apprendi* line of cases, the constitutional law of sentencing, and debates about sentencing reform generally. The offense of conviction has paramount status; sentencing is a secondary, derivative enterprise. The tail is important, but ultimately it is the dog that is in control. So too with the constitutional law of sentencing, which must ensure that the offense of conviction wags the sentence, and not the other way around.

The metaphor also helps to illustrate the flaws in the constitutional law of sentencing promulgated by the Court. The terms of the debate about the reasoning of the *Apprendi* line of cases and the future of sentencing reform must be changed. Discussion of Sixth Amendment formalisms

must be replaced with deliberation over the proper institutional balance of power in criminal sentencing. Likewise, debate over procedural requirements for adjudicating facts must not be allowed to obscure the deeper controversy over the objectives to be pursued when determining the punishment values of those facts. Otherwise the Supreme Court's unilateral imposition of particular doctrinal and normative choices—about what counts as the dog and the tail, and what counts as unconstitutional wagging—will go unanswered.

II. THE *APPRENDI* RULE AFTER *BLAKELY* AND *BOOKER*

The Court's new constitutional law of sentencing flows from its adoption and implementation of the *Apprendi* doctrine ("the Rule"). Deceptively easy to state but much more difficult to understand and apply in its nuances, the Rule provides the following: "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."[8] The Rule's constitutional source, and its application to sentencing laws, have been explained and elaborated in the *Apprendi* line of cases, most recently in *Blakely* and *Booker*.

A. SOURCE OF THE RULE.

Throughout the *Apprendi* line of cases, the Court has described the Rule as deriving from the Sixth Amendment guarantee of trial by jury in criminal cases.[9] For example, in *Blakely* the Court stated that its "commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right to a jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[10] Viewed in these terms, the Rule's requirement that certain sentence enhancements be proven to the trial jury is not simply a resolution of a disputed question of procedure regarding the identification of the finder of fact and burden of proof. Instead, the purported constitutional defect in statutes that violate the Rule is an infringement upon the trial jury's prerogative to adjudicate the defendant's guilt of the charged offense and thereby also create exposure to the punishment available for that offense under the law.

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8. *Apprendi*, 530 U.S. at 490. The recidivism exception—"other than the fact of a prior conviction"—is analyzed in other sources. *See* Benjamin J. Priester, *Structuring Sentencing:* Apprendi, *the Offense of Conviction, and the Limited Role of Constitutional Law*, 79 IND. L.J. 863, 876-78 (2004); *see also, e.g.*, Douglas A. Berman, *Conceptualizing* Booker, 38 ARIZ. ST. L.J. 387, 418-19 (2006); Daniel Doeschner, Note, *A Narrowing of the Prior Conviction Exception*, 71 BROOKLYN L. REV. 1333 (2006). A majority of the Court no longer supports the existence of the recidivism exception, however, so its overruling may be imminent. *See* Shepard v. United States, 544 U.S. 13, 27 (2005) (Thomas, J., concurring).

9. *See, e.g.*, *Booker*, 543 U.S. at 235-37; *Blakely*, 542 U.S. at 301-02, 305-14; *Apprendi*, 530 U.S. at 476-90; *id.* at 498-99 (Scalia, J., concurring); *id.* at 500-23 (Thomas, J., concurring).

10. *Blakely*, 242 U.S. at 305-06.

It is the jury's verdict of guilty—or the waiver of that right in a guilty plea—that exposes the defendant, now the convicted offender, to the penalties enacted for the offense of conviction.[11] As the *Apprendi* Court explained:

> The historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided highlight the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.[12]

Sentence enhancements that violate the Rule, therefore, are tantamount to convicting the defendant of an aggravated offense without proving that greater charge to the trial jury beyond a reasonable doubt as the Sixth Amendment mandates. By insisting that such enhancements be treated identically with criminal offenses and their constituent elements, the Rule ensures that it is the offense dog which wags the sentencing tail.

B. Application of the Rule

The *Apprendi* Rule imposes a limited, highly formalistic constitutional constraint on the sentencing of a convicted offender.[13] The Rule mandates that those factual findings which determine or increase the "statutory maximum" penalty for a crime must be established as elements of the offense—that is, either proven to a jury beyond a reasonable doubt at trial or admitted by the defendant pursuant to a guilty plea.[14] When applying the Rule to statutes that define offenses or regulate sentences, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in" the offense elements so established.[15] Legally binding, nonstatutory provisions of law that restrict a judge's sentencing discretion, such as the Federal Sentencing Guidelines, also create "statutory maximum" sentences for purposes of the Rule.[16] On the other hand, the Rule does not completely prohibit the consideration of sentencing factors—that is, additional findings of fact made by a judge by a preponderance of the evidence at a sentencing hearing—so long as they do not alter the "statutory maximum" penalty, but rather determine the appropriate sentence within that *Apprendi* max-

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11. *See Apprendi*, 530 U.S. at 478-83.

12. *Id.* (emphasis omitted).

13. Other sources provide thorough and detailed analyses of this aspect of the *Apprendi* Rule. *See* Priester, *supra* note 8, at 873-75.

14. *See, e.g.*, *Booker*, 243 U.S. at 231, 244; *id.* at 795 (Thomas, J., dissenting); *Blakely*, 124 S. Ct. at 2537; Ring v. Arizona, 536 U.S. 584, 602-04 (2002).

15. *Booker*, 243 U.S. at 228 (quoting *Blakely*, 242 U.S. 296); *see also, e.g.*, *Ring*, 536 U.S. at 588-89, 597; Harris v. United States, 536 U.S. 545, 557 (2002); *Apprendi*, 530 U.S. at 482 n.9, 483. When statutes are involved, the Rule applies not only to those provisions that expressly define offense elements, but also to those provisions that are labeled merely as regulating sentences. *See Ring*, 536 U.S. at 602-05; *Apprendi*, 530 U.S. at 476-78, 491-96.

16. *See Booker*, 243 U.S. at 227, 231-33; *Blakely*, 242 U.S. at 303-04.

imum.[17] Thus, even after *Blakely* and *Booker*, the Rule leaves significant room for the determination of an individual offender's punishment on the basis of facts that were not established as elements of the offense.

1. *Defining Statutory "Maximum" Sentences*

The Rule applies to statutory provisions that link the severity of the penalty for an offense to specified facts relating to its commission.[18] For example, the federal carjacking offense provides for a sentence of up to fifteen years' imprisonment, and for an enhanced sentence of up to twenty-five years' imprisonment if serious bodily injury results from the carjacking.[19] In *Jones* the Court held that the Rule required that the fact of serious bodily injury be established as an element of the offense before a sentence longer than fifteen years could be imposed.[20] Similarly, the New Jersey criminal code in *Apprendi* provided for a sentence of five to ten years for a weapons offense, and for an enhanced sentence of ten to twenty years if the offense was committed as a hate crime.[21] The Rule invalidated a sentence of twelve years because the hate-crime motive had not been established as an element of the offense.[22] Likewise, the Arizona statutes in *Ring* compelled the finding of additional facts to justify

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17. *See, e.g.*, *Harris*, 536 U.S. at 549-50, 564; *Ring*, 536 U.S. at 611-12 (Scalia, J., concurring); *Apprendi*, 530 U.S. at 476, 478, 494 & n.19.

18. Prior to *Blakely*, the scholarly commentary on the Court's analysis already was growing rapidly. *See* Stephanos Bibas, *Back from the Brink: The Supreme Court Balks at Extending* Apprendi *to Upset Most Sentencing*, 15 FED. SENT'G REP. 79 (2002); Stephanos Bibas, *How* Apprendi *Affects Institutional Allocations of Power*, 87 IOWA L. REV. 465 (2002); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097 (2001); Stephanos Bibas, Comment, Apprendi *and the Dynamics of Guilty Pleas*, 54 STAN. L. REV. 311 (2001); Nancy J. Gertner, *What* Harris *Has Wrought*, 15 FED. SENT'G REP. 83 (2002); Susan N. Herman, *Applying* Apprendi *to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615 (2002); Joseph L. Hoffmann, Apprendi v. New Jersey*: Back to the Future?*, 38 AM. CRIM. L. REV. 255 (2001); Kyron Huigens, Harris, Ring, *and the Future of Relevant Conduct Sentencing*, 15 FED. SENT'G REP. 88 (2002); Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387 (2002); Nancy J. King & Susan R. Klein, Apprendi *and Plea Bargaining*, 54 STAN. L. REV. 295 (2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001); Mark D. Knoll & Richard G. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pennsylvania, 22 SEATTLE L. REV. 1057 (1999); Andrew M. Levine, *The Confounding Boundaries of* "Apprendiland"*: Statutory Minimums and the Federal Sentencing Guidelines*, 29 AM. J. CRIM. L. 377 (2002); Alan C. Michaels, *Truth in Convicting: Understanding and Evaluating* Apprendi, 12 FED. SENT'G REP. 320 (2000); Benjamin J. Priester, *Constitutional Formalism and the Meaning of* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 281 (2001); Benjamin J. Priester, *Sentenced for a "Crime" the Government Did Not Prove:* Jones v. United States *and the Constitutional Limitations on Factfinding by Sentencing Factors Rather Than Elements of the Offense*, 61 LAW & CONTEMP. PROBS. 249 (1998); Priester, *supra* note 8; Stephen A. Saltzburg, *Due Process, History, and* Apprendi v. New Jersey, 38 AM. CRIM. L. REV. 243 (2001); Jeffrey Standen, *The End of the Era of Sentencing Guidelines:* Apprendi v. New Jersey, 87 IOWA L. REV. 775 (2002).

19. *See* Jones v. United States, 526 U.S. 227, 230-32 (1999) (interpreting 18 U.S.C. § 2119 (1988 & Supp. V)).

20. *See id.* at 251-52 & n.11; *see also Ring*, 536 U.S. at 600-01.

21. *See Apprendi*, 530 U.S. at 468-69, 474.

22. *See id.* at 491-97; *see also Ring*, 536 U.S. at 601-02. Apprendi was convicted pursuant to a guilty plea. *See Apprendi*, 530 U.S. at 469-70.

the death sentence, rather than life imprisonment, after a capital murder conviction.[23] The Rule required those capital sentencing aggravating factors to be established as elements.[24]

2. *Defining Sentencing Guidelines "Maximum" Sentences*

The Rule also applies to provisions of law that purport merely to regulate the sentences imposed for offenses but that in fact impose legally binding restrictions on the discretion of the sentencing judge.[25] The Washington statutory scheme in *Blakely* contained entirely separate provisions for defining criminal offenses on the one hand, and guidelines for regulating the sentences imposed upon convictions on the other.[26] Although the offense provisions included a maximum penalty of ten years' imprisonment for a class B felony kidnapping charge, the guidelines delimited a sentencing range of forty-nine to fifty-three months based on the facts admitted in the guilty plea.[27] Upon the finding of additional facts in a sentencing hearing pursuant to the guidelines, however, the judge imposed a sentence of ninety months.[28] The Court in *Blakely* held the enhanced sentence unconstitutional under the Rule because the legally binding range produced by the guidelines, not the ten years in the offense provisions, was the relevant statutory maximum.[29] In *Booker*, the

23. *See Ring*, 536 U.S. at 592-93, 597.
24. *See id.* at 600-05, 609.
25. *See* Blakely v. Washington, 542 U.S. 296, 298-300 (2004).
26. *See id.* at 299.
27. *See id.*
28. *See id.* at 300.
29. *See id.* at 304. The scholarly reaction to *Blakely*'s expansion of the *Apprendi* doctrine was immediate. *See generally*, Albert W. Alschuler, *To Sever or Not to Sever? Why* Blakely *Requires Action by Congress*, 17 FED. SENT'G REP. 11 (2004); Rachel E. Barkow, *The Devil You Know: Federal Sentencing After* Blakely, 16 FED. SENT'G REP. 312 (2004); Douglas A. Berman, *The Roots and Realities of* Blakely, CRIM. JUST., Winter 2005, at 5; Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT'G REP. 89 (2004); Douglas A. Berman, *Examining the* Blakely *Earthquake and Its Aftershocks*, 16 FED. SENT'G REP. 307 (2004); Stephanos Bibas, Blakely*'s Federal Aftermath*, 16 FED. SENT'G REP. 333 (2004); Frank O. Bowman III, *Function over Formalism: A Provisional Theory of the Constitutional Law of Crime and Punishment*, 17 FED. SENT'G REP. 1 (2004); Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved?*, 41 AM. CRIM. L. REV. 217 (2004); Steven L. Chanenson, *Hoist with Their Own Petard?*, 17 FED. SENT'G REP. 20 (2004); Timothy Cone, *Double Jeopardy Post-*Blakely, 41 AM. CRIM. L. REV. 1373 (2004); James Felman, *How Should the Congress Respond if the Supreme Court Strikes Down the Federal Sentencing Guidelines?*, 17 FED. SENT'G REP. 97 (2004); Phil Fortino, *A Post-*Blakely *Era or a Post-*Blakely *Error?*, 38 COLUM. J.L. & SOC. PROBS. 1 (2004); Jackie Gardina, *Compromising Liberty: A Structural Critique of the Sentencing Guidelines*, 38 U. MICH. J.L. REFORM 345 (2005); Michael Goldsmith, *Reconsidering the Constitutionality of the Federal Sentencing Guidelines After* Blakely*: A Former Commissioner's Perspective*, 2004 B.Y.U. L. REV. 935; Mark D. Harris, Blakely*'s Unfinished Business*, 17 FED. SENT'G REP. 83 (2004); Jason Hernandez, Blakely*'s Potential*, 38 COLUM. J. L. & SOC. PROBS. 19 (2004); Nancy King & Susan R. Klein, *Beyond* Blakely, 16 FED. SENT'G REP. 316 (2004); Larry Kupers, *Proposal for a Viable Federal Sentencing Scheme in the Wake of* Blakely v. Washington, 17 FED. SENT'G REP. 28 (2004); Eric Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621 (2004); Rory K. Little & Teresa Chen, *The Lost History of* Apprendi *and the* Blakely *Petition for Rehearing*, 17 FED. SENT'G REP. 69 (2004); Jane L. McClellan & Jon M. Sands, *The Hedgehog, the Fox, and the Guidelines:* Blakely*'s Possible Implications for the "Safety Valve"*, 17 FED. SENT'G REP. 40

Court applied the Rule in the same manner to the offense provisions of the United States Code and the sentencing regulations in the Federal Sentencing Guidelines.[30] Although the offense statute included a maximum penalty of life imprisonment for the narcotics possession charge, the Guidelines delimited a sentencing range of 210-262 months based on the quantity of crack cocaine reflected in the jury's verdict.[31] Upon the finding of additional facts at a sentencing hearing pursuant to the Guidelines, however, the judge imposed a sentence of 360 months.[32] Again the Court held the enhanced sentence unconstitutional because the Guidelines' range applicable to the offense elements established in the jury verdict alone was the relevant statutory maximum.[33]

(2004); Richard E. Myers II, *Restoring the Peers in the "Bulwark":* Blakely v. Washington *and the Court's Jury Project*, 83 N.C. L. REV. 1383 (2005); Mark Osler, *The* Blakely *Problem and the 3x Solution*, 16 FED. SENT'G REP. 344 (2004); Aaron Rappaport, *What the Supreme Court Should Do: Save Sentencing Reform, Gut the Guidelines*, 17 FED. SENT'G REP. 46 (2004); Peter B. Rutledge, Apprendi, Blakely, *and Federalism*, 50 S.D. L. REV. 427 (2005); Peter B. Rutledge, Apprendi *and Federalism*, 17 FED. SENT'G REP. 100 (2004); Jeffrey Standen, *The New Importance of Maximum Penalties*, 53 DRAKE L. REV. 575 (2005); Symposium, *The Future of American Sentencing: A National Roundtable on* Blakely, 17 FED. SENT'G REP. 115 (2004); Jenia Iontcheva Turner, *Implementing* Blakely, 17 FED. SENT'G REP. 106 (2004); Robert Weisberg, *Excerpts from "The Future of American Sentencing: A National Roundtable on* Blakely", 2 OHIO ST. J. CRIM. L. 619 (2005).

30. *See* United States v. Booker, 543 U.S. 220, 226-27, 231-35 (2005).

31. *See id.* at 227, 235.

32. *See id.* In the consolidated companion case, *United States v. Fanfan*, the sentencing findings increased the Guidelines range from 63-78 months to 188-235 months. *See id.* at 228.

33. *See id.* at 231-35, 243-44. The scholarly reaction to *Booker* was even more impressive in its scope and depth. In addition to articles cited in other footnotes, *see* Ronald J. Allen & Ethan A. Hastert, *From* Winship *to* Apprendi *to* Booker*: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195 (2005); Robert Anello & Jodi Mishkin Peikin, *Evolving Roles in Federal Sentencing: The Post* Booker/Fanfan *World*, 2005 FED. CTS. L. REV. 9 (2005); Bruce A. Antkowiak, *Judicial Nullification*, 38 CREIGHTON L. REV. 545 (2005); Rachel E. Barkow, *Our Federal System of Sentencing*, 58 STAN. L. REV. 119 (2005); Douglas A. Berman, *Assessing Federal Sentencing After* Booker, 17 FED. SENT'G REP. 291 (2005); Douglas Berman, *Distinguishing Offense Conduct and Offender Characteristics*, 58 STAN. L. REV. 277 (2005); Douglas A. Berman, *Foreword: Beyond* Blakely *and* Booker*: Pondering Modern Sentencing Process*, 95 J. CRIM. L. & CRIMINOLOGY 653 (2005); Douglas A. Berman, *Perspectives and Principles for a Post-*Booker *World*, 17 FED. SENT'G REP. 231 (2005); Douglas A. Berman, *Perspectives on* Booker*'s Potential*, 18 FED. SENT'G REP. 79 (2005); Douglas Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 HOUS. L. REV. 341 (2006); Stephanos Bibas, *The* Blakely *Earthquake Exposes the Procedure/Substance Fault Line*, 17 FED. SENT'G REP. 258 (2005); Frank O. Bowman III, *Beyond Band-Aids: A Proposal for Reconfiguring Federal Sentencing After* Booker, 2005 U. CHI. LEGAL F. 149 (2005); Frank O. Bowman III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After* Booker, 43 HOUS. L. REV. 279 (2006); Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of* United States v. Booker *and* United States v. Fanfan, 56 MERCER L. REV. 1131 (2005); James G. Carr, *Some Thoughts on Sentencing Post-*Booker, 17 FED. SENT'G REP. 295 (2005); Timothy Cone, Booker *Waivers in Plea Agreements: Are They Permissible?*, 18 FED. SENT'G REP. 94 (2005); Margareth Etienne, *Into the Briar Patch?: Power Shifts Between Prosecution and Defense After* United States v. Booker, 39 VAL. U. L. REV. 741 (2005); Nancy Gertner, *Sentencing Reform: When Everyone Behaves Badly*, 57 ME. L. REV. 569 (2005); Morris B. Hoffman, Booker*, Pragmatism, and the Moral Jury*, 13 GEO. MASON L. REV. 455 (2005); Kyron Huigens, *Solving the* Williams *Puzzle*, 105 COLUM. L. REV. 1048 (2005); Kim Hunt & Michael Connelly, *Advisory Guidelines in the Post-*Blakely *Era*, 17 FED. SENT'G REP. 233 (2005); Sandra D. Jordan,

3. *Defining Sentencing Within These "Maximum" Sentences*

The Rule does not deem all sentencing factors unconstitutional, however. Findings of fact that are made in addition to the elements of the offense are permissible when used to determine the appropriate sentence to be imposed on the convicted offender within the maximum sentence defined by application of the Rule.[34] For example, the federal firearms possession statute in *Harris* provided for a maximum sentence of life imprisonment based on the elements of the offense established in the guilty verdict alone.[35] At sentencing the judge found that the defendant had brandished the gun, rather than simply possessed it, and therefore imposed a statutory mandatory minimum sentence of seven years, rather than five.[36] This sentence did not violate the Rule because the sentencing factor did not alter the relevant statutory maximum (life), but only determined the appropriate sentence within that maximum (increase from five to seven years).[37] In *Booker*, Justice Stevens suggested a similar example, in which the elements of the offense produced a Guidelines sentencing range of 130-162 months and the finding of an additional fact at sentencing increased the Guidelines range to 151-188 months.[38] Under the Rule, that finding of fact would permit imposition of a sentence of between 151 and 162 months; that is, it constitutionally could authorize the increased minimum sentence from 130 to 151 months (as in *Harris*) but not an increase above the *Apprendi* maximum sentence of 162 months (as in *Booker*).[39]

Have We Come Full Circle? Judicial Sentencing Discretion Restored in Booker *and* Fanfan, 33 PEPP. L. REV. 615 (2006); Nancy J. King, *Reasonableness Review After* Booker, 43 HOUS. L. REV. 325 (2006); Michael Marcus, Booker, Blakely, *and the Future of Sentencing*, 17 FED. SENT'G REP. 243 (2005); Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006); Michael M. O'Hear, *The Duty to Avoid Disparity: Implementing 18 U.S.C. § 3553(a)(6) After* Booker, 37 MCGEORGE L. REV. 627 (2006); Michael M. O'Hear, *Is Restorative Justice Consistent with Sentencing Uniformity?*, 89 MARQ. L. REV. 305 (2005); Michael O'Hear, *The Myth of Uniformity*, 17 FED. SENT'G REP. 249 (2005); Paul H. Robinson & Barbara A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV. 1124 (2005); Quin M. Sorenson, *The Illegality of Resentencing*, 44 DUQ. L. REV. 211 (2006); Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing A Sentencing Agency in the Judicial Branch*, 58 STAN. L. REV. 217 (2005); Sandra Guerra Thompson, *The* Booker *Project: Introduction*, 43 HOUS. L. REV. 269 (2006); Melanie Wilson, *In* Booker*'s Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379 (2006); Ronald F. Wright, *Incremental and Incendiary Rhetoric in Sentencing After* Blakely *and* Booker, 11 ROGER WILLIAMS U. L. REV. 461 (2006); Ronald F. Wright, *The Power of Bureaucracy in the Response to* Blakely *and* Booker, 43 HOUS. L. REV. 389 (2006); Philip Zane, Booker *Unbound*, 17 FED. SENT'G REP. 263 (2005); John F. Pfaff, *The Continued Vitality of Structured Sentencing Following* Blakely*: The Effectiveness of Voluntary Guidelines* (Fordham Law Legal Studies Research Paper No. 102), *available at* http://ssrn.com/abstract=869977.

34. *See* Harris v. United States, 536 U.S. 545, 560-69 (2002).

35. *See Harris*, 536 U.S. at 550-51 (quoting 18 U.S.C. § 924(c)(1)(A)); *id.* at 574, 575-76 (Thomas, J., dissenting) (noting that statute provides maximum penalty of life imprisonment). Harris was convicted in a bench trial. *See id.* at 551.

36. *See id.* at 550-52.

37. *See id.* at 557-68.

38. *See Booker*, 543 U.S. at 278-79 (Stevens, J., dissenting in part).

39. *See id.*

Moreover, the Court also has emphasized that the Rule is inapplicable to findings of fact made by judges under indeterminate sentencing schemes, in which the selection of the appropriate sentence is made not pursuant to positive law sentencing factors but rather in the judge's own exercise of discretion.[40]

4. *Conclusions About Sentencing Factfinding Under the Rule*

The Rule places great emphasis on the factual findings necessary for determining the maximum punishment to which the convicted offender is exposed. Once that maximum sentence is established by the determination of offense-element facts in a jury verdict or guilty plea, however, the Rule does not similarly restrict the use of additional factual findings in determining the exact amount of punishment to be imposed. Sentencing factfinding is permissible so long as it occurs within the statutory range provided for the offense *and* within the applicable sentencing guidelines range, if any, for the offense-element facts. Sentencing factfinding is unconstitutional only if it produces a sentence that exceeds the statutory range provided for the offense *or* exceeds the applicable sentencing guidelines range, if any, for the offense-element facts. The only question to be asked in applying the Rule to sentencing factfinding is whether the effect of the given factual determination is to alter the "statutory maximum" penalty.

These three aspects of applying the Rule are summarized in the following charts.

CHART 1: THE NEW CONSTITUTIONAL LAW OF SENTENCING: STATUTORY RANGES

Offense of Conviction	Penalty Range	Additional Fact(s)	Sentence Imposed	Result
unlawful firearm discharge	5-10 yrs.	motive (hate crime)	12 yrs.	unconstitutional[41]
possession of firearm in connection with drug offense	5 yrs. - life	brandishing	7 yrs.	constitutional[42]
carjacking	up to 15 yrs.	victim injury	25 yrs.	unconstitutional[43]
bank robbery	up to 20 yrs.	victim injury	15 yrs.	constitutional[44]

40. *See Booker*, 543 U.S. at 233 (stating that "[w]e have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range"); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000).

41. *See Apprendi*, 530 U.S. at 491-92.

42. *See Harris*, 536 U.S. at 556-68.

43. *See* Jones v. United States, 526 U.S. 227, 231-32 & n.1 (1999).

44. *See* 18 U.S.C.A. § 2113 (West 2006); *cf. Harris*, 536 U.S. at 566 (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.).

CHART 2: THE NEW CONSTITUTIONAL LAW OF SENTENCING: GUIDELINES RANGES

Offense of Conviction	Statutory Range	Guidelines Range	Additional Fact(s)	Sentence Imposed	Result
crack distribution	10 yrs. - life	210-262 mos.	drug quantity & obstruction of justice	360 mos.	unconstitutional[45]
cocaine distribution	5-40 yrs.	63-78 mos.	drug quantity & leadership role	188 mos.	unconstitutional[46]
kidnapping	up to 10 yrs.	49-53 mos.	deliberate cruelty	90 mos.	unconstitutional[47]
narcotics	up to 20 yrs.	130-162 mos.	firearm possession	151 mos.	constitutional[48]

Again, it must be emphasized that the Rule does not require that sentences imposed on convicted offenders be based *only* on the facts determined beyond a reasonable doubt in a jury trial or admitted in a guilty plea, nor does the Rule invalidate all sentencing factfinding. Rather, the Rule is concerned with establishing the outer limit on the potential sentence—the "statutory maximum" as defined by the Rule—while leaving considerable leeway for the consideration of additional facts within that limit.

Consequently, the Rule as defined and applied by the Court is a highly formalistic principle that takes no consideration of the actual quantitative effect of the sentencing factfinding upon the offender's sentence. For example, in *Apprendi* the sentencing finding of a hate-crime motive added at least two years to the otherwise applicable weapons-offense sentence;[49] in *Harris* the sentencing finding of firearm brandishing added two years to the otherwise applicable weapons-offense sentence.[50] In *Blakely*, the sentencing finding of deliberate cruelty toward the crime victim added roughly three years to the otherwise applicable kidnapping sentence.[51] Justice Stevens' dissent in *Booker* delineated a sentencing finding of firearm possession that added nearly two years to an otherwise applicable narcotics-offense sentence.[52] Yet the sentences in *Apprendi* and *Blakely*

45. *See Booker*, 543 U.S. at 226, 235 (defendant Booker).
46. *See id.* at 228 (defendant Fanfan).
47. *See Blakely*, 542 U.S. at 303-05.
48. *See Booker*, 543 U.S. at 278-79 (Stevens, J., dissenting in part).
49. *Apprendi*, 530 U.S. at 468. The hate crime finding resulted in a sentence of twelve years; without that finding the range was five to ten years. *Id.*
50. *Harris*, 536 U.S. at 550-52. The brandishing finding resulted in a mandatory minimum sentence of seven years; without that finding the mandatory minimum sentence was five years. *Id.*
51. *Blakely*, 542 U.S. at 297-301. The deliberate cruelty finding resulted in a Guidelines sentence of ninety months; without that finding the range was forty-nine to fifty-three months. *Id.* at 300.
52. *Booker*, 543 U.S. at 278-79 (Stevens, J., dissenting). The firearm possession finding resulted in a minimum Guidelines sentence 151 months (from a range of 151-188 months); without that finding the minimum Guidelines sentence was 130 months (from a range of 130-162 months). *Id.*

were held unconstitutional, while the sentences in *Harris* and the *Booker* dissent's hypothetical were not.[53] Similarly, in *Booker*, the sentencing finding of additional quantities of crack cocaine added over eight years to the otherwise applicable narcotics-offense sentence;[54] in an indeterminate sentencing regime a judge's exercise of discretion could add eight years to an offender's sentence as well.[55] Yet the sentence in *Booker* is unconstitutional and the other is not.[56]

These consequences produced by the Rule are arbitrary and illogical. The Rule's exclusive emphasis on the relevant "statutory maximum" obscures the inconsistencies created by its operation: two findings of fact may result in indistinguishable actual effects, yet under the Rule one could be unconstitutional and the other constitutional.

C. The Absurd Formalisms of the Rule

This is not to suggest that all formalistic requirements are inappropriate in the constitutional law of sentencing. In a prior article, *Structuring Sentencing*, I argued that the Court correctly adopted the initial version of the Rule—as defined in *Apprendi* and *Harris*—as a means of preserving the significance of a verdict of guilt on a charged offense.[57] A criminal prosecution involves a statutory offense, a prosecutorial charge, and a guilty verdict on the elements of the offense at trial or in a guilty plea.[58] Each stage in this process—offense definition, charging decision, and verdict determination—narrows the scope of possible punishments to which the defendant is exposed at sentencing for the offense of conviction thereby established.[59] For example, the ruling in *Apprendi* was justified because the elements of the offense of conviction authorized a sentence of five to ten years, yet a sentence of twelve years was imposed.[60] In *Harris*, by contrast, the elements of the offense of conviction authorized a sentence of life, while a far lesser sentence of seven years was imposed.[61] It is true that in each case a sentencing finding increased the otherwise applicable sentence by two years.[62] Nevertheless, in *Apprendi* the government had sought to obtain an enhanced sentence greater than that au-

53. *Id.* at 278-80 (Stevens J., dissenting); *Blakely*, 542 U.S. at 301-05; *Harris*, 536 U.S. 456-68; *Apprendi*, 530 U.S. at 491-92.

54. *Booker*, 543 U.S. at 226, 235-36. The additional drug quantity finding resulted in a sentence of 360 months; without that finding the Guidelines range was 210-262 months. *Id.* at 235.

55. For example, the federal bank robbery offense carries a maximum penalty of twenty years' imprisonment. *See* 18 U.S.C.A. § 2113(a) (West 2006). Prior to the adoption of the Guidelines, judges could have found facts in the course of determining any sentence within that range, such as an increase from seven to fifteen years. *See Booker*, 543 U.S. at 235.

56. *See Booker*, 543 U.S. at 227-31.

57. *See* Priester, *supra* note 8, at 885-909.

58. *See id.* at 891-95.

59. *See id.*

60. *See id.* at 896-902.

61. *See id.* at 902-06.

62. *See id.* at 906-07.

thorized by a conviction for a second-degree felony, while in *Harris* the enhanced sentence sought by the government already had been authorized by the firearms possession conviction.[63] Thus, the *Apprendi-Harris* doctrine vindicates the Constitution's requirement that the restrictions of the offense of conviction be respected and that the sentence imposed be no greater than that authorized by the guilty verdict.[64]

After *Blakely* and *Booker*, however, the formalism of the Rule has been expanded far beyond this limited and necessary role of preserving the integrity of the guilty verdict on the offense of conviction. Instead, the Rule now produces illogical, inconsistent, and arbitrary outcomes. Unlike the *Apprendi-Harris* formalism, which ensures the integrity of the offense of conviction, the *Blakely-Booker* formalism has no doctrinal or logical justification that can withstand such radical inconsistencies.

The operation of the Rule exalts form over substance to uphold and invalidate functionally identical sentencing determinations. This inconsistent treatment can occur in two ways. In one situation, the same finding of fact with the same quantitative effect on the sentence is given differential treatment in two otherwise-indistinguishable cases in different states based solely on the narrow formalism. The other scenario involves intra-jurisdictional inconsistencies, when the same finding of fact with the same quantitative effect on the sentence is given differential treatment in two cases in the same state with determinate sentencing guidelines.

The first situation is far more common, and simple to describe. Consider two jurisdictions having identical armed robbery offenses with the same offense elements and the same statutory maximum penalty—say, up to ten years' imprisonment—in that offense statute. State A has discretionary judicial sentencing, leaving it entirely to the judgment of the trial court what sentence to impose within that statutory ceiling. State B has a system of determinate sentencing guidelines which involve not only calculation of a baseline punishment but also consideration of additional aggravating and mitigating facts.

Now consider the application of the Rule to the sentences imposed on otherwise identical offenders in the two states. The sentencing judge in State A might determine that, in addition to the offense elements of armed robbery, the defendant discharged his firearm in a manner that endangered the life of his victim. Accordingly, the judge might exercise his discretion to increase the sentence relative to the punishment he would have imposed without that finding—say, from four years to six years. Similarly, the sentencing judge in State B might make the same factual determinations of firearm discharge and endangerment. Rather than exercising discretion, however, he applies the determinate sentencing provisions of the guidelines and increases the sentence—say, from a baseline of four years to an enhanced sentence of six years.

63. *See id.* at 906-08.
64. *See id.* at 908-09, 928-34.

Thus, the cases in State A and State B are identical factually and in the actual quantitative effect of sentencing factfinding on the offenders' sentences. Yet the sentence in State A is constitutional but the sentence in State B is not. The *only* distinction is the formalistic analysis mandated by the Rule.

Again, it must be emphasized that the differences between the sentencing findings in State A and State B are not differences of substance, but rather differences of form. In each situation a finding of fact established as a sentencing factor increases the sentence above what otherwise would have been imposed. Whether that increase is constitutionally permissible under the Rule is not determined, for example, by the absolute length of the increase or the relative increase to the offender's sentence. Instead, the permissibility of the increase depends entirely on whether the finding implicates the "statutory maximum" defined by the Rule. In many situations, however, that definition has little relation to the nature of the sentencing process.

This problem is exacerbated in the second scenario, when the Rule produces intra-jurisdictional inconsistencies. Consider a hypothetical involving two defendants convicted in State B, which has determinate sentencing guidelines. Defendants X and Y both plead guilty to felony narcotics distribution. The only difference in their offense elements is that X distributed two and one-half kilograms of cocaine while Y distributed three and one-half kilograms, producing baseline sentencing ranges of 110-137 months for X and 130-162 months for Y. At sentencing, the respective judges each make the additional finding that X and Y possessed firearms during the commission of their offenses and add fifteen months to the midline sentence of the applicable guidelines range. Based on this identical sentencing fact with identical quantitative effect, X is sentenced to 139 months and Y to 161 months. Except for narrowly divergent drug-quantity admissions, the cases are otherwise identical. Yet under the Rule the sentence imposed on X is unconstitutional and the sentence imposed on Y is not.[65]

Even within a single jurisdiction using a determinate sentencing regime, therefore, it is possible for the Rule to produce opposing outcomes in functionally identical cases. The same finding of fact can result in the same quantitative increase in two defendants' sentences, yet one enhancement is permissible and the other is not based solely on whether the sentence imposed after the increase exceeds or falls within the applicable guidelines sentencing ranges. Worse still, this disparity can exist, as in the

65. This example is a modified version of the hypothetical suggested by Justice Stevens in *Booker*. *See supra* notes 38-39 and accompanying text. Under the Federal Sentencing Guidelines the base offense levels are 26 for X and 28 for Y. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(4)-(5) (2006). The addition of the firearm possession factor does not mandate an exact fifteen-month increase; rather, two offense levels are added. *See id.* § 2D1.1(b)(1). With a criminal history category of V, the sentencing ranges are 110-137 months and 130-162 months for X; the ranges are 130-162 months and 151-188 months for Y. *See id.* Sentencing Table.

example of Defendants X and Y, even with quite small differences in the underlying offense elements.

Thus, the problem with the Rule is not merely that it treats functionally identical sentencing factfinding differently as between discretionary and determinate sentencing regimes, but also that its operation can result in treating functionally identical sentencing factfinding differently even within determinate sentencing regimes. Identical facts producing identical quantitative punishment outcomes have divergent constitutionality depending exclusively upon form, not substance.

Taken together, these two situations illustrate the absurd formalism of the Rule. Sentencing factfinding in discretionary sentencing regimes is constitutional, even when it is functionally identical to indistinguishable findings of fact deemed unconstitutional when they occur in determinate sentencing regimes. That doctrinal result might make sense if the Rule simply invalidated all sentencing factfinding in determinate regimes. But of course that is not what it does. Sometimes sentencing factfinding in determinate sentencing regimes is permissible under the Rule and sometimes it is not, and which of those is true in a given case has nothing at all to do with the substantive merits of the sentence increase involved.

D. WHAT'S THE JURY GOT TO DO WITH IT?

At this point one could be forgiven for wondering what happened to the role of the jury in the operation of the Rule. What's the jury got to do with it? Nothing.

Despite the Court's persistence in its analysis, the Sixth Amendment right to trial by jury cannot explain the parameters of the new constitutional law of sentencing. The jury has not been given more power at trial; it still adjudicates disputed facts and determines the presence or absence beyond a reasonable doubt of the elements of the offense. Nor has the jury been given more power at the sentencing hearing; *Blakely* and *Booker* both continue to contemplate a procedure in which the jury's role concludes at trial and the sentencing hearing is a separate proceeding conducted before a judge.

This is not to say that the trial jury is without *any* power that has implications for sentencing, because of course the jury verdict establishing the elements of the offense of conviction serves a traditional separation-of-powers, checks-and-balances function in a criminal proceeding.[66] If the jury acquits, the defendant cannot be sentenced at all; if the jury convicts of lesser charges, the ultimate sentence will be lower than if the jury had convicted on the greater charges.[67] The jury stands between the accused

66. *See* Priester, *supra* note 8, at 895.

67. Opinions in the *Apprendi* line of cases sometimes have described one of the functions of the Rule as being to ensure the sanctity of acquittals on greater offenses when the defendant is convicted of a lesser offense. *See, e.g.*, *Blakely*, 542 U.S. at 303-04; Ring v. Arizona, 536 U.S. 584, 601-02 (2002); *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring); Monge v. California, 524 U.S. 721, 740-41 (1998) (Scalia, J., dissenting)

and the legislature, safeguarding the hallowed common law principle that juries of citizens have the power (if not the right) to nullify unjust laws.[68] The jury also is interposed between the accused and the prosecutor, ensuring that the executive's allegations of criminal responsibility are adjudicated by a separate and independent entity.[69] Finally, the jury's verdict constrains the authority of the judge at the subsequent sentencing hearing, serving to protect the convicted offender from punishments not authorized by the laws and proof.[70] In these ways, it is fair to say that by adjudicating the offense elements of guilty verdicts, the jury does exercise some power with respect to the convicted offender's sentence.[71]

But this exercise of power by the jury is not an exercise of *sentencing* power; it is an exercise of *trial* power. Nothing in the *Apprendi-Harris* and *Blakely-Booker* doctrines creates any direct, primary capacity for the jury to impose punishment on the convicted offender. Instead the guilty verdict's effects at sentencing are indirect and incidental consequences of the jury's offense adjudication. The constraints imposed on the sentencing judge are secondary; they are simply derivative of the jury's primary role of adjudicating guilt.[72]

If the role of the jury cannot explain the Rule, then, something else must be going on in the *Apprendi* line of cases. The reality is that the Court's reliance on the jury trial clause of the Sixth Amendment is a pretext to conceal a more controversial objective.

The true function played by the Rule is not protecting the jury's province in a criminal case, but rather protecting sentencing judge's authority to pass judgment on individual offenders against legislative attempts to constrain that discretion. The operation of the Rule reduces legislative and prosecutorial power, but it does not shift that power to the trial jury—it shifts that power to the sentencing judge. By requiring facts mandating an outer limit on sentencing discretion to be proven as an element of the offense, the Rule reduces legislative power relative to the sentenc-

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> (Petitioner Monge was convicted of the crime of using a minor to sell marijuana, which carries a maximum possible sentence of seven years in prison under California law. He was later sentenced to eleven years in prison, however, on the basis of several additional facts that California and the Court have chosen to label 'sentence enhancement allegations.' However California chooses to divide and label its criminal code, I believe that for federal constitutional purposes those extra four years are attributable to conviction of a new crime. Monge was functionally acquitted of that crime when the California Court of Appeal held that the evidence adduced at trial was insufficient to sustain the trial court's 'enhancement' findings.).

68. *See* Jones v. United States, 526 U.S. 227, 243-48 (1999) (emphasizing significance of historical practice of jury nullification as justification for the Rule); *see also* Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149 (1997); Nancy J. King, *Silencing Jury Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 433 (1998); Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253 (1996).

69. *See* Priester, *supra* note 8, at 893-96, 899-900.

70. *See id.* at 894-95, 898-900.

71. *See id.* at 896-97, 889-90.

72. *See id.* at 896-909.

ing judge.[73] The legislature can no longer use sentencing guidelines or other binding provisions of law to limit the sentencing authority of judges; only offense elements determined by juries may do that. Similarly, the Rule reduces the relative power of prosecutors, because any binding sentencing enhancements they seek to rely on must be proven beyond a reasonable doubt to a jury at trial, not merely to the judge by a preponderance of the evidence at sentencing. The beneficiary of this decrease in legislative and prosecutorial power is not the jury, however, but the sentencing judge. If legislatures are willing to entrust judges with wide sentencing discretion, then the Rule rarely will come into play. On the other hand, if legislatures seek to restrict judicial sentencing discretion within narrow limits, then the Rule imposes significant constraints on such sentencing reform measures.

Addressing the conceptual confusion caused by the Court's persistence in analyzing the Rule in terms of jury power after *Blakely* and *Booker* even though doing so makes no sense, Professor Berman said it best:

> To make better conceptual sense of [the Rule], we must . . . view [it] not in terms of the distinctive role and importance of juries and a traditional vision of a criminal trial, but rather in terms of the distinctive role and importance of judges and a traditional vision of sentencing. In other words, a resolution to [the] conceptual conundrum can be found if the [Rule] is understood to be not really about vindicating the role of juries and the meaning of the Sixth Amendment's jury trial right, but rather about vindicating the role of judges. . . . [T]hough perhaps some Justices do love jury trial rights, all the Justices love judges and thus seem comfortable allowing sentencing judges to consider extra-verdict facts when exercising reasoned judgment at sentencing.[74]

This explanation successfully reconciles the Court's holdings and their consequences. In the guise of preserving the role of the jury, the Court in fact has expanded judicial power.

III. THE THREE STAGES OF A SENTENCING DECISION: SPECIFYING FUNCTION AND NATURE

Once a conviction is obtained, the offender will be sentenced. Much like the Rule, the function of a sentencing proceeding is deceptively simple to describe: everyone agrees that the task performed at sentencing is determining the precise punishment to be imposed. But just like the Rule, the implementation of that basic idea is far from easy.

Punishment determinations must be made—but by whom, how, and under what legal regime will they occur? What is the relative power of judges and legislatures? Will there be additional factfinding by juries or

73. *See also* Berman, *supra* note 8, at 407-10; Ian Weinstein, *The Revenge of* Mullaney v. Wilbur*:* U.S v. Booker *and the Reassertion of Judicial Limits on Legislative Power to Define Crimes*, 84 OR. L. REV. 393 (2005).

74. Berman, *supra* note 8, at 410.

judges? Will judicial factfinding be pursuant to discretion, guidelines, or mandatory sentencing? What power will judges possess to assess the moral value of the facts found? Analysis of the function and nature of a sentencing decision too often is muddled by evaluating sentencing as though it were a unitary exercise—that is, by a failure to specify clearly which of these questions is being addressed.

The functional operation of sentencing can be broken down into three separate stages. Each stage has a different nature, implicating different constitutional and policy interests. Each of the three stages presents its own controversies and doctrinal conundrums. Analyzing the function and nature of sentencing in terms of this tripartite framework clarifies the true stakes in the controversies over which institution will wield what kind of sentencing power.

The first stage of a sentencing decision is the adjudication of the factual elements of the defendant's offense of conviction. That is, what *facts* are necessary to establish the defendant's guilt of the charged offense?

The second stage is the adjudication of additional findings of fact that are legally relevant to the determination of the appropriate punishment for the offender. That is, what *facts* above and beyond those offense elements will be established before deciding upon the precise sentence for the given offender?

The third stage is the determination of legal and moral *value* of the offense element facts and additional punishment facts. That is, after this array of offense elements and punishment facts has been established, what is the precise penalty that should be imposed on the offender?

Analyzing each stage separately reveals the underlying disputes and conflicts over sentencing laws and sentencing reform in a more transparent manner. The analysis also isolates certain aspects of the controversy to a single stage, which helps to more fully explain the different rationales applicable in the other stages. In the end, the tripartite analytical framework reveals that beneath the superficial camouflage of its Sixth Amendment analysis, the Court in fact has decreed as constitutional law a specific, contestable, and highly controversial normative vision of the nature of criminal sentencing.

A. Controversies at the First Stage

The decision to be made in the first stage is one of *fact*. Offenses are defined by statutes that prescribe the particular factual conditions—actus reus and mens rea—that constitute the crime. For example, aggravated carjacking might consist of (i) taking (ii) a motor vehicle (iii) from another person (iv) by force or threat (v) while possessing a firearm (vi) resulting in serious bodily injury.[75] A narcotics offense might consist of (i)

75. *See, e.g.*, 18 U.S.C. § 2119 (1988 Supp. V) ("Whoever, possessing a firearm . . ., takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation . . . shall . . . if serious bodily injury . . . results . . . be fined under this title or

knowingly (ii) possessing (iii) with intent to distribute (iv) cocaine (v) of a quantity 500 grams or more and less than five kilograms.[76] The function of the first stage is the adjudication of whether these delineated facts are present or absent in the given defendant's case.

At the first stage there is no controversy over the *process*. Everyone agrees that the Constitution mandates that offense elements be established either in a verdict beyond a reasonable doubt by a trial jury or through admission in a guilty plea by the defendant. In that limited sense, then, the first stage might seem not to involve not sentencing at all, but only trial and conviction.[77] The determination of offense elements, however, is a necessary predicate step in the sentencing process because the adjudication of offense elements has substantial implications for the range of penalties available in the other two stages.[78]

The controversies at the first stage concern *substance*: how and to what extent the established offense elements create limits on the subsequent stages. Some argue that the offense elements place narrow limits on the ultimate sentence. Others argue for much more substantial limitations. There are, in fact, four different positions on the relationship between the offense elements and the possible scope of the ultimate punishment.

1. Pure Positivism: the Apprendi *Dissent Position*

Since the *Apprendi* line of cases began, a group of four justices consistently has advocated for a purely positivist relationship between the offense of conviction and the scope of the ultimate sentence.[79] According to this position, the only constraint placed on the ultimate sentence by the offense of conviction is whatever the statutes of the given jurisdiction happen to provide.[80] Moreover, the relevant statutes for consideration are not only the statute that specifically delineates the factual elements of the charged offense, but also any *other* statutes that create penalty provisions applicable to the sentencing of a person convicted for the charged

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imprisoned not more than 25 years, or both."), *construed in* Jones v. United States, 526 U.S. 227 (1999).

76. *See, e.g.*, 21 U.S.C.A. § 841(a) - (b)(1)(B)(ii) (West 2006); *cf.* United States v. Booker, 543 U.S. 220, 228 (2006) (conspiracy to commit such violation in defendant Fanfan's case).

77. *See supra* notes 67-72 and accompanying text.

78. For this reason, Professor Cahill argues that trial juries should be instructed not only on the conviction/acquittal consequences of the charged crime's offense elements "but also as to the offense grades and overall sentencing ranges that correspond" to those elements. Michael T. Cahill, *Punishment Decisions at Conviction: Recognizing the Jury as Fault-Finder*, 2005 U. CHI. LEGAL F. 91, 92. Under this proposal, juries making first stage adjudications would be expressly informed of the second and third stage consequences of their findings. *See id.* at 95-116, 136-147.

79. *See* Priester, *supra* note 8, at 872 & n.49; Priester, *Constitutional Formalism*, *supra* note 18, at 292-96. This position has some support in the scholarly commentary, as well. *See* Bibas, *Judicial Fact-Finding*, *supra* note 18, at 1153-56.

80. *See* Preister, *Constitutional Formalism*, *supra* note 18, at 292; *see also Booker*, 543 U.S. at 327-31 (Breyer, J., dissenting); *Blakely*, 542 U.S. 320-23 (O'Connor, J., dissenting).

offense.[81] For example, in *Apprendi* the facts established as elements of the offense in the defendant's guilty plea were sufficient to establish a second-degree felony weapons offense with an authorized punishment of five to ten years' imprisonment.[82] A separate statute provided that if the sentencing judge determined by a preponderance of the evidence that a racially biased hate-crime motive was involved, the sentence could be enhanced to ten to twenty years' imprisonment (a range equivalent to a first-degree felony).[83] The four dissenters argued that the sentence of twelve years imposed on the defendant was authorized by the positive law—and therefore was constitutional.[84] The group applied this same analysis to the sentencing laws and guidelines at issue in *Blakely* and *Booker*.[85]

Interestingly, two members of the group asserting this position were Chief Justice Rehnquist and Justice O'Connor.[86] Should Chief Justice Roberts and Justice Alito align themselves with a different argument, the support on the Court for the positivist position could shrink to Justices Breyer and Kennedy.[87]

Under this positivist position, therefore, the only punishment that would be unconstitutional by reference to the offense elements would be one that was truly *ultra vires*—a judgment imposing a sentence authorized neither by the terms of the statute creating the offense of conviction nor by any other statute whose provisions are applicable to the punishment of that offense. Standing alone, the facts established as elements of

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81. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 552-54 (2000) (O'Connor, J., dissenting).

82. *See id.* at 468-69 (describing operation of N.J. STAT. ANN. §§ 2C:39-4(a), 2C:43-6(a)(2) (West 1995)).

83. *See id.* (describing operation of N.J. STAT. ANN. §§ 2C:44-3(e), 2C:43-7(a)(3)).

84. *See Apprendi*, 530 U.S. at 552-54 (O'Connor, J., dissenting); Priester, *supra* note 8, at 897. These justices have conceded the theoretical possibility that the sentencing effect authorized by statute might be so outrageously disconnected to the offense of conviction as to violate the fundamental fairness guarantee of the Due Process Clause, although in their view none of the statutes presented in the *Apprendi* line of cases has been close to implicating this proscription. *See* Priester, *Sentenced*, *supra* note 18, at 263-66 (describing multiprong factors analysis for fundamental fairness applied by these justices in cases prior to *Jones*); Priester, *Constitutional Formalism*, *supra* note 18, at 292-94 (same after *Jones* and *Apprendi*); Priester, *supra* note 8, at 872 & nn.48-49, 56; *id.* at 876 & nn.77-79; *id.* at 884 & n.120 (same after *Harris* and *Ring*); *see also Blakely*, 542 U.S. at 306

> (Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. . . . The second alternative is that legislatures may establish legally essential sentencing factors within limits—limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense.").

85. *See Booker*, 543 U.S. at 326-27 (Breyer, J., dissenting) (citing and describing prior dissenting opinions); *Blakely*, 542 U.S. at 323-25 (O'Connor, J., dissenting); *id.* at 327-28 (Kennedy, J., dissenting); *id.* at 2552 (Breyer, J., dissenting).

86. *Apprendi*, 530 U.S. at 523.

87. Justices Kennedy and Breyer have reaffirmed their acceptance of the positivist position in the most recent decisions. *See Booker*, 543 U.S. at 331-33 (Breyer, J., dissenting); *Blakely*, 542 U.S. at 327-28 (Kennedy, J., dissenting); *id.* at 328-29 (Breyer, J., dissenting).

the offense create no constitutionally significant limitation on the ultimate sentence.

2. *Statutory Mandatory Maximums: The* Apprendi-Harris *Position*

As described above, the original incarnation of the *Apprendi* principle declared that the factual findings established as elements of the offense of conviction create a narrow constitutional constraint upon the ultimate sentence to be imposed on the offender.[88] In determining the constitutionally significant maximum punishment, the only statute to be considered is the provision that delineates the elements of the offense of conviction, and the only facts that may be considered in applying that statute to the defendant are those established in a jury verdict or guilty plea.[89] In *Apprendi*, this meant that the defendant's sentence of twelve years was unconstitutional because the established offense elements of the weapons crime only authorized a ten year maximum, and the separate statute authorizing the enhanced punishment involved only a sentencing factor.[90] In *Harris*, the principle was further clarified and held to extend *only* to determining the maximum punishment authorized by the offense elements, not the minimum authorized punishment.[91]

In *Structuring Sentencing*, I argued that the constitutional doctrine ought to be limited to this *Apprendi-Harris* principle. The purpose served by the doctrine is to ensure the significance of the offense of conviction.[92] The legislature's offense definitions, prosecutor's charges, and jury's verdict each have a role to play in authorizing and delimiting the scope of the ultimate punishment to be imposed on a convicted offender.[93] To allow discretionary factfinding by sentencing judges or positive-law sentencing factors to enhance a sentence beyond the maximum authorized by the charged offense for which the defendant was convicted would destroy the constitutional structure of criminal procedure.[94] On the other hand, permitting discretionary factfinding by sentencing judges or positive-law sentencing factors to produce an increase in the defendant's sentence while remaining beneath that *Apprendi-Harris* maximum—such as in *Harris*, where the finding of brandishing resulted in an increase in the mandatory minimum penalty from five years to seven years while not altering the available maximum punishment of life imprisonment[95]—is entirely consistent with the constitutional structure of criminal procedure.[96]

88. *See supra* notes 18-24 and accompanying text.
89. *See* Priester, *supra* note 8, at 873-76.
90. *See Apprendi*, 530 U.S. at 468-69.
91. *See Harris*, 536 U.S. at 565; Priester, *supra* note 8, at 879-81.
92. Priester, *supra* note 8, at 891-909.
93. *See id.* at 891-95.
94. *See id.* at 896-902.
95. *See Harris*, 536 U.S. at 550-51, 554 (interpreting 18 U.S.C. § 924(c)(1)(A) (2002)).
96. *See* Priester, *supra* note 8, at 902-09.

Under this *Apprendi-Harris* position, therefore, the only limit on sentencing created by the establishment of offense elements is a narrow one: the determination of the maximum available punishment that ultimately may be imposed on the offender. All other considerations, including statutory sentencing factors or other mandatory positive-law provisions, are constitutional.[97]

3. *Guidelines Mandatory Maximums: The* Blakely-Booker *Position*

Also as described above,[98] a second iteration of the *Apprendi* principle has extended the application of the requirement from statutory punishment ranges to sentencing guidelines punishment ranges. Like the *Apprendi-Harris* position, the only facts that may be considered in applying the statutes and sentencing guidelines to the defendant are those established in a jury verdict or guilty plea.[99] In the *Blakely-Booker* position, however, the constitutionally significant maximum punishment is determined not only by the statute that delineates the elements of the offense of conviction, but also by the separate mandatory provisions of law that constrain the authority of the sentencing judge to impose punishment.[100] For example, even though the statute defining the narcotics possession offense provided for a maximum penalty of life imprisonment, *Booker* held that the defendant's sentence of 360 months was unconstitutional because the quantity of crack cocaine reflected in the jury's verdict produced a Guidelines sentencing range of 210-262 months, and the additional facts justifying the enhanced sentence had been established as sentencing factors at a sentencing hearing pursuant to the Guidelines, not as offense elements.[101]

It is worth emphasizing that to date the Court has restricted the *Blakely-Booker* principle, like the *Apprendi-Harris* principle before it, exclusively to the determination of the *maximum* punishment that ultimately may be imposed on the offender. Establishment of sentencing factors above and beyond the offense elements constitutionally may result in increased punishment in two circumstances. One is when consideration of those additional facts increases the *minimum* end of a mandatory guidelines range.[102] The other is when consideration of those additional facts enhances the sentence but to an extent that nonetheless remains *less than*

97. *See supra* notes 25-33 and accompanying text. Professor Green agrees that the *Apprendi* doctrine should apply only to the jury-authorized maximum penalty. *See* Craig R. Green, Apprendi's *Limits*, 39 U. RICH. L. REV. 1155, 1207-17 (2005). Contrary to my position in *Structuring Sentencing* and this Article, he also would apply the doctrine to the mandatory guidelines in *Blakely* because they are statutory. *See id.* Because the Federal Sentencing Guidelines are non-statutory, however, he agrees that *Apprendi* should not have been expanded any further, as it was *Booker*. *See id.*; *see also* Craig Green, Booker *and* Fanfan: *The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005).

98. *See* Priester, *supra* note 8, at 928-35.

99. *See Booker*, 542 U.S. at 226-27, 235-36; *Blakely*, 542 U.S. at 301-03, 313.

100. *See Booker*, 543 U.S. at 233-34; *Blakely*, 542 U.S. at 303-04.

101. *See Booker*, 543 U.S. at 235.

102. In that regard, *Blakely* and *Booker* preserved the doctrinal result in *Harris*.

the offense-elements-authorized maximum punishment.[103]

Under this *Blakely-Booker* position, therefore, a broader constitutional limit on the ultimate sentence is created by the establishment of offense elements. It applies to any and all mandatory provisions of law, whether in the statute defining the offense or in sentencing guidelines, that restrict the maximum available punishment that ultimately may be imposed on the offender. Consequently, significantly less capacity is available to use mandatory provisions of law to constrain and control judicial sentencing discretion.[104]

4. All Mandatory Effects: The Harris *Dissent Position*

Lurking in the background for nearly all of the development of the *Apprendi* line of cases has been the issue of whether the constitutional constraints created by establishment of the offense elements ought to apply not only to determination of the maximum punishment that ultimately may be imposed on the offender, but also to determination of the *minimum* punishment as well. In *Harris*, a group of four Justices from the *Apprendi-Blakely-Booker* majority argued that it should.[105] They conceded that the finding of fact involved—that the defendant had not simply possessed a firearm in relation to a drug trafficking crime, but actually had brandished it during the drug offense—did not increase the maximum available punishment (life imprisonment) the defendant faced.[106] Nonetheless, they maintained that because the mandatory minimum penalty had been increased from five years to seven years, the defendant's sentence was unconstitutional unless the brandishing finding was established as an offense element.[107] Although there has been no occasion in the Court's cases to state so directly, the implication seems clear that these four Justices would apply this principle not only to statutory provisions, as in *Apprendi-Harris*, but also to mandatory sentencing guidelines provisions, as in *Blakely-Booker*.[108]

Under this mandatory-effects position, therefore, a quite broad constitutional limit results from the establishment of offense elements. Any and

103. *See supra* notes 38-39, 48, 65 and accompanying text (describing analysis in Justice Stevens' dissenting opinion).

104. *See Booker*, 543 U.S. at 331-33 (Breyer, J., dissenting); *Blakely*, 542 U.S. at 314 (O'Connor, J., dissenting).

105. *See Harris*, 536 U.S. at 572-73, 575-80 (Thomas, J., dissenting).

106. *See id.* at 575-76 (describing ranges of five to life and seven to life).

107. *See id.* at 575-79.

108. In his separate *Apprendi* opinion that served as the basis for the *Harris* dissent, Justice Thomas suggested he would not distinguish between mandatory guidelines and statutes for purposes of applying his position. *See Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring). In *Booker* he and the other three members of the *Harris* dissent joined the merits majority opinion by Justice Stevens, which relied on the same argument—and in fact exactly the same citations to precedent—in applying the *Apprendi* principle to the maximum-increasing provisions in the Federal Sentencing Guidelines. *See Booker*, 543 U.S. at 233-34. Accordingly, it seems clear that these Justices would extend their position's statutory holding in *Harris* to mandatory guidelines minimum-increasing provisions as well. *See also* Amy Baron-Evans & Anne E. Blanchard, *The Occasion to Overrule* Harris, 18 FED. SENT'G REP. 255 (2006).

all mandatory provisions of law, whether offense statutes or sentencing guidelines, that restrict in any way the scope of the available punishment that ultimately may be imposed on the offender are governed by the constitutional principle. The only kind of additional factual findings that are permissible at sentencing are those which have no binding effect on the punishment determination being made by the judge, such as the consideration of advisory guidelines or the exercise of judicial discretion.[109] Sentencing reform that aspires to limit judicial sentencing authority in a mandatory way must be carried out through offense elements, or not at all.

5. *Aside: The Scalia Conundrum*

It is worth noting that between the four-Justice *Apprendi* dissent bloc, who maintain the purely positivist position, and the four-Justice *Harris* dissent bloc, who assert the mandatory-effects position, stands Justice Scalia—the sole Justice favoring the *Blakely-Booker* position. Unlike his four counterparts in the *Apprendi-Blakely-Booker* majority,[110] Justice Scalia voted in *Harris* to apply the constitutional principle only to determinations of the maximum authorized penalty and not to determinations of the minimum end of the punishment range.[111] Despite being the dispositive vote for this doctrinal outcome, Justice Scalia abstained from his frequent penchant for writing separately to explain his reasoning.[112] Nevertheless, his reasons may be inferred from other opinions in the *Apprendi* line of cases.[113] Although he believes the *Apprendi* doctrine, and the later *Blakely-Booker* doctrine, is necessary to preserve the defendant's entitlement to a determination of his worst-case punishment scenario through a factual finding of offense elements, he considers any sentence beneath that maximum—whether determined through judicial

109. *See, e.g.*, *Booker*, 543 U.S. at 233-34.

110. *See id.* at 225; *Blakely*, 542 U.S. at 314; Priester, *supra* note 8, at 884 & nn.121-24 (analyzing positions of justices prior to *Blakely*). Justice Scalia may have signaled in *Apprendi* itself that he ultimately would break with his erstwhile allies; he expressly declined to join the parts of Justice Thomas's concurring opinion that asserted the same arguments later made in the *Harris* dissent. *See Harris*, 536 U.S. at 575-83 (Thomas, J., dissenting); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

111. *Harris*, 536 U.S. at 576-77.

112. He joined Justice Kennedy's plurality opinion. *See Harris*, 536 U.S. at 549.

113. Justice Scalia was the instigator and principal proponent of the *Apprendi* majority's originalist Sixth Amendment analysis. *See* Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring); *Apprendi*, 530 U.S. at 498-99 (Scalia, J., concurring); Jones v. United States, 526 U.S. 227, 253 (1999) (Scalia, J., concurring); Monge v. Cal., 524 U.S. 721, 740-41 (1998) (Scalia, J., dissenting); Almendarez-Torres v. United States, 523 U.S. 224, 248-49 (1998) (Scalia, J., dissenting). The plurality opinion in *Harris* was written by Justice Kennedy, but it does not rely on the non-originalist, fundamental fairness due process analysis he otherwise insisted should be applied. *See Harris*, 536 U.S. at 556-68; *supra* note 84 and accompanying text (describing and citing to fundamental fairness position followed by Justice Kennedy and three other Justices). Instead, the *Harris* plurality opinion relies extensively upon the exact originalist arguments previously asserted by Justice Scalia, including citations to and quotations from those opinions. *See Harris*, 536 U.S. at 566, 558-59, 565, 568; *see also* Priester, *supra* note 8, at 884 & nn.123-24; Stephanos Bibas, *Back from the Brink*, supra note 18 (analyzing Justice Scalia's position in *Harris*).

discretion, mandatory statutory provisions, or mandatory sentencing guidelines—to be a windfall to which the defendant has no constitutionally cognizable entitlement.[114] In *Structuring Sentencing*, I argued that this mode of reasoning in fact better supports the *Apprendi-Harris* position, not *Blakely-Booker*.[115] Justice Scalia, however, seems solidly encamped in the latter.

6. First-Stage Controversies: Conclusions

The controversy to be resolved in the first stage of a sentencing decision is only the initial part of the debate over the balance of power between legislatures and judges over which institution will wield how much and what kind of sentencing power. That first issue is how and to what extent the established offense elements create limits on the subsequent stages. Those limits might be almost nonexistent, as in the positivist position, or relatively narrower or broader, as in the *Apprendi-Harris* and *Blakely-Booker* positions, or extensive, as in the mandatory-effects position. Even apart from the subsequent stages, the decision of which position is adopted as the constitutional rule, therefore, has substantial consequences for defining the nature of the sentencing proceeding as well as the future of sentencing reform.

B. CONTROVERSIES AT THE SECOND STAGE

The decision to be made in the second stage also is one of *fact*. The determination of the appropriate punishment to be imposed on the convicted offender often depends on particular factual conditions independent of the offense elements. For example, although the offense elements of the charged crime might proscribe carrying a firearm in relation to a narcotics offense, the ultimate punishment imposed on a convicted offender might vary depending on whether the firearm was simply carried

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114. Justice Scalia stated:

> Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to *whether the defendant has a legal right to a lesser sentence—and that makes all the difference* insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail.

Blakely, 542 U.S. at 309 (Scalia, J., opinion for the Court).

> I think it not unfair to tell a prospective felon that if he commits his contemplated crime he is exposing himself to a jail sentence of up to 30 years and that if, upon conviction, he gets anything less than that he may thank the mercy of a tenderhearted judge (just as he may thank the mercy of a tenderhearted parole commission if he is let out inordinately early, or the mercy of a tenderhearted governor if his sentence is commuted).

Apprendi, 530 U.S. at 498 (Scalia, J., concurring). The *Harris* plurality relied on the same argument: "Since sentencing ranges came into use, defendants have not been able to predict from the face of the indictment *precisely* what their sentence will be; the charged facts have simply made them aware of the '*heaviest* punishment' they face if convicted." *See Harris*, 536 U.S. at 562 (emphasis added).

115. *See* Priester, *supra* note 8, at 902-09.

or instead was brandished or discharged.[116] Similarly, although a second-degree kidnapping offense might proscribe intentionally abducting another person without intent to hold for ransom or to injure, the ultimate punishment imposed might take into account the fact that the perpetrator was nonetheless deliberately cruel to his victim.[117] The function of the second stage is the adjudication of whether these additional punishment facts are present or absent in the given case.

Thus, at the second stage there is no controversy over *substance*. Everyone agrees that sometimes facts can exist which are legally and morally irrelevant to guilt or innocence of the offense of conviction, but which nevertheless are legally and morally relevant to the scope of punishment. All other culpability factors being equal, the defendant with a rap sheet of prior convictions would routinely be sentenced to a greater punishment than his counterpart with a previously clean record after both have been convicted of joint participation in the same criminal incident.[118] All other culpability factors being equal, a conspirator who breaks with his peers and cooperates with the government in the investigation or prosecution of others would routinely be sentenced to a lesser punishment than the other conspirators.[119] Such facts are not adjudicated at trial where they have nothing to contribute to the factual determinations at issue there. Rather, they are adjudicated at sentencing where they can affect the outcome.

The only dispute at the second stage involves *process*. Some favor additional factfinding by judges under a regime of judicial sentencing discretion, as was historically the predominant regime. Alternatively, judicial factfinding can be subject to advisory or mandatory sentencing provisions, as has occurred more frequently during the last two decades of sentencing reform. Finally, even those who maintain that judicial factfinding at sentencing is impermissible agree that additional facts legally relevant to punishment may be proven to juries as offense elements.

1. Historical Practice: Judicial Discretion

As has been thoroughly chronicled elsewhere, for most of our nation's history the predominant regime for sentencing convicted defendants was the exercise of judicial discretion.[120] In fact, because appellate review of

116. *See* 18 U.S.C. § 924(c)(1)(A) (2000), *construed in Harris*, 536 U.S. at 545.

117. *See, e.g.*, *Blakely*, 542 U.S. at 299 (discussing WASH. REV. CODE ANN. §§ 9A.40.020(1), 9A.40.030(1), 9.94A.390(2)(h)(iii) (West 2000)).

118. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (2006) (increasing criminal history score points based on prior convictions); U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, Sentencing Table (1992) (increasing punishment ranges for each offense level based on criminal history category, as determined by number of criminal history points).

119. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2006) (providing for downward departure from otherwise-applicable guidelines penalty range upon government motion certifying "substantial assistance" to government).

120. *See, e.g.*, KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 9-29 (1998); Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 696-98 (2005); *see also* Douglas

criminal sentences was nearly nonexistent, sentencing authority was vested not just in judges generally, but exclusively in *trial* judges. Consequently, those judges had plenary authority to adjudicate whatever facts above and beyond the offense elements they deemed relevant to evaluating the appropriate punishment to be imposed on the offender. Some facts might be aggravating, leading the judge to impose a higher sentence than in its absence; other facts might be mitigating, supporting a comparatively lesser sentence. Moreover, because the power to adjudicate additional facts was discretionary, neither the government nor the defendant could compel a sentencing judge to consider any particular fact. That is, judges had the discretion not only make the adjudication whether any given fact was present or absent, but also to decide *which* facts were going to be adjudicated at all.

In *Williams v. New York*, in 1949, the United States Supreme Court validated this sentencing regime.[121] At sentencing, the judge had considered not only the facts established as offense elements by the jury's felony-murder conviction, but also allegations of Williams' participation in numerous other burglaries (for which he had not been charged) and evidence of his bad moral character.[122] Relying in part on this additional evidence, the judge concluded Williams could not be rehabilitated and sentenced him to death.[123] The Supreme Court rejected a federal Due Process Clause challenge to this exercise of judicial discretion to adjudicate additional facts at sentencing.[124]

The constitutionality of judicial discretion to adjudicate additional facts at sentencing apparently remains sacrosanct on the Court today. Although the Justices have not taken any case that presented that question directly, plentiful dicta in the *Apprendi* line of cases supports the assessment that the Justices are unanimous in that conclusion.[125] Likewise, the reasoning used in the majority and dissenting opinions across the *Apprendi* line of cases is consistent with the same assessment. It appears quite unlikely, then, that the current Court would see any Due Process Clause or fundamental fairness defect in permitting judges to exercise their discretion to adjudicate additional facts at sentencing.

Finally, it should be noted that the regime of judicial discretion to adjudicate punishment facts remains influential in half the state criminal codes.[126] A handful more states rely on discretionary sentencing by juries

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A. Berman, *Reconceptualizing Sentencing*, 2005 U. CHI. LEGAL F. 1, 3-15, 41-52 (emphasizing rehabilitative model of punishment as conceptual basis for early- and mid-twentieth century judicial discretionary sentencing regimes and lack of alternative conceptual basis for late-twentieth century sentencing reform).

121. Williams v. New York, 337 U.S. 241 (1949).

122. *See id.* at 244.

123. *See id.*

124. *See id.* at 245-51; *see also* Berman, *supra* note 120, at 4-6 (discussing *Williams*).

125. *See, e.g.*, *Booker*, 543 U.S. at 233; *Blakely*, 542 U.S. at 308-09; *Apprendi*, 530 U.S. at 481.

126. As of 2004 eighteen states and the District of Columbia had some form of sentencing guidelines, advisory or mandatory, and several more were considering proposals. *See*

rather than judges.[127] Although the Court's cases have highlighted determinate sentencing regimes from several states and the federal system, much criminal sentencing around the country still takes place pursuant to a sentencing judge's exercise of discretion to decide *which* facts above and beyond the offense elements that he or she is going to adjudicate before determining punishment.

2. *Contemporary Developments: Guided and Mandatory Sentencing*

As also has been thoroughly chronicled elsewhere, in the last three decades the calls for sentencing reform have become increasingly strong and increasingly successful.[128] The changes enacted have varied widely across the fifty-two criminal jurisdictions in the United States. For example, implementing appellate review of sentences prevents individual sentencing judges from deviating too greatly from their peers.[129] Abolishing executive parole authority to release prisoners early achieves "truth in sentencing" by ensuring that the offender serves the time the judge imposes.[130] Narrowing the punishment ranges provided in the offense statutes reduces the breadth of authority granted to sentencing judges.[131]

Other sentencing reforms, however, were aimed specifically at the process of deciding *which* additional punishment facts to adjudicate. Some states adopted advisory guidelines with enumerated additional facts and factors that sentencing judges and appellate judges *should* consider, seeking to ensure greater consistency without binding their decisions in any particular case.[132] Other states and the federal government enacted mandatory guidelines, specifying with even greater precision which additional facts the judge *must* adjudicate at sentencing.[133] Mandatory minimum sentencing statutes, especially in jurisdictions without a guidelines regime, also compel the sentencing judge to adjudicate a particular fact.[134] And some statutes or guidelines did the opposite, enumerating certain factors that sentencing judges were *prohibited* from considering in

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Richard S. Frase, *State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues*, 105 COLUM. L. REV. 1190, 1195 (2005).

127. The current number is five. *See* Adriaan Lanni, Note, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?*, 108 YALE L.J. 1775, 1790 n.65 (1999) (Arkansas, Kentucky, Missouri, Texas, and Virginia). Prior to the modern sentencing reform movement, the number was about one-quarter. *See* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 230 & n.29.

128. *See, e.g.*, STITH & CABRANES, *supra* note 120, at 29-48; Berman, *supra* note 120, at 8-15; Bowman, *Beyond Band-Aids*, *supra* note 33, at 151-55; Klein, *supra* note 120, at 698-702; Michael M. O'Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U. CIN. L. REV. 749 (2005).

129. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 368 (1989).

130. *See id.* at 367.

131. *Compare* 18 U.S.C.A. § 2113 (West 2006) (providing for up to twenty years' imprisonment for bank robbery), *with* N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995) (providing for five-to-ten years' imprisonment for second-degree felonies).

132. *See, e.g.*, Berman, *Roots and Realities*, *supra* note 29.

133. *See id.*

134. *See infra* notes 183-88 and accompanying text.

determining punishment.[135]

Although the kind and extent of sentencing reform differs greatly across the country, without question the sentencing reform movement has led to profound changes in the political and legal discourse about criminal sentencing.[136] Oversight and accountability of sentencing decisions has become an interest of comparable significance to the exercise of legal and moral judgment in determining the punishment for a given offender.

3. *Scholarly Commentary: Juries in the Second Stage*

Without more, the preceding discussion might suggest—regardless of how the decision is made about *which* particular additional facts to adjudicate above and beyond the offense elements—that the power to *make* adjudications at sentencing is necessarily a judicial one. But using the jury as factfinder at sentencing is possible.

Under this alternative, the jury's role would encompass adjudication of all facts in the case. For example, circumstances such as the defendant's recidivism, a hate-crime motive, or the exact drug quantity possessed are frequently deemed important to the determination of punishment. At the same time they often are not incorporated into the primary criminal code provisions delineating the statutory offense elements to be proven at trial—for the very reason that such facts may be highly prejudicial to the defendant and could taint the jury's fair adjudication of other offense elements.[137] Yet there is no logical reason why the jury cannot still adjudicate them. If the defendant does not admit these punishment facts in a guilty plea, then a bifurcated proceeding can be used to retain jury adju-

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135. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL §§ 5H1.1-.12 (2006) (providing that enumerated facts and circumstances are "not ordinarily relevant" to calculating Guidelines punishment).

136. One aspect of these second stage adjudications that too often may be overlooked by policymakers and judges is the amount of procedural due process that should be required. *See* Berman, *supra* note 120, at 15-34, 50-52. *See generally* Alan DuBois & Anne E. Blanchard, *Sentencing Due Process: How Courts Can Use Their Discretion to Make Sentencings More Accurate and Trustworthy*, 18 FED. SENT'G REP. 84 (2005). A full discussion of those issues is beyond the scope of this Article. Nothing about the nature of the second stage determination as I have defined it precludes the application of significant procedural protections to factual adjudications of additional punishment facts.

137. This argument is a favorite of Justice Breyer's. *See Apprendi*, 530 U.S. at 557 (Breyer, J., dissenting)

> (At the same time, to require jury consideration of all such factors—say, during trial where the issue is guilt or innocence—could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, e.g., "I did not sell drugs, but I sold no more than 500 grams.");

id. at 565 (Breyer, J., dissenting) (arguing that hate crime motive sentence enhancement was constitutional); Almendarez-Torres v. United States, 523 U.S. 224, 235 (1998) (opinion of Breyer, J., for the Court) (citing risk of prejudice to defendant as grounds for interpreting recidivism sentence enhancement as sentencing factor rather than offense element); *see also* Monge v. California, 524 U.S. 721, 729 (1998) (opinion of O'Connor, J., for the Court) ("A defendant might not, for example, wish to simultaneously profess his innocence of a drug offense and dispute the amount of drugs allegedly involved.").

dication of the disputed fact.[138] Thus, although second stage punishment facts are not proven at trial, they nevertheless are proven to the jury as elements of the offense.

Some scholars support exactly this kind of second-stage factfinding, maintaining that the power to find *all* facts relevant to punishment is the province of the jury.[139] Professor Reitz insists that the Court's decisions in the *Apprendi* line of cases have not gone far enough: "the goal would be to apply the Sixth Amendment to factfinding with real impact on sentencing decisions, however that factfinding is incorporated into the overall system."[140] Similarly, Professor Kirgis argues that the Sixth Amendment jury trial guarantee should be coextensive with the Seventh Amendment protection in civil cases: a constitutional right to jury findings on all questions of fact, "whether those events are relevant at the liability or the penalty phase of the proceeding."[141] Just as in civil cases, issues of efficiency or fairness may dictate use of separate proceedings to adjudicate facts related to criminal culpability for the offense first and facts related to the sanction for that violation second.[142] Thus, prejudice, or any other reason for deeming a fact relevant only to punishment and not guilt, is not a valid basis for dispensing with jury factfinding in favor of judicial determination. If additional facts above and beyond those deemed relevant to guilt must be adjudicated to determine the appropriate punishment or achieve a just sentence, then the jury must serve as the finder of fact.

It is important to distinguish the expansive position taken by this view from the much more limited one taken by Court's *Apprendi* doctrine. The Rule applies only to a narrowly defined subset of facts that have mandatory-maximum effect on the penalty range. Those facts are deemed offense elements that must be proven to the jury; any other relevant punishment facts may be found by judges at sentencing. Under the view of these scholars, by contrast, the jury must find *all* facts relevant to punishment and *no* authority for judicial factfinding exists. The second-

138. *See Monge*, 524 U.S. at 738 n.1 (Scalia, J., dissenting) ("If simultaneous consideration of two elements would be genuinely prejudicial to the defendant (as, for example, when one of the elements involves the defendant's prior criminal history), the trial can be bifurcated without sacrificing jury factfinding in the second phase.") (citing *Almendarez-Torres*, 523 U.S. at 261, 269 (Scalia, J., dissenting)).

139. *See generally* Paul F. Kirgis, *The Right to a Jury Decision on Sentencing Facts After* Booker*: What the Seventh Amendment Can Teach the Sixth*, 39 GA. L. REV. 895 (2005); Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082 (2005).

140. Reitz, *supra* note 139, at 1119; *see also id.* at 1119-22 (explaining scope of jury factfinding right).

141. Kirgis, *supra* note 139, at 962.

142. The question remains how to get fact questions that are pertinent only to sentencing before the jury if they are not part of the offense charged in the indictment. Probably the best answer is to bifurcate the proceedings into culpability and sentencing phases, with the jury issuing a general verdict of guilty or not guilty first, and then answering a set of interrogatories regarding the offense-related sentencing factors only if the initial verdict was guilty.

Id. at 965-66.

stage power to adjudicate punishment facts is recognized, but the only permissible process for finding those facts is jury determination under procedures applicable to offense elements.

4. *Second-Stage Controversies: Conclusions*

Like the first stage, the second stage of a sentencing decision involves a controversy over how much and what kind of sentencing power will be wielded by judges. The history, contemporary practice, and case law authorize significant judicial authority to decide *which* additional facts to adjudicate at sentencing above and beyond the offense elements established in the conviction. This authority might be entirely discretionary, in which case the constitutional doctrines from the first stage have little impact. Even under the most restrictive of those first-stage doctrines, however, after establishing the affected determinate sentencing provisions as offense elements, there remains considerable room for discretionary decisions by the sentencing judge about which additional facts to adjudicate prior to making the final punishment determination. Although some scholars reject the use of any procedure other than jury-determined offense elements to adjudicate the presence or absence of all facts relevant to punishment, their position has yet to gain political or judicial currency. In the end, therefore, decisions about which additional facts relevant only to punishment, not guilt, will be adjudicated at sentencing are an indispensable part of the decision-making process when sentencing a convicted offender.

C. Controversies at the Third Stage

At the third stage, the controversy involves determinations of a kind entirely different from those made in the prior stages. The adjudications made in the first and second stages are essentially questions of *fact*. The decisions made in the third stage, by contrast, are essentially questions of *value*. That is, they concern the legal and moral worth, or weight, of the offense element facts and additional punishment facts. These normative decisions are made in the course of determining the precise punishment that should be imposed on the offender. That the third stage involves, unlike the first and second stages, a distinctively normative decision is a distinction of tremendous importance in understanding the true stakes in the debates over sentencing reform and the constitutional law of sentencing.

The factual adjudications carried out in the first and second stages of a sentencing proceeding are descriptive in nature. Findings of fact are made by the jury to determine whether the factual elements of the charged offense have been proven beyond a reasonable doubt, or the defendant waives his right to that jury determination and admits the same facts in his guilty plea. Additional findings of fact related to punishment also are made, usually by the judge at a sentencing hearing. These findings of fact in the first and second stages are comprised of a series of binary, ministe-

rial decisions: Is Fact X proven or not proven? There is no normative analysis to be made of how significant or important any given particular fact is in the case, but only a descriptive function of declaring its presence or absence. The inventory of relevant facts that potentially might exist in the case—offense elements and then punishment facts—is evaluated serially until a final list of established facts is completed. That list then serves as the basis for justifying the particular sentence that will be imposed on the given offender.

Taken alone, however, the presence or absence of any specific fact—or even a complete array of facts—is insufficient to justify a punishment. Instead, an entirely different determination is necessary as well: *How much* each of those facts, and the totality of the facts, counts toward justifying the punishment?

The third stage, then, involves normative decisions about *substance*: the legal and moral value of the various facts established in a given case. The determinations being made are not binary, descriptive questions about whether a given fact has been established, but rather are judgments about the significance of a given fact's presence or absence in assessing the level of punishment to be imposed on the offender. Fact X exists, but how important is it? Fact Y does not exist in this case, but how much does that matter? Should Fact X or Fact Not-Y make a relatively substantial difference to the offender's punishment, or a relatively inconsequential one? Should Fact X or Fact Not-Y have the same importance to Defendant A's sentence and Defendant B's sentence? Those questions are not adjudications of fact, but instead are normative value determinations about legal and moral significance.

Unlike adjudication offense elements and additional punishment facts, moreover, the evaluation of the value of the array of facts might not be made serially. Instead, the list of established facts might be evaluated simply in its totality, without ever assigning precise values to each particular component of the overall list. When that occurs, the decisions in the third stage become even more dissimilar to the adjudications in the first and second stages.

Consequently, there are numerous ways these decisions about the value of facts in determining punishment could be carried out in a sentencing regime. These various legal options can be classified into four general categories.

1. Judicial Judgment

The first category includes sentencing regimes in which decisions about the value of facts are reserved entirely to the judgment of the sentencing judge. The judge assigned to each defendant's case evaluates the particular offense elements and additional punishment facts and reaches a conclusion about the appropriate sentence to be imposed. No sources of law constrain the judge's evaluation of the specific facts separately or in totality. No formal requirement of consistency across multiple cases exists.

Appellate review, if provided for, might offer an opportunity to invalidate the most dramatically harsh or lenient sentences relative to other generally comparable cases, but it would provide relief only to the most outlier sentences.[143] The principal objective is to ensure that each defendant receives the punishment most appropriate for the facts of his or her case.

Within this category, then, considerable possibility exists for inconsistency among different judges in their assessments of the same or highly similar facts—and even for inconsistency by a single judge across cases. The possibility was exacerbated when offense statutes provided for quite broad sentencing ranges upon conviction.[144] The broader the scope of available punishments, the greater the likelihood of different sentences for comparable offenders convicted under the same statute.

In the contemporary era of sentencing reform, the unfettered exercise of judicial judgment has been vigorously attacked on this very basis. Especially in the aftermath of Judge Marvin Frankel's devastating appraisal of pervasive arbitrariness in criminal sentencing,[145] critics have lamented the systemic inconsistencies produced by the lack of any method for ensuring similar treatment of similar cases. At the federal level, the "battle cry of disparity" led to repeated introduction of sentencing reform bills in Congress until the ultimate adoption of the Sentencing Reform Act of 1984.[146] Similar concerns led to the adoption of sentencing reform measures in many states.[147]

Nonetheless, some judges, commentators, and scholars continue to argue in favor of sentencing regimes in the first category.[148] These arguments continue to accept that the ultimate objective of criminal sentencing should remain ensuring that each defendant receives the most appropriate punishment for the offense elements and additional punishment facts in the case. They also continue to believe that the particular judges presiding over each particular defendant's case are best suited to assessing the legal and moral value of those facts.

For example, Professor Huigens provides a comprehensive justification for the exercise of judicial discretion at sentencing. Under his view, all positive law provisions assessing criminal fault must be offense elements found by the jury, while judges retain the authority to make discretionary findings of interstitial fault to differentiate among offenders within the

143. *Cf.* Robert Weisberg & Marc L. Miller, *Sentencing Lessons*, 58 STAN. L. REV. 1, 10 (2005) ("Gentle consistency and minimization of extreme inequality, not hard equalities, should be the goal.").

144. *See, e.g.*, 21 U.S.C.A. § 841(b)(1)(A) (West 2006) (providing penalty range of ten years to life).

145. *See generally* MARVIN FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973); Marvin Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

146. *See* STITH & CABRANES, *supra* note 120, at 104 (chapter title).

147. *See, e.g.*, Berman, *supra* note 120, at 9-10.

148. *But see* Weisberg & Miller, *supra* note 143, at 9-10 ("we risk returning to a world of unstructured, individualized sentencing—a world that no scholar in this Issue praises or desires").

limits established by the jury verdict and positive law.[149] The implementation of positive law sentencing factors, no less than the definition and adjudication of offenses, is necessarily plagued by a "coarse-grained" relationship between provisions of law and moral judgments about punishment.[150] The exercise of judicial discretion to make interstitial findings of fault, on the other hand, takes account of the myriad other circumstances the positive law cannot (and, he argues, should not) specify, and therefore achieves a "fine-grained" balance between the imposition of punishment and moral judgment.[151] Judicial discretion therefore is the superior method of determining an individual offender's punishment.[152]

In addition, some scholars favor an alternative discretionary sentencing regime in which juries, not judges, make the normative value decisions about punishment facts.[153] The jury's role would include not only factfinding in the first and second stages, but also the individualized punishment decisions of the third stage.

For proponents of sentencing regimes in the first category, then, the principal normative focus is the appropriateness of each defendant's sentence rather than systemic consistency.

2. *Advisory Guidelines*

Like the first category, sentencing regimes in the second category are guided by the idea that decisions about the value of facts are best made by judges. Unlike the first category, however, these regimes make significant accommodations to concerns of consistency and systemic uniformity in punishments.

In response to the arguments of sentencing reformers, some jurisdictions adopted advisory sentencing guidelines.[154] These measures are provisions of law designed to reduce the possibility of different punishment outcomes on similar facts without fundamentally altering the authority of judges generally to decide the legal and moral weight of offense elements and additional punishment facts. With varying degrees of specificity and detail, these guidelines instruct sentencing judges not only about which facts and factors are significant at sentencing (a second-stage function), but also about the value those facts should carry in the determination of the particular punishment to be imposed. Those instructions might take

149. *See* Huigens, Apprendi *Puzzle*, *supra* note 18, at 391-92, 433-34; Huigens, *supra* note 33, at 1069, 1080-81.

150. *See* Huigens, *supra* note 33, at 1072-80.

151. *See id.* at 1066-72, 1080-81.

152. *See id.* at 1069.

153. *See* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003); Lanni, *supra* note 127; *see also* Ronald F. Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1372-79 (1999) (analyzing viability of jury sentencing in relation to Federal Sentencing Guidelines).

154. *See, e.g.*, Kevin R. Reitz, *The Enforceability of Sentencing Guidelines*, 58 STAN. L. REV. 155, 166-67 (2005) (discussing implementation of Virginia and Pennsylvania advisory guidelines).

the form of relatively simple recommended enhancements based on certain facts, or more complex calculations of a "presumptive" sentence based on the array of adjudicated facts.[155]

The distinguishing feature of second-category regimes is that these sentencing reform provisions are advisory, not mandatory. A sentencing judge who declines to follow a recommendation provided in the guidelines, or who rejects a presumptive sentence and imposes a different sentence instead, does not commit reversible error per se.[156] Similarly, appellate courts which affirm sentences variant from the directions in the guidelines are performing their proper role so long as they find the sentencing judge's determination to be within acceptable bounds.[157] That is, unlike some sentencing reform measures with similar titles,[158] the provisions serve as "guidelines" in the colloquial sense.[159]

In recent years, some commentators and scholars have argued that sentencing regimes in the second category provide the most effective and fairest process for determining punishments.[160] Rejecting calls for more stringent restrictions on judicial authority, they maintain that judges—both sentencing judges in the trial courts and appellate judges in the higher courts—are the institutional actors best suited to evaluating the legal and moral value of the offense elements and additional punishment facts in the myriad cases that come before them.[161] At the same time, they agree that judges—again, at the trial and appellate levels—should take on a greater obligation to ensure systemic consistency and uniformity in punishments in comparable cases.[162]

Proponents of regimes in the second category believe that decisions about the legal and moral value of the facts of particular cases should be made by judges, while also seeking to guide judges at all court levels to take better account of the serious concerns about consistency and systemic uniformity in punishments raised by sentencing reformers.

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155. *See id.* at 168-69 (discussing "presumptive" sentences).

156. Although elected state judges have strong incentives to sentence within the presumptive range. *See id.*

157. *See, e.g.*, State v. Gallion, 678 N.W.2d 197, 201-02 (Wis. 2004) (describing appellate review for reasonableness of sentences deviating from recommendations of advisory guidelines). The *Booker* remedial opinion instructed the courts of appeals to review sentences for "reasonableness" in relation to the sentence calculated under the Guidelines as well as statutory factors. *See* United States v. Booker, 543 U.S. 220, 261 (2005). *But see* Bowman, *Beyond Band-Aids*, *supra* note 33, at 164, 182-86 (expressing skepticism of meaningfulness of appellate review of advisory guidelines under reasonableness standard).

158. *See infra* note 164 and accompanying text.

159. *See, e.g.*, PIRATES OF THE CARIBBEAN: THE CURSE OF THE BLACK PEARL (Walt Disney Pictures 2003) (Captain Barbossa, speaking of the Pirate Code to Elizabeth Swann, explains that "the code is more of what you would call guidelines than actual rules").

160. *See generally*, STITH & CABRANES, *supra* note 120; Berman, *Tweaking* Booker, *supra* note 33; *but see* Wright, *supra* note 153, at 1380 ("Coordination of sentences is unlikely to happen without binding sentencing rules.").

161. *See, e.g.*, SMITH & CABRANES, *supra* note 120, at 6-7, 78-82.

162. *See, e.g., id.* at 166-77.

3. *Broad ("Simplified") Mandatory Guidelines*

The third category includes sentencing regimes in which legislatures play a dominant role in making decisions about the value of facts. In these regimes judges are no longer the primary institutional actors responsible for assessing how much weight the presence or absence of particular facts will have in determining the offender's ultimate punishment. Instead the legislature, or in some jurisdictions an agency exercising delegated legislative authority,[163] makes many of the normative value decisions. Those decisions are codified in provisions of law that have mandatory effect—sometimes confusingly titled as "guidelines"—upon sentencing judges.[164] Although these determinate sentencing provisions do not abolish judicial value decision-making entirely, the judicial authority that does remain is considerably narrower than in discretionary or advisory-guidelines regimes.[165]

The principles underlying third-category regimes are a direct response to the concerns raised by the sentencing reform movement in the last three decades. Problems of arbitrariness, inconsistency, and disparity can be solved if all judges apply the same values to the same facts across cases. Proponents of third-category systems are not satisfied with the degree of systemic uniformity provided by advisory-guidelines regimes, however. They believe determinate sentencing provisions are necessary to achieve an acceptable level of that objective, so mandatory guidelines must be implemented.

Despite the prominence of this systemic-uniformity objective, however, third-category regimes do not dispense with *all* judicial authority to make decisions of value about facts at the sentencing stage. In adopting mandatory guidelines and determinate sentencing provisions, the legislature's goal is not absolute consistency—it does not seek to preempt the field of all possible value decisions by making every decision itself.[166] Rather, the goal is a simpler one of attaining a far greater degree of systemic consistency than judges alone can provide. It is enough, then, to mandate the precise values to be attached to *some* of the offense elements and punishment facts adjudicated in the first and second stages—and it is for this reason these guidelines regimes are described as "simplified" by comparison to the fourth category's highly detailed and complex

163. The Federal Sentencing Guidelines, for example, are promulgated not by Congress but an administrative agency, the Sentencing Commission. *See generally* United States Sentencing Commission, http://www.ussc.gov.

164. For example, prior to *Booker* the Federal Sentencing *Guidelines* were mandatory.

165. Like advisory guidelines, these determinate sentencing provisions address not only the third-stage questions of value but also the prior, second-stage questions of which additional facts will be adjudicated at sentencing. *See supra* notes 154-55 and accompanying text. Unlike advisory guidelines, however, just as the answers to the third-stage questions are mandatory in determinate sentencing regimes, so too are the answers to those second-stage questions.

166. One kind of value decision is deciding that a certain fact has no value; that is, assigning a value of zero. *See supra* note 135 and accompanying text.

mandatory-guidelines regimes.[167] The operation of the determinate sentencing provisions thereby creates a narrow range of possible punishments. Although judges are precluded from making value decisions that override the constraints of these determinate sentencing provisions, they do retain the authority to make value decisions for the purpose of selecting the appropriate punishment within the mandatory range.

A number of scholars recently have written in favor of simplified mandatory guidelines.[168] The most comprehensive analysis has been offered by Professor Bowman, who in a series of recent articles has championed a simplified-guidelines regime as the best model for federal sentencing after *Booker*.[169] Unlike supporters of discretionary sentencing or advisory guidelines, he believes the mandatory Federal Sentencing Guidelines have achieved a number of significant successes that should be preserved.[170] He then argues that simplified guidelines will cure defects that have doomed the existing complex Guidelines.[171] The proposal has culminated in a Model Reform project demonstrating how the ideas can be implemented successfully in practice.[172]

Proponents of regimes in the third category take quite seriously the admonitions of sentencing reformers that uniformity in decisions about the legal and moral value of the facts used to determine punishments is necessary for a fair and just sentencing regime. Although these systems retain some role for judges in making value decisions about punishment facts to attain some level of individualized consideration of the particular case, the primary objective is ensuring a high degree of systemic consistency among judges and across cases.

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167. Accordingly, these regimes often provide substantial room for judicial deviation from the presumptive mandatory guidelines sentence. *See* Reitz, *supra* note 154, at 168-69.

168. *See, e.g.*, David Yellen, *Reforming the Federal Sentencing Guidelines' Misguided Approach to Real-Offense Sentencing*, 58 STAN. L. REV. 267 (2005); David Yellen, *Saving Federal Sentencing Reform After* Apprendi, Blakely, *and* Booker, 50 VILL. L. REV. 163 (2005). Professor Chanenson would combine simplified mandatory guidelines with the return of parole. *See* Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 189-94 (2005); Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 432-58 (2005). Professor Bibas, who opposes *Apprendi*, *see supra* note 79, would use simplified guidelines to work around the Rule. *See* Stephanos Bibas, *Reforming the U.S. Sentencing Guidelines After* Blakely (U. Iowa Legal Studies Research Paper No. 04-01, 2004), *available at* http://ssrn.com/abstract=634202.

169. *See* Bowman, *Beyond Band-Aids*, *supra* note 33; Frank O. Bowman III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315 (2005); Frank O. Bowman III, *Mr. Madison Meets A Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005). *See also* Constitution Project Sentencing Initiative, *Excerpt from Principles for the Design and Reform of Sentencing Systems: A Background Report*, 18 FED. SENT'G REP. 207 (2006); *The Constitution Project's Sentencing Initiative Panel Discussion (Mar. 2005)*, 18 FED. SENT'G REP. 120 (2005).

170. *See* Bowman, *Beyond Band-Aids*, *supra* note 33, at 161-64.

171. *See id.* at 164-76 (identifying defects in existing Guidelines); *id.* at 198-215 (explaining superiority of simplified mandatory guidelines regime).

172. *See* Frank O. Bowman III, *'Tis a Gift to Be Simple: A Model Reform of the Federal Sentencing Guidelines*, 18 FED. SENT'G REP. 301, 302-05 (2006). *See generally* Constitution Project Sentencing Initiative, *Constitution Project Sentencing Initiative Recommendations for Federal Criminal Sentencing in a Post-*Booker *World*, 18 FED. SENT'G REP. 310 (2006).

*4. Detailed ("*Blakely*-ized") Mandatory Guidelines*

Like regimes in the third category, sentencing regimes in the fourth category also are characterized by determinate sentencing guidelines through which legislatures have a dominant role in making decisions about the value of facts established as offense elements or additional sentencing factors. Unlike the third category, however, in these regimes the legislature claims the nearly exclusive power to make such value decisions, and denies judges any substantial authority to do so. Accordingly, these regimes are also characterized by highly detailed and complex systems of mandatory guidelines that prescribe the precise values of particular facts.

In these regimes sentencing reform has reached its apogee of influence, and concern for systemic uniformity has become truly paramount. Even the degree of consistency provided by simplified mandatory guidelines is deemed insufficient because of the residual authority given to judges to reach different conclusions about the value of some facts in some cases. Instead, all judges must apply the same values to the same facts across cases—with no room for disagreement or divergent assessment of value. The objective of the legislature is absolute consistency in value assessments; the legislature preempts the field of possible value decisions by making the decisions itself.

To avoid overstating the description too much, however, it should be noted that this abolition of judicial authority need not be fully literal for a regime to fall into the fourth category. For example, in the mandatory era prior to *Booker*, the Federal Sentencing Guidelines was this type of regime. The Guidelines require the sentencing judge to begin with the specified base offense level for the convicted offender's crime, then to modify the offense level with specific offense characteristics for that crime, adjustments applicable to all offenses, and increments to account for multiple counts of conviction.[173] Next, the judge calculates the offender's criminal history category based on the score produced by considering the type and nature of any prior convictions.[174] At each step in the process, the Guidelines prescribe the precise effect of any given adjudicated fact; for example, two offense levels added for causing injury during a robbery, or three criminal history points scored for a prior felony.[175] Finally, the judge cross-references the final offense level and criminal history to determine the mandatory Guidelines sentencing range, such as 12-18, 46-57, 135-168, or 292-365 months.[176] In the mandatory era the judge was required to impose a sentence falling within this range unless the Guidelines itself, through one of the enumerated exceptions in the departure

173. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)-(e) (2006).

174. *See id.* § 1B1.1(f).

175. *See id.* §§ 2B3.1(b)(3)(A), 4A1.1(a).

176. *See id.* § 1B1.1(g)-(h) & Sentencing Table.

provisions, authorized a deviation.[177] Thus, although the Guidelines were a highly detailed system of determinate sentencing provisions, they did not mandate a literally determinate punishment. Yet the judge's residual sentencing authority, especially the power to decide the value of particular facts in selecting the appropriate punishment, was insubstantial compared to the effect of the mandatory Guidelines prescribed by Congress and the Sentencing Commission.

In the aftermath of *Blakely* and *Booker*, jurisdictions which had implemented a regime in the fourth category were faced with the choice of how to respond to those decisions.[178] One option was to shift the regime into the second category and make previously mandatory guidelines advisory, as the Supreme Court's remedial opinion in *Booker* did with the federal guidelines.[179] The other option was to bring the determinate sentencing

177. *See id.* § 1B1.1(i). One such departure was authorized when a circumstance was present in the offender's case that was of a kind (second stage factual adjudication) or to a degree (third stage normative value decision) not already adequately taken into consideration in the Guidelines. *See id.* § 5K2.0(a).

178. *See, e.g.*, Steven L. Chanenson & Daniel F. Wilhelm, *Evolution and Denial: State Sentencing After* Blakely *and* Booker, 18 FED. SENT'G REP. 1, 1-4 (2005); Tony Ortiz, *The New Mexico Sentencing Commission's Legislative Proposal Subsequent to* Blakely v. Washington, 18 FED. SENT'G REP. 54, 54-55 (2005); David Louis Raybin, *The Anticipated Resolution of the* Blakely *Split of Authority in the States: Will the United States Supreme Court Dance the Tennessee Waltz?*, 18 FED. SENT'G REP. 41, 41-44 (2005). A few states have not even made the choice yet. *See* Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to* Blakely v. Washington, 18 FED. SENT'G REP. 7, 8-11 (2005). The Ohio courts have not yet ruled on *Blakely*'s applicability; the courts in California and New Mexico have rejected *Blakely* challenges to their state sentencing regimes; and the courts in Colorado and New Jersey have identified *Blakely* problems but the ultimate remedy remains in flux. *See id.*; *see also* Bennett Barlyn, *Sentencing Law Under the Knife: Judicial Surgery, the New Jersey Supreme Court and* State v. Natale, 18 FED. SENT'G REP. 35, 35, 37 (2005) (discussing New Jersey); Jonathan D. Soglin & J. Bradley O'Connell, Blakely, Booker, & Black*: Beyond the Bright Line*, 18 FED. SENT'G REP. 46, 46-50 (2005) (discussing California). The post-*Blakely* fate of California's determinate sentencing regime was pending in the United States Supreme Court during the October 2006 Term. *See* Cunningham v. California, 126 S. Ct. 1329, 1329 (2006); Michael M. O'Hear, Cunningham*: Why Federal Practitioners and Policy Makers Should Pay Attention*, 18 FED. SENT'G REP. 260, 260-61 (2006).

179. To date, it appears that Indiana and Tennessee have adopted a solution of this type. *See* Stemen & Wilhelm, *supra* note 178, at 9; Wright, *Power of Bureaucracy*, *supra* note 33, at 398-400; *see also Tennessee's Post-*Blakely *Legislation*, 18 FED. SENT'G REP. 72 (2005). The aftermath of *Booker* in the federal system, including whether or how Congress should respond to the decision with legislation, remains a subject of considerable discussion. *See, e.g.*, Lynn Adelman & Jon Deitrich, *Disparity: Not a Reason to "Fix"* Booker, 18 FED. SENT'G REP. 160 (2006); Laura I. Appleman, *Rediscovering Retribution: Understanding Punishment Theory After* Blakely, 18 FED. SENT. REP. 247, 247 (2006); Douglas A. Berman, *Now What?: The Post-*Booker *Challenge for Congress and the Courts*, 18 FED. SENT. REP. 157 (2006); Nora V. Demleitner, *Where to Go From Here? The Roberts Court at the Crossroads of Sentencing*, 18 FED. SENT'G REP. 221, 221 (2006); Jason Hernandez, *Presumptions of Reasonableness for Guideline Sentences After* Booker, 18 FED. SENT'G REP. 252, 252-53 (2006); Adam Lamparello, *The Unreasonableness of "Reasonableness" Review: Assessing Appellate Sentencing Jurisprudence After* Booker, 18 FED. SENT'G REP. 174 (2006); Carissa Byrne Hessick, *Prioritizing Policy Before Practice After* Booker, 18 FED. SENT'G REP. 167 (2006); Michael H. Marcus, *Post-*Booker *Sentencing Issues for a Post-*Booker *Court*, 18 FED. SENT'G REP. 227, 227-28 (2006); Mark Osler, *Ball in a Cup: The Case for Stability and Patience*, 18 FED. SENT'G REP. 164 (2006); Stephen R. Sady, *Guidelines Appeals: The Presumption of Reasonableness and Reasonable Doubt*, 18 FED.

statutes into compliance with those holdings by amendments providing for jury determination beyond a reasonable doubt at trial of all determinate guidelines facts—the so-called "*Blakely*-ized" mandatory guidelines.[180] Some scholars argued in favor of the latter course to preserve the mandatory nature of sentencing reforms and continue to assure systemic uniformity.[181]

Advocates for adopting sentencing regimes in the fourth category give primacy to the need for consistency and systemic uniformity in normative decisions about the legal and moral value of the facts used to determine punishments.[182] Individualized punishment is achieved not by relying on judges, but rather through the implementation of a highly detailed and complex determinate sentencing scheme that incorporates all value decisions about punishment facts that the legislature deems relevant.

5. *Aside: Mandatory Minimum Sentencing Statutes*

In addition to these four categories of sentencing regimes, there is another type of contemporary sentencing reform that also involves decisions of the *value* of offense elements or additional punishment facts that can exist in any of the four regimes. These are mandatory minimum sentencing provisions, which delimit a particular punishment floor when a particular fact is established.

Some mandatory minimum sentencing provisions are enacted as offense elements that increase the bottom end of the punishment range relative to what would otherwise apply.[183] An offense statute might include a provision that leaves the maximum penalty constant but increases the minimum penalty if an additional offense element is established.[184] Or an

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SENT'G REP. 170 (2006); Jon M. Sands, *Roberts' Sentencing Rules of Order*, 18 FED. SENT'G REP. 250, 251 (2006).

180. "When the Kansas Supreme Court found Apprendi infirmities in that State's determinate-sentencing regime in *State v. Gould*, the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. The result was less, not more, judicial power." Blakely v. Washington, 242 U.S. 296, 309-10 (2004) (citations omitted). It appears most of the other states with mandatory guidelines regimes have followed suit: Alaska, Arizona, Minnesota, North Carolina, Oregon, and Washington each has *Blakely*-ized their sentencing regime, at least in significant part. *See* Stemen & Wilhelm, *supra* note 178, at 8-11; Wright, *Power of Bureaucracy*, *supra* note 33, at 395-98; *see also* Tom Lininger, *Oregon's Response to* Blakely, 18 FED. SENT'G REP. 29, 29-31 (2005); Lenell Nussbaum, *Sentencing in Washington after* Blakely v. Washington, 18 FED. SENT'G REP. 23, 24-26 (2005); Dale G. Parent & Richard S. Frase, *Why Minnesota Will Weather* Blakely's *Blast*, 18 FED. SENT'G REP. 12, 12-13, 15-16 (2005); Ronald F. Wright, Blakely *and the Centralizers in North Carolina*, 18 FED. SENT'G REP. 19, 19-21 (2005).

181. *See, e.g.*, M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 539, 564-79 (2005); Kirgis, *supra* note 139; Reitz, *supra* note 139, at 1085-87, 1109-13. The option of *Blakely*-izing mandatory guidelines is not without its potential pitfalls. *See* Berman, *Tweaking* Booker, *supra* note 33, at 364-71.

182. Stemen & Wilhelm, *supra* note 178, at 9-10.

183. *See, e.g.*, Harris v. United States, 536 U.S. 545, 546-47 (2002).

184. For example, a commonly charged federal firearms offense has a maximum penalty of life and mandatory minimum terms of five, seven, and ten years depending on whether the firearm was possessed, brandished, or discharged. *See* 18 U.S.C.A.

offense might contain penalty tiers, essentially defining lesser but aggravated offenses in a single statutory section. For example, the principal federal narcotics offense contains penalty ranges of zero to twenty years, five to forty years, and ten years to life depending upon the quantity of drugs involved;[185] when a certain threshold quantity of drugs is proven as an offense-element, the maximum and minimum penalties increase in tandem.[186] In either instance, once the jury establishes that fact in its verdict or the defendant admits it in a guilty plea, a first-stage offense element adjudication, the statute mandates that no sentence lower than the prescribed level be imposed, a third-stage value decision.

Other mandatory minimum sentencing provisions take the form of additional punishment facts to be adjudicated at sentencing. For example, if the offender visibly possessed a firearm while committing a felony enumerated on a list, then regardless of the otherwise-applicable bottom end of the sentencing range for that felony, the offender must be sentenced to no less than five years.[187] Similarly, recidivism or detrimental character evidence, adjudicated at sentencing to avoid prejudicing a trial jury, might also trigger operation of a mandatory minimum sentence provi-

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§ 924(c)(1)(A) (West 2006). In *Harris*, the Supreme Court unanimously agreed that Congress could have intended the brandishing and discharging minimum-increasing facts to be offense elements of aggravated offenses; five Justices, however, concluded that Congress in fact intended them only to be sentencing factors. *See Harris*, 536 U.S. at 548, 556; *id.* at 552-556 (Kennedy, J., plurality opinion) (interpreting as sentencing factors); *id.* at 572 (Breyer, J., concurring) (joining plurality's analysis); *cf. id.* at 576-80 (Thomas, J., dissenting) (arguing that minimum-increasing facts must be proven as offense elements).

185. *See* 21 U.S.C. § 841(a)-(b)(1)(A)-(D). Soon after *Apprendi*, the federal courts of appeals overturned prior precedent and adopted such an interpretation of § 841. *See, e.g.*, United States v. Thomas, 274 F.3d 655, 660 (2d Cir. 2001) (en banc); United States v. Vazquez, 271 F.3d 93, 96, 98-99 (3d Cir. 2001) (en banc); United States v. Promise, 255 F.3d 150, 152, 156-57 (4th Cir. 2001) (en banc).

186. Currently the federal circuits are divided regarding the interpretation of the mandatory minimum aspects of the § 841 sentencing tiers. Some circuits hold that, unlike the minimum-only tiers in § 924(c) in *Harris*, the maximum-minimum linked tiers in § 841 create elements of the offense in all cases; the mandatory minimum term is inapplicable if the relevant drug quantity was not found by the jury or admitted in the plea. *See* United States v. Gonzalez, 420 F.3d 111, 127-131 (2d Cir. 2005); *see also* United States v. Velasco-Heredia, 319 F.3d 1080, 1085-86 (9th Cir. 2003); United States v. Graham, 317 F.3d 262, 273-75 (D.C. Cir. 2003); United States v. Martinez, 277 F.3d 517, 528-30, 532-34 & n.15 (4th Cir. 2002). Other circuits hold that the drug quantity ranges can fairly be interpreted as elements for some purposes but not for others; the mandatory minimum term must be applied as a sentencing factor in all cases in which the judge finds the fact at sentencing. *See* United States v. Goodine, 326 F.3d 26, 31-32 (1st Cir. 2003); United States v. Copeland, 321 F.3d 582, 603 (6th Cir. 2003); United States v. Solis, 299 F.3d 420, 454 (5th Cir. 2002).

187. *See* McMillan v. Pennsylvania, 477 U.S. 79, 81-82 & n.1 (1986); *see also* 42 PA. CONS. STAT. § 9712 (1982)

> (Any person who is convicted in any court of this Commonwealth of [enumerated offenses] shall, if the person visibly possessed a firearm during the commission of the offense, be sentenced to a minimum sentence of at least five years of total confinement notwithstanding any other provision of this title . . . . Provisions of this section shall not be an element of the crime. . . . The applicability of this section shall be determined at sentencing. The court shall . . . determine, by a preponderance of the evidence, if this section is applicable.).

sion.[188] That is, these provisions combine a second-stage adjudication of an additional punishment fact with a third-stage value decision prohibiting the sentencing judge from imposing a lesser punishment.

Thus, these types of sentencing laws can be implemented in any of the four categories of sentencing regimes. In regimes of judicial discretion or advisory guidelines, these provisions serve to supersede the value decisions that otherwise would be made by judges. By altering the otherwise-applicable statutory penalty range by raising the minimum end of the available sentence, the legislature substitutes its own value decision regarding the punishment consequence of the establishment of that particular fact. In regimes of simplified or detailed guidelines, mandatory minimum terms might be created in the offenses' statutory ranges or in the guidelines' punishment ranges. Once again, they serve to alter otherwise applicable penalty ranges by cutting off authority to impose a punishment lesser than that mandated upon establishment of the particular fact.

Enacting mandatory minimum sentencing provisions enables a legislature to decree specific punishment values for particular facts without having to make fundamental changes to its jurisdiction's overall sentencing regime. This flexibility in implementation makes mandatory minimum sentencing provisions a particularly powerful political tool for legislators eager to appear to be "tough on crime" by taking away judges' power to be "too lenient" on convicted offenders when certain specific facts are present.[189] Although mandatory minimum sentences are frequently criticized strenuously on numerous grounds,[190] one of the most frequently raised objections is that mandatory minimum provisions have resulted in a severe one-way upward ratchet in criminal sentences without adequate public discourse about appropriate levels of punishment.[191] Nonetheless, because these provisions can be adopted in any kind of sentencing regime, their pervasiveness is unlikely to disappear any time soon.

6. *Third-Stage Controversies: Conclusions*

The task performed at the third stage of a sentencing proceeding is fundamentally different from the tasks in the other two stages. Instead of adjudicating of facts, this stage involves decisions of value. These normative decisions about the legal and moral worth of the offense elements and additional punishment facts ultimately result in the determination of

188. *See supra* notes 137-38 and accompanying text.

189. *See, e.g.*, CAL. PENAL CODE § 667(e), *discussed in* Ewing v. California, 538 U.S. 11, 16 (2003).

190. *See, e.g.*, Charles J. Ogletree, *Testimony of Charles Ogletree: Discriminatory Impact of Mandatory Minimum Sentences in the United States*, 18 FED. SENT'G REP. 273 (2006); Patricia M. Wald, *Testimony of The Honorable Patricia M. Wald On Behalf of the American Bar Association*, 18 FED. SENT'G REP. 284 (2006); *see also Harris*, 534 U.S. at 569-72 (Breyer, J., concurring) (discussing criticisms of mandatory minimum sentencing laws).

191. *See, e.g.*, Justice Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

the precise punishment to be imposed on the offender. But there is a great deal of debate and controversy over how such decisions should be made, and what the principal objective of the decision-making process is. Should these normative value decisions be made by judges or by legislatures? More difficult, though, is the question of the principal goal of making these decisions in the first place. Is the goal to determine the individualized just punishment—that is, to ensure that the punishment imposed in this case fits the particular offense and offender involved? Or is the goal to determine the extent of society's legal and moral condemnation—that is, to ensure that the punishment imposed in this case is consistent with those imposed in similar cases? The four categories of third-stage sentencing regimes answer those questions with divergent patterns of judicial and legislative influence as well as varying degrees of emphasis on individualized punishment and systemic uniformity.

D. Conclusions from the Tripartite Analysis

Breaking down a sentencing decision into these three stages provides the best analytical framework not only for assessing the validity of the Supreme Court's reasoning and outcomes in its recent decisions on the constitutional law of sentencing, but also for debating the future of sentencing reform legislation and the nature of sentencing. By specifying more precisely which stage or stages are implicated in a given debate, the disagreements and arguments can be isolated to the particular principles and positions actually in conflict. The salutary effects of this analytical clarity extend far beyond constitutional doctrines to all discussions and proposals for sentencing reform.

One advantage provided by the tripartite analysis is a more precise delineation of the nature of the actions being taken during a sentencing proceeding. For purposes of both implementation of sentencing laws and appellate review of sentencing decisions, this specification of function illustrates more vividly what really is taking place and what really is at stake in debates over sentencing reform.

At the implementation phase, the analysis isolates the function being performed with improved clarity. In the first and second stages, the function is the adjudication of facts. The nature of the action of carrying out that function is descriptive—a ministerial determination of a binary choice between whether a given fact has, or has not, been established under the applicable procedures. At the first stage, that determination can only be the constitutional requisites for offense elements: proof beyond a reasonable doubt in a jury trial or admission in a guilty plea. At the second stage, procedures applicable to this function are contested: they might involve a judge exercising discretion about which facts to consider or not consider, proof of specified sentencing factors to a judge pursuant to statutes or mandatory or advisory guidelines, or even the full requisites of offense elements. Regardless of these variations, however,

the fundamentally descriptive nature of the action being taken in this stage remains the same.

In the third stage, by contrast, the function is a decision about the punishment value of those established facts. That action is definitively normative—it is an exercise of reasoned judgment about the legal and moral significance of the existence of the array of proven facts.[192] In that way the function being performed at the third stage is fundamentally different from that of the other two stages. Because of this, conflating the third stage with the prior two is mistaken.[193] Yet it is exactly such conflation that often leads to analytical confusion and unpersuasive arguments in debates over sentencing reform.

The tripartite analysis also provides improved clarity from the perspective of appellate review of sentencing decisions. In the first and second stages, standards of review applicable to verdicts and findings of fact would govern. The facts adjudicated in the first stage are offense elements. On appeal from a jury verdict, findings of fact comprised in the verdict will not be disturbed unless the defendant can succeed on a claim of insufficiency of the evidence; that is, "only if the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt" once inferences are drawn in favor of the verdict.[194] Accord-

192. One method for ensuring that third stage normative decisions are in fact reasoned judgments about the punishment value of facts, rather than arbitrary decrees, is to require sentencing judges to delineate their normative decisions in written opinions. *See, e.g.*, Steven L. Chanenson, *Write On!*, 115 YALE L.J. POCKET PART 146, 146-47 (2006), *available at* http://www.thepocketpart.org/2006/07/chanenson.html (citing Marc L. Miller, *Guidelines Are Not Enough: The Need for Written Sentencing Opinions*, 7 BEHAV. SCI. & L. 3 (1989)); *see also, e.g.*, Berman, *supra* note 8, at 410-12 (discussing importance of exercising of reasoned judgment in judicial discretionary sentencing authority); Douglas A. Berman, *Reasoning Through Reasonableness*, 115 YALE L.J. POCKET PART 142, 144 (2006), *available at* http://www.thepocketpart.org/2006/07/berman.html.

193. Professor Huigens argues that the opposite is true: in his view, analytically separating the first and second stages from the third stage is mistaken. He maintains that all findings of "fact" in criminal law are not simply descriptive, but also normative judgments. *See* Huigens, *supra* note 33, at 1060-63, 1073-74. The examples he provides are findings that seem to implicate substantial degrees of moral judgment: what qualifies as an unjustifiable risk disregarded by a recklessness mens rea, what constitutes consent in a rape case, or whether a homicide was heinous or depraved. *See id.* Other possible examples, however, seem far removed from those: whether the defendant did or did not fire his gun, what quantity of drugs was found in a given container, or what amount of money was taken from a bank teller during a robbery. Moreover, to the extent normative assessments are made in first or second stage adjudications, they are distinct from third stage value decisions. When normative considerations are involved in factfinding, such as whether the defendant acted with a recklessness mens rea, they are principally aimed at *authorizing* punishment in the first instance. Normative considerations involved in value decisions, by contrast, are principally aimed at determining the *degree* of punishment—such as how severely or leniently a reckless offense should be punished relative to others. Thus, while it may be true that the determination of whether certain "facts" are present or absent in a given case may have a normative component, the exercise of finding facts in adjudicating offense elements or punishment facts is *primarily* descriptive.

194. United States v. Carrillo, 435 F.3d 767, 775 (7th Cir. 2006); *see also* United States v. Oslund, 453 F.3d 1048, 1059 (8th Cir. 2006) ("Only if 'no interpretation of the evidence . . . would allow a reasonable-minded jury to conclude guilt beyond a reasonable doubt' will we reverse a jury's verdict on the grounds of insufficient evidence.") (quoting United States v. Martin, 412 F.3d 901, 904 (8th Cir. 2005)); *id.* at 1059-60 (rejecting insufficiency of

ingly, those findings of facts are exceptionally difficult, if not practically impossible, to overturn on appeal.[195] Lesser procedural requirements usually are used in the second stage, and the defendant's capacity to contest and overturn the finding of additional punishment facts is correspondingly greater. For example, findings of fact made by a sentencing judge pursuant to the Federal Sentencing Guidelines (both before and after *Booker*) are subject to the somewhat less stringent clearly erroneous standard of review on appeal.[196]

The standard of review applicable to the normative value decisions made in the third stage is not so obvious, however. On the one hand, normative decisions might be viewed as analogous to decisions on questions of law, which are reviewed *de novo* and accordingly can be reversed based on the appellate court's own reasoning or analysis with no deference owed to the trial court's.[197] On the other hand, such decisions might be compared to decisions on questions of judgment, which are reviewed

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evidence claim relating to credibility of eyewitness who identified defendant); *Carrillo*, 435 F.3d at 775-76 (rejecting insufficiency of evidence claim relating to proof of participation in, and specific intent for, conspiracy charge); Jackson v. Virginia, 443 U.S. 307, 319 (1979) (holding that

> [t]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, holding that *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.)

(internal citations omitted).

195. *See* Priester, *supra* note 8, at 923-28. Challenges to facts established by guilty plea are even more difficult to overturn. Many guilty plea agreements require the defendant to waive the right to appeal the conviction and sentence. Even if the defendant can appeal, the express admission of offense element facts in the plea colloquy cannot be overcome except by overturning the validity of the plea in its entirety.

196. *See, e.g.*, United States v. Rattoballi, 452 F.3d 127, 132, 140 (2d Cir. 2006) (reversing district court's Guidelines decision not to impose a fine based on finding of fact of inability to pay "in light of the defendant's admission (that he had 'accumulated some modest wealth' and was 'capable of paying a modest fine') and his considerable assets (between $1 and $1.5 million)."); United States v. Willis, 433 F.3d 634, 636 (8th Cir. 2006) (declining to reverse Guidelines determination of drug quantity involved in conspiracy where "ample evidence supports" district court's factual finding). A finding of fact is clearly erroneous if, after viewing all the evidence from trial, the appellate court is "left with the definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

197. Unlike findings of fact, issues of law are reviewed *de novo*. *See, e.g.*, United States v. Paley, 442 F.3d 1273, 1276 (11th Cir. 2006) (holding that "[w]e review the district court's determination of the facts concerning the amount of money involved in a money laundering scheme only for clear error. We review the district court's interpretation of the sentencing guidelines de novo.") (citations omitted); United States v. Salgado, 250 F.3d 438, 451 (6th Cir. 2001) (stating that "[i]n reviewing a trial court's evidentiary determinations, this court reviews de novo the court's conclusions of law and reviews for clear error the court's factual determinations that underpin its legal conclusions"); United States v. Dakota, 197 F.3d 821, 827 (6th Cir. 1999) (reviewing de novo "district court's conclusions" of law [as to] whether evidence offered at trial constituted hearsay within the meaning of the Federal Rules of Evidence).

for abuse of discretion and are reversed only if the trial court "manifests a clear error of judgment" in reaching the ruling it does.[198] And in fact, the four categories of sentencing regimes reflect differing assessments of the nature of the normative value decisions. Discretionary-sentencing regimes and advisory-guidelines regimes reserve considerable judicial authority to determine normative value. In those regimes, then, deferential review for abuse of discretion would be expected. Mandatory-guidelines regimes, whether simplified or detailed, by contrast, are characterized by the legislature substituting its own normative decisions for some or all of the sentencing judge's authority to decide the value of facts. In such regimes, *de novo* review of value decisions likely would apply. Again the distinctly different nature of the third stage comes into stark relief. Unlike the easily assessed descriptive adjudications of fact, the nature of the third stage's function is, itself, part of the debate over sentencing reform. Whether the normative value decisions being made in the third stage are matters of law or matters of judgment is only one part of the controversy.

Another advantage of the tripartite analysis in improving the clarity of debates over the constitutional law of sentencing and sentencing reform is the manner in which the analysis helps to frame the discussion of the stakes involved. Sometimes these discussions take place in terms of an institutional battle for power, particularly between legislatures and judges. Other times the emphasis falls on the clash between the relative importance of assuring individualized punishment for offenders and systemic equality across cases. Unfortunately, these discussions often take place without carefully specifying which issues are involved, and when.

To the extent it allocates institutional power between the legislature and judge, the first stage ought not be controversial at all. Judicially created common law offenses are all but nonexistent in contemporary American criminal law.[199] Criminal offenses and their punishment ranges are indisputably the province of the legislature.[200] Just as a prosecutor

198. United States v. Martinez, 455 F.3d 1127, 1129 (10th Cir. 2006) (holding that "'[w]e review a district court's refusal to grant a mistrial for abuse of discretion,' which means we will reverse only if the decision . . . manifests a clear error of judgment.") (internal quotations omitted); *see also id.* at 1130 (rejecting claim that denial of mistrial constituted abuse of discretion); United States v. Ebbers, 458 F.3d 110, 122 (2d Cir. 2006) (rejecting claim that admission of testimony under Federal Rules of Evidence constituted abuse of discretion); United States v. Martinez, 418 F.3d 1130, 1133-34 (10th Cir. 2005) (rejecting claim that four-level Federal Sentencing Guidelines departure was abuse of discretion). If the identified error made by the trial court is not one of judgment, however, but rather one of fact or law, then the less deferential standards of review applicable to those determinations, respectively, will be applied by the appellate court. *See, e.g.*, *Martinez*, 455 F.3d at 1129 ("We review a district court's refusal to grant a mistrial for abuse of discretion, which means we will reverse only if the decision was based on a clearly erroneous finding of fact *or* an erroneous conclusion of law *or* manifests a clear error of judgment."); United States v. McDaniel, 398 F.3d 540, 544 (6th Cir. 2005) (holding that "[t]his standard [of review] is consistent with the Supreme Court's admonition, . . . that we review evidentiary decision for an abuse of discretion, because it is an abuse of discretion to make errors of law or clear errors of factual determination") (internal quotations omitted).

199. Priester, *supra* note 8, at 891-92 & n.151.

200. *Id.* at 891-92.

cannot charge an offense that does not exist, or a jury cannot convict of an offense that has not been charged, so too a judge cannot punish the offender outside the terms of the statute under which he or she has been convicted.[201] To do so would be *ultra vires* and a violation of constitutional principles as fundamental as the separation of powers and the rule of law.[202] Although the first stage has some role to play in delimiting the range of punishment a convicted offender faces, the breadth or narrowness of those limitations is plainly a matter of legislative power. If the offense elements defined by statute are accompanied by a broad punishment range, then adjudication of that offense has comparatively little influence on determining the final penalty. The converse is true when the statutory offense elements have a corresponding narrow penalty range.

The important point, however, is that the first stage alone involves only a preliminary step in the process from adjudicating a defendant's guilt to determining the exact sentence to be imposed on a convicted offender. Answering the questions of what offense elements are required to be proven and what penalty range is provided by that statute upon conviction, is necessary but not sufficient for calculating punishment.

It is the second stage, then, that actually features the battle for institutional power between legislatures and courts that has been waged since the beginning of the *Apprendi* line of cases. In recent decades of sentencing reform, many legislatures have not been content with simply defining criminal offenses and broad penalty ranges and leaving the selection of the appropriate punishment to the sentencing judge. Instead they have enacted various sentencing reform measures, from solitary mandatory-minimum provisions to complete guidelines regimes, by which legislatures—through the prosecutors as their enforcement intermediaries[203]—can constrain the power of judges at sentencing. Naturally judges have resisted this diminution in their power, seeking to circumvent or invalidate such measures to retain their traditionally extensive power at sentencing. In the *Apprendi* line of cases, the Supreme Court invoked the jury trial guarantee in the Sixth Amendment to justify a victory for judicial power. Yet because of the inapposite constitutional basis[204] and nonsensical distinctions[205] made by the Rule, this supposed triumph is strangely limited.

The important point here is that although the operation of the Court's Rule requires that certain facts be established as offense elements rather than sentencing factors, the Rule actually implicates the second stage far more than the first. This is true because it has only narrow application to certain kinds of determinate sentencing provisions that increase the Rule-defined "maximum" penalty. All other kinds of sentencing provisions—

201. *Id.* at 896, 899.
202. *See id.* at 894-95, 897-99.
203. *See id.* at 893-94.
204. *See supra* notes 67-72 and accompanying text.
205. *See supra* notes 57-65 and accompanying text.

such as advisory guidelines, all forms of discretionary judicial sentencing, and even to those *determinate* sentencing provisions that do not affect the Rule-defined "maximum" penalty—are untouched by the Court's doctrine. The Court's Rule leaves the vast majority of the second stage free from its new constitutional law of sentencing. Although one possible resolution of the second-stage controversies is to essentially abolish the second stage and turn all punishment facts into offense elements,[206] most participants in the sentencing reform debate do not argue for such an outcome. Thus, even if some forms of determinate sentencing provisions must be shifted back into the first stage, there remains a considerable role for the second stage of a sentencing decision.

The third stage of a sentencing decision, unlike the previous stages, addresses a completely different question. Decisions about the punishment value of adjudicated facts give normative measure to the legal and moral weight of the defendant's situation. Rather than allocating institutional power, the third stage allocates the relative significance of two fundamental values—individualized punishment and systemic uniformity. Those who emphasize the goal of individualized justice oppose bright lines and fixed rules at the third stage to enable each case to be judged on its own facts and circumstances. By contrast, those who emphasize the goal of systemic uniformity favor such measures because they ensure that the idiosyncratic nature of a particular case does not interfere with consistency and equal treatment across all sentencing proceedings. Although the Court's opinions and the scholarly commentary often do not specify the discussion on these terms, the reality is that most of the disputes over the constitutional law of sentencing and the future of sentencing reform generally are *third-stage* controversies. For that reason, separating the third-stage questions from the first and second stages will provide greater clarity to the discussions.

The important point about the third stage is that these contrasting goals of individualized punishment and systemic uniformity need not correlate with institutional power. The opinions of the Court, and sometimes even analyses in the scholarly debate, seem to assume that judges mete out individualized punishment and legislatures prescribe systemic uniformity. Clarifying the nature of the third stage demonstrates that this need not be the case. Judges do not need to pursue only individualized punishment through the exercise of discretionary power at sentencing; their decisions might be shaped by advisory guidelines and rigorous appellate review by other judges to ensure a significant degree of systemic uniformity. Likewise, legislatures need not impose modes of systemic uniformity like mandatory-minimum provisions or highly detailed mandatory guidelines that eliminate all (or nearly all) judicial discretion; they might achieve a greater degree of systemic uniformity by enacting mandatory guidelines that impose broad constraints while also reserving some degree of individualization within that regime as well.

206. *See supra* notes 137-38 and accompanying text.

One of the great advantages of the tripartite analysis, then, is illuminating this distinction. Disagreements that are really about the third-stage clash between individualized punishment and systemic uniformity should be carried out on those normative terms, without muddling the debate by assuming those objectives necessarily require any particular arrangement of institutional powers. The second and third stages of the analysis do distinct work in the determination of punishment, and assessing those functions separately is crucial for preserving clarity in the discussion. Different judges or different legislatures might agree that certain facts—such as an offender's recidivist history, the degree of the victim's bodily injury, or the extent of the victim's monetary loss—should be included in the array of additional punishment facts at the second stage, while disagreeing about the normative punishment value of those facts at the third stage.[207] Similarly, different judges or legislatures might agree that certain facts—such as an offender's race, religion, or socio-economic status—are improper criteria for distinguishing among offenders, barring their adjudication at the second stage and thereby ensuring no consideration at the third stage.[208] Specifying which kind of decision is being made, and why, focuses on the underlying reasons for assessing the decision as right or wrong.

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207. One concern, for example, is that judges in different geographic locations will assess similar cases differently. *See, e.g.*, Stephanos Bibas, *Regulating Local Variations in Federal Sentencing*, 58 STAN. L. REV. 137, 139-40 (2005); Ian Weinstein, *The Historical Roots of Regional Sentencing Variation*, 11 ROGER WILLIAMS U. L. REV. 495, 498-99 (2006).

208. This situation of overlapping outcomes between the second and third stages is worth a bit more elaboration. When a given fact is not adjudicated in the second stage, that fact necessarily carries a weight of zero in the third stage. That is, the fact simply is not part of the array of offense element facts and additional punishment facts upon which normative value decisions are made. Of course, the same functional result could be achieved by adjudicating the existence of the fact in the second stage but then assigning it a weight of zero in the third stage. That is, the fact is part of the array of facts but is found to produce no normative effect. Either way, the fact has no effect on the offender's sentence. Nonetheless, the implications of making that zero-worth determination at the second or third stage are different, and important. Take the examples of the offender's "good works" before or after his crimes compared to his race. The offender might seek to present evidence of his good works in the second stage as a proffered reason for leniency and mitigation of his punishment in the third stage. If the evidence is adjudicated but ultimately found to have no mitigating effect, the consequence is that although the evidence was insufficient to produce any effect in this case, stronger evidence in other cases might produce an effect. By contrast, if the offender sought a second stage adjudication of his race as a proffered reason for leniency and mitigation of his punishment in the third stage—or if the prosecution sought the same finding as grounds for aggravation—the claim would be rejected out of hand. Legally and socially powerful values of race-blind justice are served when a judge declines to adjudicate, or the legislature prohibits adjudication of, the fact of the offender's race in the second stage. Permitting that fact into the mix at the third stage, even if it ultimately carries zero weight toward aggravating or mitigating the penalty, simply does not serve those values in the same way—because unlike good works, which might make a difference in some cases, race cannot be allowed to matter in *any* case. Thus, although the functional outcome on punishment may be the same, extrinsic considerations of law and policy determine whether that outcome is achieved by a mandate that a given fact not be considered at the second stage or by a determination that it has zero worth in the third stage does in fact matter.

Finally, the tripartite analysis clarifies not only the doctrinal disputes in the constitutional law of sentencing, but also the terms of the broader debate over sentencing reform measures in general. Although the first and second stages have some role to play in those debates, the real stakes come in the third stage's balancing of individualized punishment and systemic equality. For example, calls for legislatures to enact more carefully drafted criminal offenses with more nuanced penalty ranges probably are not motivated by concern for the first-stage balance of institutional power between legislature and judge for its own sake, but rather a third-stage objective of achieving greater systemic equality. Reducing judicial discretion is not an end in itself, but only a derivative goal pursued as a means of achieving the ultimate end. Similarly, much of the opposition to mandatory sentencing guidelines that superficially appears to be motivated by second-stage concerns about identity of the factfinder and burden of proof usually has, at its core, a third-stage goal of maximizing individualized punishment. Once again, reducing legislative power and preserving judicial discretion are not valued for their own sake; instead, they are simply derivative goals along the way to the ultimate objective. The tripartite analysis serves to break through these facades and focus on the true goals of proponents and opponents of various sentencing reform measures.

IV. DEFINING DOGS, TAILS, AND WAGGING: THE FUTURE OF THE CONSTITUTIONAL LAW OF SENTENCING AND SENTENCING REFORM

In the end, the tripartite analysis demonstrates that, no matter the issues and controversies abounding in the constitutional law of sentencing in particular and sentencing reform in general, the ultimate question can be reduced to the simple terms of the canine metaphor. For purposes of both constitutional law and sentencing policy, it is necessary to define not only the offense dog and sentencing tail, but also what constitutes wagging. How significant must the effect of the offense elements over the ultimate punishment be to ensure that the dog is wagging the tail? When do sentencing decisions become so significant that they superseded the offense of conviction and cause the tail to wag the dog? Conversely, what kinds of sentencing decisions ought to be deemed permissible, despite their significance, because they do not override the dog's power to wag the tail? The framework provided by the tripartite analysis focuses the debate about the *Apprendi* line of cases and the future of sentencing reform on the deepest implications of the doctrinal and normative choices made by the Court and illustrates why decreeing those choices as constitutional law is so problematic.

A. Assessing the Supreme Court: Power Grabs and Hidden Motives

Examining the *Apprendi* line of cases through the lens of the tripartite analysis reveals the full extent of the aggrandizement of judicial power executed by the Court. If the only problem was that the Court's purported Sixth Amendment justification is inapposite and produces absurd doctrinal results, the solution might seem to lie in revising the existing doctrines at the margins. The problem with the Court's doctrines is far more significant, however. What the Court has done is mandate its own particular, highly contestable vision of the nature of the sentencing process as federal constitutional law. In doing so the Court has placed substantial obstacles in the path of several prominent modes of contemporary sentencing reform which rely on equally particular and contestable visions. The Court has acted without identifying the constitutional basis for its mandate and without explaining why the Constitution privileges its vision of the nature of sentencing. Consequently, its holdings are nothing more than a sheer power grab by the Court on behalf of judges and at the expense of legislatures.

At all three stages, the Court has imposed on Congress and the states a particular vision of the natures of the sentencing process. At none of these stages has the Court adequately explained its rationales. Of course, the likely reason for that failure is that the Court's commands are unjustified and legislatures should be free to implement the sentencing process in other ways.

At the first stage, the Court initially followed the correct course by adopting, if for the wrong reasons, the *Apprendi-Harris* doctrine.[209] Rejection of the pure positivism position advocated by the dissent is not explained by the Sixth Amendment, but is easily defensible in terms of the constitutional structure of criminal procedure.[210] That is, the *Apprendi-Harris* doctrine does not diminish legislative power or expand judicial power, but rather balances power between all the institutions involved by ensuring that the ultimate sentence imposed is consistent not only with the legislature's criminal code in general, but with the terms of the *specific* criminal offense charged by the prosecution and proven to conviction by jury or plea.[211]

The Court has gone astray by further expanding the doctrines applicable at the first stage. Unlike the *Apprendi-Harris* doctrine, the *Blakely-Booker* expansion is not about preserving the integrity of the offense of conviction. Once an offense has been defined, charged, and proven, it remains for a particular sentence to be imposed on the individual offender—and so long as the scope of available punishment delimited by that offense of conviction is observed, then no constitutional violation is produced when additional factfinding and normative judgment are car-

209. *See* Priester, *supra* note 8, at 855.
210. *See id.* at 896-902.
211. *See supra* notes 57-64, 92-96 and accompanying text.

ried out in the second and third stages.[212] Yet the *Blakely-Booker* expansion deems unconstitutional certain types of sentencing provisions which constrain the sentencing authority of judges and declares that such provisions can only be enforced if established as offense elements in the first stage.[213] A much greater number of sentencing provisions would be deemed unconstitutional in the not-at-all-implausible eventuality that *Harris* is overruled and the mandatory-effects position is imposed, a doctrinal result firmly advocated by four justices.[214] Under both positions, however, it is only provisions that have mandatory constraining power over judicial sentencing discretion that run afoul of the Court's doctrines; the use of numerous similar, even functionally identical, second- and third-stage sentencing determinations remains unaffected.

The tripartite analysis therefore exposes the Court's action for what it is: a crass power grab that diminishes legislative power in favor of sentencing judges. The Court is not, for example, adopting a comprehensive conception of second-stage adjudications that deems all comparable findings of fact permissible or impermissible based on some intrinsic aspect of the finding's effect on the offender's sentence. Instead the Court's doctrine, whether the current *Blakely-Booker* expansion or the mandatory-effects position, assesses solely how the provision at issue affects *judicial power* at sentencing. If the provision constrains judges to find certain facts with mandatory limitations on judicial discretion, or compels judges to assign specific normative values to the existence of certain facts, then it is unconstitutional to apply the provision at sentencing. If the provision does not constrain factfinding or impose normative valuations, then there is no constitutional violation at sentencing.[215] The dispositive question is whether sentencing judges, rather than legislatures, are making the second- and third-stage decisions that affect the offender's sentence.

The Court has not provided a credible constitutional analysis justifying the imposition of the *Blakely-Booker* expansion of its doctrines. Certainly the Sixth Amendment jury trial right cannot be the source of these mandates, because the right to jury factfinding is triggered under the doctrines only *after* it has been determined that the provision involved interferes with *judicial* power at sentencing. The claim of preserving jury power, then, is plainly pretextual. Any attempt to ground the Court's analysis in Due Process Clause principles would be likewise nonsensical; it would strain all credulity to assert that the functionally identical sentencing determination can be fundamentally unfair in some situations and not in others, yet that is exactly the inconsistent treatment produced by

212. *See* Priester, *supra* note 8, at 902-09.

213. *See supra* notes 98-101 and accompanying text

214. *See supra* notes 105-08 and accompanying text.

215. *Cf.* United States v. Booker, 543 U.S. 220, 284 (2005) (Stevens, J., dissenting) (noting that by severing the statutory provisions making the Federal Sentencing Guidelines mandatory to make them advisory, the *Booker* remedial majority "expands, rather than limits, judicial power").

the absurd formalisms of the Court's doctrines.[216] Similarly, in *Structuring Sentencing*, I explained why the constitutional structure of criminal procedure also cannot justify a constitutional doctrine broader than the basic *Apprendi-Harris* principle.[217]

The most plausible conclusion, then, is that the reason the Court has not provided a sound constitutional justification for mandating its own particular, highly contestable vision of sentencing as federal constitutional law is because one does not exist. What is unconstitutional about legislatures regulating the adjudication of facts at the second stage through the use of sentencing factor provisions? What is unconstitutional about legislatures specifying the normative value of facts in calculating punishment in the third stage? Nothing, it would seem, except that judges want to wield that power themselves. The Court's *Blakely-Booker* expansion is not a bold effort to safeguard profound constitutional rights against legislative encroachment, but rather is a mundane overstepping of the bounds of power solely to defend parochial institutional interests.

The tripartite analysis also helps to reveal the hidden motives concealed beneath the veneer of the Court's opinions. It is possible, of course, that some Justices do seek to increase judicial power as an end in itself. They might believe that legislatures are ill-suited to ensure justice in criminal sentencing for any number of reasons, such as constituent pressure, political incentives, or simply relative institutional competence.[218] It is likewise possible that other Justices support legislative primacy as an end in itself, believing that the separation of powers vests legislatures with authority to adopt sentencing policy even if they are unfair, ineffectual, or disparaging of judicial judgment.[219] But as with sentencing reform debates generally, the more convincing explanation is that the Justices view the allocation of institutional power as an instrumental means for achieving deeper, more important ends.

When examined at this deeper level, the divide between the Justices forming the *Apprendi-Blakely-Booker* majority and those in dissent mirrors the same foundational debate discussed above: the division between

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216. *See supra* Parts II.B.4 & II.C.

217. *See* Priester, *supra* note 8, at 902-09.

218. *See, e.g.*, Rachel Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1715, 1718 (2006); Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 989, 997-1011 (2006); Frank O. Bowman III, *Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform*, 44 WASHBURN L.J. 495, (2005); Bowman, *Mr. Madison*, *supra* note 169, at 236; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-11 (2001).

219. *See* Harris v. United States, 536 U.S. 545, 568-69 (2002) (holding that

> [t]he Court is well aware that many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty. These criticisms may be sound, but they would persist whether the judge or the jury found the facts giving rise to the minimum. We hold only that the Constitution permits the judge to do so, and we leave the other questions to Congress, the States, and the democratic processes.)

(citations omitted).

those pursuing individualized punishment as the primary objective of sentencing, and those seeking systemic uniformity as the principal objective. The real stakes are the third-stage determinations of the normative punishment value of facts. The majority Justices and the dissenters hold opposing visions of the fundamental nature of the sentencing process—and both groups seek to write their vision into federal constitutional law.

While the Justices forming the majority in favor of the *Apprendi-Blakely-Booker* doctrine have a clear motivation for protecting judicial discretionary power at sentencing from legislative encroachment, their deeper motivation appears to be a rejection of any normative necessity for systemic uniformity and a corresponding insistence on individualized punishment as the fundamental normative objective of sentencing. Of course the majority's doctrine invalidates legislative attempts to pursue systemic uniformity and bolsters judges' assertions of unregulated sentencing discretion. But the rejection of uniformity is more profound, for it also repudiates *defendants'* attempts to seek harmonization of punishments:

> We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. . . . For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.[220]

In the majority's view, then, once the outer limits of the possible penalty are established by the jury's verdict (pursuant to offense statutes, mandatory sentencing guidelines, or both), the offender's worst-case scenario has been determined, and any sentence imposed less than that maximum is a windfall.[221] All defendants convicted of the same offense elements will of course face that same worst-case scenario; as long as any given defendant is sentenced somewhere within the limits for his or her particular offense of conviction, all the uniformity that is necessary has been provided.[222] Any differences in punishment that might be portrayed as disparities by comparison to another seemingly similar offender do not give rise to any constitutionally cognizable claim for relief for the very reason that the only constitutionally cognizable interest the defendant possesses is a jury determination of the worst-case scenario.

Ultimately, to the majority, the concern for systemic uniformity is illusory. Within the range of penalties authorized for the offense of convic-

220. *Booker*, 542 U.S. at 233.

221. *See supra* notes 114-15 and accompanying text (discussing Justice Scalia's description of the leniency-as-windfall argument).

222. If *Harris* is overruled and the mandatory-effects position adopted by a majority of the Court, the same reasoning would follow. The defendant's constitutional entitlement would be to a jury determination of the maximum and minimum sentence authorized by statute, mandatory sentencing guidelines, or both. *See supra* notes 107-08 and accompanying text (describing mandatory-effects position). The defendant does *not*, however, have any constitutional claim against exercise of judicial discretion to adjudicate additional facts or determine normative value in deciding upon the specific punishment *within* that range of penalties. *See id.*

tion, the only relevant goal is the determination of the individualized punishment for each offender. Broad ranges of available penalties best serve this goal by providing greater capacity to tailor the punishment to the facts and circumstances of the particular case. To the extent legislatures seek to restrict this pursuit of individuality, the *Apprendi-Booker-Blakely* doctrine (or the mandatory-effects position, were it to be adopted) requires that they do so only by complying with the high procedural hurdles applicable to elements of the offense.[223] The doctrine thereby serves as a deterrent to the legislative pursuit of systemic uniformity and privileges the pursuit of individualized punishment.

The Justices dissenting from the imposition of the *Apprendi-Blakely-Booker* doctrine have an equally clear but opposing motivation—sustaining the constitutional validity of sentencing provisions that restrict judicial sentencing discretion in furtherance of legislative sentencing reform goals—and a correspondingly contrary deeper motivation that rejects the normative necessity of individualized punishment and insists that achieving significant levels of systemic uniformity across cases is the fundamental normative objective of sentencing.[224] The dissenters expressly assert that proponents of sentencing reform are correct in their claims that justice requires consistency of punishments in similar cases, and they accordingly oppose the erection of any constitutional law obstacles to legislative efforts to achieve greater systemic uniformity by constraining judicial sentencing discretion—even to the point of permitting sentencing enhancements that exceed the authorizations of the offense of conviction. [225] That is, individualized punishment cannot be said to be doing justice if disparities and inconsistencies across the system mean that similar cases are receiving divergent individualized assessments. Sentencing reform measures that reduce individualization of punishment in favor of systemic uniformity, therefore, are necessary to achieving justice.

For example, in the *Booker* remedial majority opinion, Justice Breyer goes to great lengths to defend the real offense sentencing regime created by the Federal Sentencing Guidelines.[226] He concedes that a detailed consideration of the facts and circumstances of the offense and offender in each particular case is a worthy goal—but he insists that such consideration must be carried out in a consistent, systemically uniform manner which ensures that all sentencing judges take account of the same array of relevant and immaterial circumstances (second-stage adjudications of fact) and assign the same punishment significance to them (third-stage value decisions).[227] He argues that sentencing factors are necessary for two principal reasons: one, offense elements alone are too unwieldy to

223. *See* Priester, *supra* note 8, at 914-16.

224. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 564 (2000) (Breyer, J., dissenting); *id.* at 552-54 O'Connor, J., dissenting).

225. That position, I argued in *Structuring Sentencing*, is inconsistent with the constitutional structure of criminal procedure. *See* Priester, *supra* note 8, at 896-902.

226. *See Booker*, 543 U.S. at 246-68.

227. *See id.* at 249-58 (Part II of remedial majority opinion by Breyer, J.).

assure the necessary degree of specificity, and two, many facts directly relevant to punishment either are irrelevant to the adjudication of guilt or are highly prejudicial.[228] Implementing a real offense mandatory guidelines regime thus achieves a high degree of systemic uniformity across cases, but *not* at too great a reduction in individualized consideration of the facts of the offense and the offender.[229] If he cannot preserve the Guidelines as sentencing factors because (over his objection) the *Apprendi* doctrine invalidates them, then he will maximize their uniformity-seeking purpose to the fullest extent possible by saving real offense sentencing.[230] This is why Justice Breyer maintains that Congress would prefer to have the detailed, real offense sentencing provisions of the Guidelines retained in advisory form, rather than having no guidelines at all.[231]

The response of the remedial dissent further illustrates this clash of foundational normative principles.[232] The primary congressional purposes behind enactment of the Guidelines, argues Justice Stevens, were "the certainty of a binding regime and a deep suspicion of judges' ability to reduce disparities" across cases.[233] Consequently, Congress specifically defeated proposals for advisory guidelines of the very type the remedial majority opinion creates.[234] Real offense sentencing, therefore, was an instrumental, constitutive component of a regime of *mandatory* guidelines designed to reduce systemic disparities—*not* a sentencing end in itself.[235]

Based on this reasoning, the *Booker* remedial dissent argues that the remedial majority characterizes congressional intent exactly backwards.[236] Had Congress understood that offense elements were the only procedural tool available to constrain judicial sentencing authority, then the Guidelines would have used them.[237] Justice Stevens does not call for complete conversion of Guidelines factors into offense elements, but he

228. *See id.* at 254-56; *see also Apprendi*, 530 U.S. at 555-59 (Breyer, J., dissenting).
229. *See Booker*, 543 U.S. at 251-52.
230. *Id.*
231. *See id.* at 246-48, 251-54.
232. *See id.* at 272-303 (Steven, J., dissenting); *id.* at 303-13 (Scalia, J., dissenting).
233. *Id.* at 292 (Stevens, J., dissenting).
234. *See id.* at 293-96.
235. *See id.* at 295-99. Justice Souter joined Justice Stevens' remedial dissent in full. Justices Scalia and Thomas did not join the portion of Justice Stevens' opinion relying on legislative history, but they agreed with his interpretation of Congress' intent in enacting the Guidelines for textual reasons. *See id.* at 303 n.1 (Scalia, J., dissenting); *id.* at 323-25 (Thomas, J., dissenting). Justice Ginsburg joined these four Justices in the majority in *Apprendi* and *Blakely*, joined Justices Stevens and Souter in joining Justice Thomas' dissent in *Harris*, and joined the merits majority opinion in *Booker* itself. She parted ways with her usual counterparts in the *Booker* remedial analysis, however, providing the deciding vote to make Justice Breyer's remedial opinion the opinion for the Court. *See Booker*, 543 U.S. at 245 n.*. She did not write separately to explain her reasoning. *But see* Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 716-17 (2005) (noting that "The $64,000 question is 'why did Justice Ginsburg defect?'" and speculating on answers).
236. *Booker*, 543 U.S. at 272 (Stevens, J., dissenting); *id.* at 304 (Scalia, J., dissenting).
237. *Id.* at 297-300 (Stevens, J., dissenting).

maintains that Congress would want the Guidelines to be "*Blakely*-ized" to the extent necessary to comply with the *Blakely-Booker* mandatory-maximums rule.[238] Justice Scalia similarly emphasizes that Congress did not enact real offense sentencing to assist judges, but rather to constrain them, in achieving consistency in their individualized punishments.[239] Although the remedial dissenters concede Congress's goal of ensuring greater consistency among judges and systemic uniformity across cases, their fundamental normative insistence on individualized punishment as the objective of sentencing affects their assessment of the appropriate *Booker* remedy.[240] Rather than maximizing judicial discretion, which joining the remedial majority in crafting advisory guidelines would seem to better accomplish, they argued for *Blakely*-izing the Guidelines to retain the maximal amount of individualized punishment of offenders within the uniformity-focused mandatory regime.[241]

B. Beyond the Court: Fundamental Irreconcilability of the Normative Claims

Of course the clash between these opposing normative views inside the walls of the Supreme Court is only a small portion of the extensive legal, moral, and political deliberation over sentencing reform. The battle is also waged in legislatures, academia, and debates conveyed in the popular media. No matter the forum, the normative dispute between proponents of the primacy of individualized punishment and the proponents of the primacy of systemic uniformity remains intractable.

The reality is that these debates rarely have a clear winner when theory is reduced to practice. On occasion one view attains prominence, and the law achieves that objective at the expense of the other. This might be true, for example, in jurisdictions that have all but eschewed sentencing reform and continue to reserve nearly all second- and third-stage sentencing determinations to judges. The same might be said of jurisdictions that

238. *See id.* at 278-80, 286-89, 300-03 (Stevens, J., dissenting). That is, to the extent a Guidelines provision delimits a mandatory maximum available penalty, it must be established as an element of the offense; to the extent the provision delimits a mandatory minimum available penalty, it may remain a sentencing factor. *See, e.g., id.* at 278-80 (giving illustrative examples). Of course, this assertion about the limited *Blakely*-ization of the Guidelines seems more strategic than genuine. Given that Justices Stevens, Souter, and Thomas previously dissented in *Harris*, it seems clear that they would vote to extend *Blakely-Booker* beyond the mandatory-maximums position to the full mandatory-effects position advocated by the *Harris* dissent. *See supra* note 105. Such a holding would essentially necessitate the complete *Blakely*-ization of the Guidelines because nearly all Guidelines provisions have the mandatory effect of altering the offense level and thereby the bottom or top end (or both) of the mandatory sentencing range. Even further *Blakely*-ization would be required in the criminal history provisions of the Guidelines in the seemingly inevitable event that the Court abrogates the still-extant "recidivism exception" to the *Apprendi-Blakely-Booker* rule. *See* Priester, *supra* note 8, at 876-78; *see also* Shepard v. United States, 125 S. Ct. 1254, 1264 (2005) (Thomas, J., concurring) (noting that a majority of the justices rejects the recidivism exception).

239. *See Booker*, 543 U.S. at 303-05 (Scalia, J., dissenting).

240. *See id.* at 300-05.

241. *See id.* at 303-05 (Scalia, J., dissenting).

were to adopt highly complex "*Blakely*-ized" mandatory guidelines that codify nearly all second and third stage sentencing determinations. More often a compromise is reached, and the competing claims are accommodated with a procedural or substantive solution that strikes a balance between pursuing individualized punishment and systemic uniformity. Such compromises can include, for example, measures like advisory guidelines, broad mandatory guidelines, or judicial discretion limited by a selection of mandatory-minimum statutes but no formal guidelines.

Whatever degree of supremacy of one view or compromise between the views that occurs in the practical design and implementation of sentencing law, all debates about the constitutional law of sentencing in particular, and sentencing reform in general, must take account of the stark truth that the two views are premised upon irreconcilable normative claims about the fundamental objective against which justice in sentencing must be measured.

Superficially, at least, it might seem that both views accept the validity of the premise that justice requires that "similarly situated" offenders receive "similar" punishments for their crimes. If that were true, then the dispute simply would involve the relative institutional competence of legislatures and courts to decide which cases count as "similar" and the level of generality at which "similarity" should be assessed.[242]

For example, it is easy to make the generalization that proponents of the primacy of individualized punishment favor judges. They believe that judges should decide which cases are similar because similarity should be assessed with a high level of specificity to the facts of a particular case—even if sometimes a systemic disparity seems to result because the same facts are assessed differently by different judges.

The corresponding generalization about the proponents of the primacy of systemic uniformity is equally easy to make: they favor legislatures. They believe that legislatures should decide which cases are similar because a certain level of generality in assessing similarity is necessary to ensure an acceptable level of systemic uniformity across all cases—even if

242. Of course, the decision about which cases count as similar, itself, depends on having made a prior decision about the purposes punishment the given sentencing regime serves. *See* Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 167 (2005); Marc L. Miller, *Purposes at Sentencing*, 66 S. CAL. L. REV. 413, 424-25 (1992); Marc L. Miller, *Sentencing Equality Pathology*, 54 EMORY L.J. 271, 272-75, 277 (2005); Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1069-70 (2003). One often-cited fatal flaw in the origins of the Federal Sentencing Guidelines was the Sentencing Commission's failure to specify the punishment purposes of the Guidelines before seeking to proscribe unwarranted disparities among offenders. *See, e.g.*, Kevin Cole, *The Empty Idea of Sentencing Disparity*, 91 NW. U. L. REV. 1336, 1336 (1997)

> (holding that [t]he Commission's central preoccupation—with reducing sentencing disparity—requires a coherent underlying theory of punishment, because disparity is not a self-defining concept . . . . The problem with equality is well known. Whether a particular state of affairs squares with equality requires elaboration of some additional, underlying theory of what is right.).

sometimes an individual unfairness seems to result because different facts are assessed the same by the sentencing laws.

As demonstrated by the tripartite analysis, however, superficial agreement is deceptive and the corresponding generalizations are inaccurate. Not all those who favor individualized punishment trust judges; some of them want highly detailed criminal codes or complex mandatory sentencing guidelines. Not all those who favor systemic uniformity trust legislatures; some of them prefer advisory guidelines or rigorous appellate review as the means of achieving their goal.

At the same time, however, the appearance of a superficial agreement between the two views helps identify the deeper conceptual divide between them. Although both views might rhetorically subscribe to the premise that similar punishments should be imposed in similar cases, in fact the two views have fundamentally irreconcilable interpretations of what that premise actually means.

Proponents of the primacy of individualized punishment argue that the most important objective of sentencing is ensuring a just punishment for each individual offender. Whether justice has been achieved is a question of whether each individual offender has received the most appropriate penalty on the facts and circumstances of his or her particular case. As Professor Huigens has written, "The existence of discretion, somewhere in the system, to make a context-sensitive evaluation of the offender's conduct and character is intrinsic to criminal law because context-specific, retrospective assessments of the offender and his wrongdoing are intrinsic to just punishment."[243] That the system as a whole sometimes produces disparities between what appear to be similar cases is deemed a price to be paid for achieving the requisite degree of individualized treatment. If each individual offender has received the most appropriate, highly contextualized punishment, then the system also is just. Thus, under this view whether the sentencing system serves justice is derivative of whether individual offenders receive justice.

Fundamentally, then, the deepest normative premise of the individualized-sentencing view is that every case is unique and just punishment requires each case to be treated as such. No two cases are ever identical, even if there are numerous readily identifiable intrinsic similarities between offenders and the details of their crimes. It follows that if there always are differences between any two cases, then mandating that the identical punishment be imposed on both offenders without regard to those differences is unjust. Perceived disparity among cases is an illusion; when the full details of each case are considered, the apparent similarities vanish and the differential punishments are justified. In other words, there is no such thing as "similarly situated" cases after all.

Proponents of the primacy of systemic uniformity, on the other hand, assert that the most important objective of sentencing is ensuring the con-

243. Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 818 (2002).

sistency of punishments across the sentencing system as a whole. Whether justice has been achieved is a question of whether consistently similar punishments are imposed in similar cases and consistently different punishments are imposed in different cases. That individual offenders receive less particularized consideration of every possible detail of their cases is deemed a price to be paid for achieving the requisite level of systemic uniformity. If like cases are treated alike across the system, then the punishment imposed on each individual offender also is just. Thus, under this view whether the individual offender receives justice is derivative of whether the system as a whole achieves systemic uniformity.

Fundamentally, then, the deepest normative premise of the systemic-uniformity view is that the facts and circumstances of individual offenders' cases are irrelevant to just punishment for the same offense of conviction. There is no injustice in punishing identical offenses the same, even if there are numerous readily identifiable extrinsic differences between the offenders and the details of their crimes. Justice does not require any consideration of individual situations beyond proof of the elements of the offense of conviction; in fact, permitting capacity for individual defendants to argue for a special punishment in their particular cases would *create* an injustice by undermining the systemic uniformity necessary to just punishment of *all* offenders. In other words, "similar" has no legally cognizable normative content beyond the definitions of "similarity" enacted in positive law.

These foundational normative premises are irreconcilable. The deepest claims of the individualized-punishment view give primacy to the uniqueness of each case and necessarily reject the need for any meaningful consistency across offenders. The deepest claims of the systemic-uniformity view, on the other hand, necessarily reject the demand for meaningful assessment of the unique facts and circumstances of any particular case beyond those deemed relevant by positive law and give primacy to the goal of consistency and uniformity in the treatment of all offenders in the system.

This fundamental irreconcilability of normative premises has profound implications for the constitutional law of sentencing and debates over sentencing reform. Of course, pragmatic bargains and practical compromises between the views are possible, and occur with some frequency in legislative debates over sentencing policy. Yet such accommodations of competing claims are only that—concessions of principles to achieve workable practical outcomes. To mistake pragmatic politics for normative agreement only invites further confusion and discord in future debates about sentencing law and policy.

C. Implications for the Future

The tripartite analysis and its critique of the Court's new constitutional law of sentencing have several important implications for the future of sentencing law and policy, and sentencing reform measures in particular.

Specifically, the analysis demonstrates the necessity of rolling back the scope of the Court's constitutional doctrines. By expanding judicial power in the constitutional law of sentencing beyond its proper bounds, the Court has distorted the Rule into a more restrictive constitutional principle than is necessary to preserve an offender's rights and the structure of institutional powers relating to sentencing. The Rule therefore should be limited to its original *Apprendi-Harris* scope, and the subsequent *Blakely-Booker* expansion should be overturned. The constitutional law of sentencing will then make sense formalistically, and its functional effects will return to their appropriately limited scope.

As for the future of sentencing reform more generally, the tripartite analysis helps to sharpen the terms of political and scholarly debate. Controversies regarding first-stage adjudications of offense elements and second-stage adjudications of additional punishment facts can be addressed on their terms—but they likely often will be overwhelmed by the significance of the controversies regarding third-stage normative value decisions. Efforts to design sentencing regimes to balance the competing objectives of individualized punishment and systemic uniformity will benefit from greater precision in delineating which kinds of reform are desired or necessary at which stages of the sentencing process.[244]

In addition, recognizing the fundamental irreconcilability of the two normative premises has profound implications for the constitutional law of sentencing and debates over sentencing reform. While pragmatic bargains and practical compromises between the views are possible, such accommodations of competing claims are not at all the same as prescribing or prohibiting any given solution as a matter of federal constitutional law. In fact, the fundamental irreconcilability of these two normative positions makes it all the more important for constitutional law to be removed from the equation—at least absent a convincing argument that the Constitution itself mandates the triumph of one view over the other.

V. CONCLUSION

In the *Apprendi* line of cases, the United States Supreme Court has relied upon the Sixth Amendment guarantee of trial by jury to promulgate a new constitutional law of sentencing. Unfortunately, the Court's invocation of that hallowed right is pretextual. The statutory provisions deemed unconstitutional by the new doctrine do not infringe any power of the jury, but only the dearly held power of the sentencing judge. Under the guise of preserving the role of the jury, then, the Court actually has protected its own institutional turf.

The true nature of the Court's crass power grab is exposed by a tripartite analysis of the decisions involved in sentencing a convicted offender. First, the adjudication of offense-element facts establishes a conviction

244. *See, e.g.*, Berman, *supra* note 120, at 47-48; Chanenson, *Next Era*, *supra* note 168, at 386-400 (discussing struggles to balance systemic uniformity and individualized punishment when designing sentencing regimes); Reitz, *supra* note 154, at 156-71.

for the charged crime. Next, additional facts bearing on punishment are adjudicated separately. Finally, normative value decisions establish the legal and moral worth of those facts to determine the particular penalty to be imposed on the offender. Subjecting the new constitutional law of sentencing to scrutiny through the perspective of this tripartite framework reveals the full implications of the Court's actions. It diminished legislative power in favor of sentencing judges. Moreover, it has altered the landscape of sentencing reform by disrupting the balance between competing concerns for individualized punishment and systemic uniformity. Without valid basis, the Court has decreed as federal constitutional law a specific, contestable, and highly controversial normative vision of the nature of criminal sentencing.

The Court has distorted the constitutional requirement imposed by the *Apprendi* line of cases into a more restrictive principle than is justified. The original, limited nature of the principle should be preserved, and the more recent expansion to invalidate other sentencing provisions, including the federal guidelines, should be abandoned. The constitutional law of sentencing will be formalistically and functionally superior as a result, and sentencing reform debates nationwide will once again be free from the menacing shadow of arbitrary and illogical doctrinal restrictions.

Casenotes


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