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## *APPENDI AT 20: REVIVING THE JURY'S ROLE IN SENTENCING\**

STEPHANOS BIBAS\*\*

When I was in law school in the early 1990s, if we had done a retrospective on the twentieth or twenty-fifth anniversary of criminal procedure, it would have been about the Warren Court versus the early Rehnquist Court.<sup>1</sup> It would have been about the Fourth and Fifth Amendments. It would have been about the due-process versus crime-control models or law and order versus defendants' rights.<sup>2</sup> A mark of how much things have changed, and how different the debate is today, is that here we are talking about the Sixth Amendment, and we are not discussing a stale left-right debate.

This Symposium focuses on maybe the most fertile and interesting area of criminal procedure in the twenty-first century. The Constitution's jury-trial guarantees, both in Article III and in the Sixth Amendment, provide that the trial of all crimes or in all criminal prosecutions shall be by jury.<sup>3</sup> Juries were designed to be central checks on the legislature, executive, and judiciary.<sup>4</sup> But the Constitution left unanswered a major question: What sentencing-related decisions count as part of a criminal trial or a criminal prosecution and so trigger the jury-trial rights? Back in the eighteenth century, felonies led to fixed punishments unless there was executive clemency,<sup>5</sup> of which there was a fair

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1. See generally Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995) (discussing the Warren Court's innovations in criminal procedure and the fate of those changes in the ensuing decades); Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337 (2002) (discussing the Rehnquist Court's rollback of defendant-friendly Warren Court precedents).

2. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149–73 (1968) (discussing the values underlying the due-process and crime-control models).

3. U.S. CONST. art. III, § 2 (“The Trial of all Crimes . . . shall be by Jury . . . .”); *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”).

4. See *Williams v. Florida*, 399 U.S. 78, 100 (1970) (“The purpose of the jury trial . . . is to prevent oppression by the Government.”); *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968); Jenny Carroll, *The Jury as Democracy*, 66 ALA. L. REV. 825, 829–35 (2015) (discussing the jury's role as a check on the power of formal government).

5. *Apprendi v. New Jersey*, 530 U.S. 466, 478–80 (2000).

amount.<sup>6</sup> Imprisonment was not a common form of punishment, and there was no separate sentencing phase.<sup>7</sup>

This began to change right around the time of the Founding. The first Congress passed a bill that called for mandatory, specific punishments for some offenses but let judges choose among a broad range of punishments for others.<sup>8</sup> Shortly after that, the United States moved to using imprisonment frequently and allowing a large degree of flexibility in imposing sentences.<sup>9</sup> So, by the early nineteenth century, judges had broad discretion to sentence within wide ranges.<sup>10</sup>

The result was a dichotomy in criminal procedure. Jury trials required proof beyond a reasonable doubt, live hearings, witnesses, and rules of evidence.<sup>11</sup> Sentencings, by contrast, required no standard of proof, no witnesses, and no rules of evidence or procedure; rank hearsay was the norm.<sup>12</sup> *Williams v. New York*<sup>13</sup> in 1949 exemplified this high-water mark of untrammelled judicial discretion.<sup>14</sup>

Perhaps that dichotomy was tolerable as long as the two stages were doing separate things: The jury trial was historical, backward-looking, factual, and focused on whodunit.<sup>15</sup> The sentencing was forward-looking, assessing amenability to rehabilitation, as *Williams* put it.<sup>16</sup> To the *Williams* Court, this was the inevitable march of progress.<sup>17</sup>

6. See STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 54 (2002); Paul J. Larkin, Jr., *Revitalizing the Clemency Process*, 39 HARV. J.L. & PUB. POL'Y 833, 851–54 (2016).

7. See *Apprendi*, 530 U.S. at 478–79 (“The defendant’s ability to predict with certainty the judgment from the face of the felony indictment flowed from the invariable linkage of punishment with crime.”); Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1124–26, 1124 n.204 (2001) [hereinafter Bibas, *Judicial Fact-Finding*].

8. Crimes Act of 1790, ch. 9, 1 Stat. 112 (codified as amended in scattered sections of 18 U.S.C.).

9. See *United States v. Grayson*, 438 U.S. 41, 46 (1978), *superseded by statute*, Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; TWENTIETH CENTURY FUND, *FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING* 85–87 (1976); Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1125–26.

10. TWENTIETH CENTURY FUND, *supra* note 9, at 87–88; Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1125–26.

11. See U.S. CONST. amend. VI; *Williams v. New York*, 337 U.S. 241, 246–47 (1949).

12. See *Williams*, 337 U.S. at 246–47; James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-Booker Dustbin*, 49 WM. & MARY L. REV. 289, 300–02 (2007).

13. 337 U.S. 241 (1949).

14. See *id.* at 249–52; Bilsborrow, *supra* note 12, at 301.

15. See *Williams*, 337 U.S. at 246–47.

16. See *id.* at 247–48, 248 n.13.

17. See *id.* at 247–48.

But by the 1970s, the pendulum had swung back from rehabilitation to retribution.<sup>18</sup> And the sentencing reform movement began to create sentencing guidelines to structure and channel judicial sentencing discretion based on the severity of crimes and criminal records, as well as various aggravating and mitigating factors.<sup>19</sup> So rather than exercising open-ended, therapeutic discretion in the name of rehabilitation, judges were now finding discrete facts that led to particular punishments.<sup>20</sup> This system looked better suited to satisfy due-process-type values like notice, predictability, and procedural safeguards.<sup>21</sup> But it also looked like judges were usurping the fact-finding role of juries.<sup>22</sup> A fact that triggered a particular sentence was a sentencing factor that a judge could find by a preponderance of the evidence, rather than an element of the crime that a jury had to find beyond a reasonable doubt.<sup>23</sup>

At first, in *McMillan v. Pennsylvania*,<sup>24</sup> the Supreme Court blessed this approach as a continuation of sentencing discretion.<sup>25</sup> But by 2000, Justices Stevens, Scalia, Souter, and Ginsburg had won over Justice Thomas, joining together in *Apprendi v. New Jersey*<sup>26</sup> to hold that any fact that increases a maximum sentence (except recidivism) is an element that must be proved to a jury beyond a reasonable doubt.<sup>27</sup> The Court extended that holding to death-penalty eligibility in *Ring v. Arizona*<sup>28</sup> and to state sentencing guidelines in *Blakely v. Washington*.<sup>29</sup> Then, the curiously splintered opinion in *United States v. Booker*<sup>30</sup> found that binding federal guidelines were unconstitutional.<sup>31</sup> The

18. See Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 845–46 (2002).

19. See Jack H. McCall, Jr., *The Emperor's New Clothes: Due Process Considerations Under the Federal Sentencing Guidelines*, 60 TENN. L. REV. 467, 484–86 (1993).

20. See *id.* at 484–85.

21. See William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 181–83 (1988).

22. See Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289, 304 (1992).

23. Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1099–100.

24. 477 U.S. 79 (1986), *overruled by* *Alleyne v. United States*, 570 U.S. 99 (2013) (plurality opinion).

25. *Id.* at 86.

26. 530 U.S. 466 (2000).

27. *Id.* at 490.

28. 536 U.S. 584 (2002); *id.* at 609.

29. 542 U.S. 296 (2004); *id.* at 305.

30. 543 U.S. 220 (2005).

31. *Id.* at 258–59.

Court remedied that problem *not* by requiring juries to find facts, but rather by making the federal guidelines advisory—sort of.<sup>32</sup>

These cases are admirable because they confronted fundamental issues of criminal law that had long lain dormant: What is a crime? Is it whatever the legislature labels a crime? And what facts trigger punishment? Must all facts that justify punishment be included in the definition of the crime itself? For too long, we have ignored the linkage of crime and punishment. At English common law, jury trials were about both liability and punishment, as juries manipulated their verdicts to calibrate punishments to crimes.<sup>33</sup> But as sentencing rules proliferated, sentencing judges decided more and more facts that might otherwise have been the province of juries.<sup>34</sup> Until *Apprendi*, courts had never delineated what procedures were needed at sentencing and what issues were reserved for juries.<sup>35</sup> *Apprendi* and *Blakely* linked criminal procedure to substantive criminal law, as they tried to define crimes and the procedures needed to link punishments to crimes.<sup>36</sup>

The *Apprendi* line of decisions was grounded in originalism and formalism.<sup>37</sup> As an originalist matter, juries, not judges, had to find guilt beyond a reasonable doubt.<sup>38</sup> And as a formalist matter, Justice Scalia argued that if the Court did not draw a line at these elements, then legislatures and guidelines could endlessly erode the province of juries.<sup>39</sup> That is how the more originalist Justices Scalia and Thomas formed an unlikely coalition with the more due-process-oriented Justices Stevens, Souter, and Ginsburg.<sup>40</sup>

The problem, though, is that twenty-first-century criminal procedure does not fit within eighteenth-century boxes. At the time of the Founding, imprisonment was not widely used as a punishment,<sup>41</sup> and there was nothing

32. *Id.* at 259–60.

33. Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1124 & n.204.

34. See Herman, *supra* note 22, at 304.

35. See Bibas, *Judicial Fact-Finding*, *supra* note 7, at 1102.

36. See *Blakely v. Washington*, 542 U.S. 296, 305–06 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 478, 482–84 (2000).

37. Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 195 (2005) [hereinafter Bibas, *Originalism and Formalism*].

38. *Apprendi*, 530 U.S. at 478.

39. *Blakely*, 542 U.S. at 306–08; see Bibas, *Originalism and Formalism*, *supra* note 37, at 194 & n.82.

40. Bibas, *Originalism and Formalism*, *supra* note 37, at 194.

41. See TWENTIETH CENTURY FUND, *supra* note 9, at 84–87 (explaining that “[i]ncarceration as a punishment for the purposes of rehabilitation was practically nonexistent” until the late eighteenth century).

like modern sentencing.<sup>42</sup> Plus, there was no plea bargaining.<sup>43</sup> But today, hardly any cases go to juries anymore.<sup>44</sup> The real battle for power is not judges versus juries at trial, but judges versus prosecutors at sentencing (or in plea bargains based on sentencing forecasts). Plea bargains specify facts that trigger statutory and guideline sentences.

More generally, the *Booker* remedy for federal sentencing is a truly odd bird. Though it purported to loosen and transform the U.S. Sentencing Guidelines,<sup>45</sup> it left in place a system that prizes technical procedures and mathematical computations over moral evaluation and reason-giving.<sup>46</sup> That may perhaps promote more uniform sentences,<sup>47</sup> a topic on which there is much debate.<sup>48</sup> But it does not promote the more populist, democratic checks that the Sixth Amendment was designed to ensure.<sup>49</sup>

As a newish federal judge, the most striking thing about the sentences that I review on appeal is how routinized they are. Judges check a series of boxes.<sup>50</sup> It is often hard to tell from the paper record why a judge chose a particular sentence. In the best of cases, I read transcripts of sentencing judges engaging personally with the flesh-and-blood defendant before them. But all too often, it looks as if a defendant has been sentenced by computer. Perhaps the proceeding is more moving in person than it looks on paper; perhaps not. But the kind of

42. See *Apprendi*, 530 U.S. at 478–80.

43. See Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 5 (1979) (“[P]lea bargaining did not occur with any frequency until well into the nineteenth century . . .”).

44. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (“[O]urs ‘is for the most part a system of pleas, not a system of trials . . .’” (quoting *Lafler v. Cooper*, 566 U.S. 156, 170 (2012))); Elizabeth N. Jones, *The Ascending Role of Crime Victims in Plea-Bargaining and Beyond*, 117 W. VA. L. REV. 97, 105 (2014) (“[P]lea-bargaining is so common that it is almost uncommon to find a criminal case in which plea-bargaining does not occur . . .”).

45. *United States v. Booker*, 543 U.S. 220, 245–46 (2005).

46. See Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625, 631–32 (2007) (discussing the mechanical, trial-level procedures that the Fourth Circuit requires to uphold a sentencing decision under reasonableness review).

47. See *id.* at 625 (“[N]early two-thirds of all sentences are within the prescribed Guidelines range, a difference of less than ten percent from pre-*Booker* levels.”).

48. See, e.g., Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 52 (2010) (“Consistent with anecdotal reports from around the country, the first empirical study of individual judges’ responses to *Booker*, *Kimbrough*, and *Gall* reports a spike in inter-judge sentencing disparity.”).

49. See Carissa Byrne Hessick & William W. Berry III, *Sixth Amendment Sentencing After Hurst*, 66 UCLA L. REV. 448, 473 (2019) (explaining that the *Booker* remedy failed to “vindicate Sixth Amendment . . . values”).

50. See *United States v. Pruitt*, 813 F.3d 90, 91, 93–94 (2d Cir. 2016) (expressing concern that the “check-a-box section” of a required form for sentencing judges discourages them from providing reasons for the sentences they impose); Mullen & Davis, *supra* note 46, at 631–32.

intensely personal, face-to-face confrontation that the Founders prized is not happening as often as it should in our mechanized system of justice.

The other disappointment is that the Guidelines hardly seem to be working as planned. The ideal was that experts would be in charge of drafting and revising them and that they would continue to revise them in light of the lessons of experience.<sup>51</sup> Reason-giving and appellate review would create a feedback loop, encouraging the U.S. Sentencing Commission to do more of what worked and less of what did not.<sup>52</sup>

But from the start, the experts rejected tethering the Guidelines to one dominant purpose of punishment, like retribution or deterrence.<sup>53</sup> Then Congress started stepping in and overriding the Commission instead of deferring to it.<sup>54</sup> And despite many years of criticism of the Guidelines' mechanistic approach, the Commission does not revisit its fundamental structure but largely tinkers at the margins.<sup>55</sup>

Is there a way back within our high-volume, plea-bargaining assembly line? Or is *Apprendi* a ringing symbolic victory with little obvious payoff on the ground? Can sentencing guidelines, appellate review, or the like be salvaged, or should they be junked? Is there a way to make the role of juries more meaningful? Our distinguished panel of scholars will address these and other questions over the next couple of hours as well as in their essays.

51. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1319 (2005) (“[T]he Sentencing Commission was intended to gather feedback about how the system worked and serve as an authoritative (though not final) body of neutral experts who would translate the feedback into sensible revisions of the rules.”).

52. See Amy Baron-Evans & Kate Stith, *Booker Rules*, 160 U. PA. L. REV. 1631, 1639 (2012).

53. Aaron J. Rappaport, *Unprincipled Punishment: The U.S. Sentencing Commission's Troubling Silence About the Purposes of Punishment*, 6 BUFF. CRIM. L. REV. 1043, 1044 (2003) (explaining that the Sentencing Commission “refused to address or identify the purposes of punishment that ground the guideline system”).

54. See Paul J. Hofer, *Federal Sentencing After Booker*, in 48 CRIME AND JUSTICE: A REVIEW OF RESEARCH 137, 138 (Michael Tonry ed., 2019) (asserting that Congress “[did] not avoid micromanaging the commission’s work” and enacted laws that “override the guidelines wherever they conflict”).

55. See, e.g., William K. Sessions III, *The Relevance of Offender Characteristics in a Guideline System*, 51 HOUS. L. REV. 1211, 1220–22 (2014) (discussing the Commission’s “modest” steps toward including offender characteristics as relevant sentencing factors).