BOOKER, PRAGMATISM AND THE MORAL JURY

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INTRODUCTION

Those of us who believe the central purpose of the criminal law is to punish—to exact retribution from wrongdoers in an act of completed social exchange that will then restore their moral standing—bring a certain perspective to the difficult question of the roles that judges, juries and legislatures should play in the criminal justice system. If retribution is indeed to be a paramount consideration, then it follows that the act of sentencing is very much a moral act, not an act of arithmetic (as the federal sentencing guidelines have made it) or an act of social engineering (as judges who stubbornly cling to the rehabilitative ideal would have it).

Because crime is a breach of the social contract, even the most ardent of rehabilitationists must concede that in representative democracies the primary responsibility of hewing the punishment to the crime, at least in some rough fashion, must be borne by legislatures, not individual judges. Moreover, to the extent legislatures leave room for others—judges, parole officials, sentencing commissions, even juries—to impose a specific level of punishment within those broadly hewn legislative confines (and no one, not even the most ardent retributionist, can seriously object to that), the question then becomes a matter of the division of sentencing labor. How should these other players contribute to the difficult task of converting the legislature's general opprobrium into a specific sentence in a specific case for a specific wrongdoer?

When I use the phrase, "the moral jury," I mean to evoke a sense that the jury must play, and as an historical matter has always played, a critical role not only in deciding factual guilt but also in deciding moral guilt—that is, gauging, in some fashion, the seriousness of the crime and the justness of the desert. In its most dramatic form, the jury might actually impose the specific sentence. In less dramatic forms, it might issue an advisory sentence, make findings that allow the judge to aggravate the sentence, distinguish between levels of culpability, or even nullify. But in any retribution-

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based system that is not completely determinate, the jury, which represents a microcosm of social response that single judges never can, must continue to have some voice in expressing the moral judgment inherent in any criminal sentence.

The remedial majority's opinion in *United States v. Booker* and *United States v. Fanfan*[1] illustrates that the Court is still struggling with the idea of the jury as a moral force in criminal cases. Even more troubling, it shows that several members of the Court have such hostility toward the moral jury that rather than embracing it as a complete or even partial solution to the *Apprendi* problem,[2] they are willing instead, in the name of some new strain of pragmatism, to do considerable violence to well-settled doctrines of restraint in constitutional cases, and to deconstruct then reassemble Congress's sentencing intent beyond all recognition. But there is some good news. Because of the remedial majority's unnecessary aggressiveness in invalidating the entirety of the federal sentencing guidelines as a mandatory scheme, Congress now has a unique opportunity to rebuild a federal sentencing system that more completely reflects a retributionist perspective and that restores the moral jury's rightful place in the firmament of criminal sentencing.

There is no small amount of irony in the remedial majority's hostility toward the jury, given that the whole of the *Apprendi* "problem" is bottomed on the Sixth Amendment's guaranty of the right to jury in criminal cases.[3] Before I turn to the constitutional details of that right, and to the destination at which *Apprendi's* train has brought us, let me begin with some observations about the jury's role in answering the unanswerable questions embedded in sentencing.

I. THE MORAL JURY

Philosophers have argued for millennia about the tension between individual justice and social justice, the tension between the justice that comes from focusing on all the individual circumstances of a single case,

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[1] 125 S. Ct 738 (2005). The two cases were consolidated in the Supreme Court, and I will therefore refer to them simply as *Booker*. The phrase "remedial majority," coined by Justice Scalia in his partial dissent, is meant to describe the 5-4 opinion, authored by Justice Breyer, dealing with the remedy for the constitutional violation. The constitutional violation itself was found by a different 5-4 majority, which Justice Scalia dubbed the "merits majority." *Id.* at 789, 794. *See infra* Part III.

[2] Apprendi v. New Jersey, 530 U.S. 466 (2000). *See infra* text accompanying notes 100-02.

[3] "Irony" may not be the right word. Four of the five Justices comprising the remedial majority were the four dissenters in *Apprendi*. The remedial majority's opinion in *Booker* might be best understood as a reflection of its continued hostility toward *Apprendi* itself, and to the constitutional role of the jury as expressed in *Apprendi*. *See infra* Part IV.F.

and the justice that comes from thinking across many cases to try to ensure that roughly similar crimes are punished roughly the same.[4] Is it really "just" to give one defendant probation because he robbed a gas station to feed his starving family, but then to imprison another defendant who robbed the same gas station because he needed money for prostitution, or for drugs, or because he did it just for the thrill? Does it matter if the family man had two prior felony convictions and the john/addict/thrill-seeker had none? What, in the end, is the proper balance between and among the externalities of the crime—the details of its commission, the criminal history of the actor, the impact on the victim—and the guesses we must make about the internal nature of the actor's state of mind at the time he or she committed the crime?[5]

The history of sentencing is very much the history of our answers to that last question, and sentencing guidelines were the latest, but certainly not the first, attempt at more than a case-by-case, judge-by-judge, ad hoc answer. Now that the mandatory nature of the federal guidelines is no more, and especially now that Congress will almost certainly respond to *Booker* in what could be just the first volley in an important inter-branch exchange, it appears that this fundamental question about the nature of justice is at long last very much back in the public discourse.

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[4] Aristotle emphasized the idea that "justice" must include the proposition that like cases should be treated alike: "[Justice] involves equality, or the distribution of equal amounts to equal persons." POLITICS 129 (E. Barker trans. & ed., 1946). This notion has since played a central role in any examination of "justice," especially in what more modern scholars have called "distributive justice." *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 149-231 (1974). Of course, the Aristotelian view that like cases must be treated alike only restates the central coordination paradox: are any two cases really alike when the individual actors, and their accumulated experiences, are always unique?

[5] How the criminal law, at different points in history, has struck this balance between external and internal considerations has depended in great measure on our evolving views about the internal world's accessibility. The so-called "theory of mind" problem asks a profoundly important question, critical not only to the niceties of sentencing but to the very foundations of the law itself: how do we breach the gap between your mind and my mind, except to presume, because I have a powerful sense of my own free will, that you must also have free will? *See, e.g.*, SIMON BARON-COHEN ET AL., UNDERSTANDING OTHER MINDS (1993). Until the twentieth century, these were questions that did not seem to trouble us much, and least in areas of everyday life like entering into contracts and punishing their breach. Socrates, the God of the Old and New Testaments, Aquinas, Blackstone, our founders, Holmes—none had any serious doubts that the law must presume that each of us, unless we are juveniles, possessed or insane, has the internal capacity to follow the rules that bind us into societies. In the twentieth century, driven both by real and imagined psychological insights, the "juvenile, possessed or insane" exception has rather dramatically started to swallow the rule. *See, e.g.*, Robert M. Sapolsky, "The Frontal Cortex and the Criminal Justice System," *Law and the Brain*, 359 PHIL. TRANS. R. SOC. LON. B 1805 (S. Zeki & O. Goodenough eds., 2004). Even among just the "externalities" of the crime, there may be important differences between the facts about the crime (so-called "offense-based" facts) and the facts about the criminal (so-called "offender-based" facts). *See infra* text accompanying notes 78 and 83.

The answers we give will likely depend on our views about the deeper purposes of the criminal law. If the principal object of the criminal sentence is to rehabilitate, then we should focus on the individual circumstances of the criminal-patient, perhaps marginally on the victim (but then only to help us heal the rift between the two patients), and not one whit about how similarly situated criminal-patients should be treated. In fact, to even ask the so-called "coordination" question—are similarly situated defendants being treated similarly?—makes no sense in a world of pure rehabilitation, any more than it makes sense to ask whether similarly situated cancer patients are treated similarly.[6] Rehabilitation is not about treating patients similarly, it is about treating them, period.[7] You and I may have committed the same crime; but if I am more resistant to treatment than you are, no rehabilitationist would object if I received the longer sentence.

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[6] Except, of course, in the procedural sense. Our notions of fairness certainly drive us to try to give similarly-situated patients access to similar care and treatment. Thus, for our patient-defendants, due process requires that they have access to a litany of basic rights—the right to have most federal charges screened by a grand jury, the right to counsel, the right to remain silent, the right to a jury, the right to a public trial, the right to confront witnesses—rights embedded in the diagnostic process of determining whether they suffer from the disease of criminality. Of course, the truth is that the trial is much more than a "diagnostic process." It is the event that stands between the individual and the condemning power of the state. That we have constructed such a profoundly protective litany of procedural rights is itself proof that the criminal law is about much more than curing wrongdoers.

[7] To be sure, those who think of crime as a treatable disease will endeavor to find treatment regimens that are effective across large classes of people. That is, drug users may be treated to a relatively uniform regimen, and aggravated robbers to a quite different one. As for deterrence and incapacitation, I will not address these other two modern theories of punishment except to mention that, like rehabilitation, their deepest foundations remain retributive, since the state simply has no moral right to impose punishment, on any theory, unless defendants *deserve* it. *See* C.S. LEWIS, THE PROBLEM OF PAIN 91-92 (1940) ("What can be more immoral than to inflict suffering on me for the sake of deterring others if I do not *deserve* it? And what can be more outrageous than to catch me and submit me to a disagreeable process of moral improvement without my consent, unless (once more) I *deserve* it?"). For a wonderful survey of the modern evolution of punishment theories, *see* Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

But if the foundation of criminal punishment is retribution,[8] then we will tend to focus much more on the externalities of the crime itself—what exactly did the wrongdoer do, and how did it impact the victim—than on the internal state of the wrongdoer's mind or the social forces that may have contributed to that state of mind. Likewise, because retribution is concerned with gauging the seriousness of the crime and then imposing a social cost that the wrongdoer must pay to re-enter the social fold, retributionists are very much concerned with the social aspects of punishment; that is, it matters very much that roughly similar crimes trigger roughly similar punishments.

In many ways, as we shall see, the federal sentencing guidelines reflected a renewed retributionist vigor as Congress began to reject the excesses of rehabilitationism.[9] The return to retribution has not just been driven by a lost faith in science's ability, especially psychiatry's ability, to effect criminal "cures." It has also been driven, at least in the academy, by a re-discovery of the social roots, and indeed, perhaps even the biological roots, of the law.[10] The fundamental difference between having cancer and robbing a bank is that we presume an intentionality in the latter, an intentionality that is at the heart of the social contract and the individual responsibility we each must bear for its breach. The structures of the criminal law evolved from private vengeance to public trial precisely as the social roots

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[8] The word "retribution" may evoke images of stern and merciless judges robotically imposing maximum sentences for all crimes, acting with no more compassion and balance than if victims were imposing the sentences themselves. Retribution as a kind of centralized form of personal revenge; sentencing judge as Madame Defarge. Nothing could be further from the truth. The central idea of proportionality—that the punishment must fit the crime—is a corollary of retributionism, a corollary with profoundly libertarian roots. *See* NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 4 (1974); Cesare Beccaria, *On Crimes and Punishments*, in ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 19-21 (R. Bellamy ed., 1995) (1764). Retributionists believe that the state's right to punish is limited to its right to extract from the criminal only that amount of punishment necessary to balance the books of harm, and to restore the criminal to the moral fold. It is precisely because retributionism respects the individual as a morally sentient being, and distrusts the power of the state, that it not only imposes restraints on the state's ability to punish, but in fact looks upon the act of punishment as a completed act of moral rehabilitation. *See* GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT 71 (T. Knox trans., 1942) (1821). When twentieth century criminology moved its focus from completed moral rehabilitation to uncompleted sociological rehabilitation, it was a failure not only because the rehabilitative therapies did not work, but also because, uncoupled to any proportionality restraints, the new treatment-based perspective gave the state new and unacceptable powers. *See generally* FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981).

[9] *See infra* Part IV.C. But see *infra* text accompanying notes 15-18, observing that one aspect of the federal guidelines—who gets to impose sentence, judges or juries—remained starkly rehabilitationist.

[10] *See* Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCHOL. 284 (2002); Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 OHIO ST. J. CRIM. L. 627 (2004).

of law became clearer and clearer.[11] Our post-modern obsession with the individual, and, paradoxically, our increasing dependence on the state, have had the effect of pulling us farther and farther away from viewing crime as a breach of the social ties that bind us, and closer and closer to a view of crime as an arbitrary opportunity for the state to engage in forced treatment of the criminally-diseased.[12]

Even after the reported demise of rehabilitationism in the 1970s,[13] its ghosts have lingered, and indeed prospered, in two reincarnated forms: the therapeutic jurisprudence movement and at least one critical aspect of the federal sentencing guidelines. The rehabilitative pedigree of the therapeutic jurisprudence movement is palpable from its name, and although it began as a kind of drug addiction exception to the emerging dominance of retribution, it is beginning to morph, or at least threaten to morph, into something much more troubling.[14]

Although the federal sentencing guidelines were in general an adjustment toward a more retributionist perspective,[15] they remained profoundly rehabilitationist in one important sense, a sense that goes to the heart of the subject of this article: they left sentencing authority in judges.[16] To be sure,

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11 *See infra* note 30 and accompanying text.

12 In a materialist post-Freudian world, where no one is responsible for his actions because those actions are the product of uncontrollable forces—parents, schools, poverty, neighborhoods, atoms—we will eventually be compelled to treat bank robbery just like kidney failure, albeit a really complicated kind of kidney failure. Once we cross that threshold from responsibility to determinism, there will be no need for the law itself, let alone a particular kind of criminal law. That is, by its very nature law is concerned with the regulation of relationships between people in a manner that presupposes intentionality and responsibility. *See supra* note 5. It is true that social responsibility of a sort lay at the heart of rehabilitationism as well, but it was of an oddly asymmetric sort. Rather than looking at the reciprocal social connections that bind us to one another into families, social groups and, ultimately, the state, rehabilitationists of the Progressive era typically saw social responsibility as flowing only in one direction: from the many to the few, the powerful to the weak, the rich to the poor, the state to the individual.

13 *See, e.g.*, ALLEN, *supra* note 8.

14 For an example of the threatened morphing, see, e.g., Judith A. Kaye, *Rethinking Traditional Approaches*, 62 ALA. L. REV. 1491 (1999). For views that this morphing is troubling, see, e.g., James L. Nolan, Jr., THE THERAPEUTIC STATE (1998); Morris B. Hoffman, Community Courts and Community Justice: *A Neo-Retributionist Concurs with Professor Nolan*, 40 AM. CRIM. L. REV. 1567 (2003); Morris B. Hoffman, *Therapeutic Jurisprudence, Neo-Rehabilitationism and Judicial Collectivism: The Least Dangerous Branch Becomes Most Dangerous*, 29 FORDHAM URB. L.J. 2063 (2002).

15 Actually, they were the product of a political compromise between the left's concerns about sentencing disparity and the right's concerns about returning not so much to retribution as to deterrence and incapacitation. *See supra* note 7.

16 Even the language of the debate over the federal sentencing guidelines reflected the unstated assumption that juries were not to be part of the mix, and that the controversy was only over the amount of sentencing discretion to be reposed in judges or retained by legislatures. Thus, critics of the guidelines talked about the "fear of judging" and proponents retorted with the "fear of law." *Compare* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS

that authority was largely emasculated and bureaucratized, but in the end, whatever sentencing discretion was left was left in judges, not in juries. And that decision reflects one of rehabilitationism's central catechisms: only judges are wise and experienced enough to impose sentence.[17]

In less progressive times, when our unenlightened ancestors sentenced to punish, it made perfect sense for the arbiters of that punishment to be as broadly representative as possible. Who better to make a statement about the magnitude of an individual's breach of his duties to his fellow members of society than his fellow members of society? In this sense, retribution had, and still has, important democratic resonances.[18] But as retribution receded in the early twentieth century, and as the purpose of the criminal law switched from moral exchange to sociological treatment, it made no more sense for jurors to impose sentences than to have twelve citizens decide what kind of medicines to prescribe for a liver ailment. The criminal law became more and more therapeutic, and we needed experts to impose coerced treatment, experts who were familiar with the wide range of available therapies—anger management, domestic violence classes, drunk driving schools, substance abuse treatment, shoplifting therapy, sex offender therapy, boot camps, community corrections, prison. We needed judges, and their expert surrogates, probation officers and parole boards.[19]

Another critical corollary of rehabilitation was indeterminate sentencing.[20] Our expert judge-doctors would no more consider sending Johnny to prison for a fixed number of years than our internists would consider admitting him to the hospital for a fixed number of days. In both cases, the diseased person needs to be treated for as long as it takes until he is either

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(1998), *with* Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299 (2000). But the more profound fear, from both sides, was a fear of juries, a fear that is palpable in the remedial majority's opinion in *Booker*. *See infra* Part IV.F.

17 Of course, I do not mean that the rehabilitation movement invented the catechism of judge sentencing. As discussed *infra* in the text accompanying notes 28-37, there is a long history of judge sentencing that predated the English jury trial and then continued to co-exist with it, and all of this was of course centuries before we became enlightened to the notion that the object of the criminal law could be, or should be, to cure criminality. *But see* John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) (contending that the roots of punishment were in fact rehabilitative, at least until the Norman Conquest).

18 It is no coincidence that the two most famous western examples of jury sentencing come from Greece and Rome. *See infra* text accompanying notes 32 and 33; *see also* Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311 (2003).

19 And, in fact, at the beginning of the 1900s roughly half the states allowed juries to impose sentence, but by the beginning of the 2000s that number had shrunk to five. *See infra* text accompanying notes 48-50.

20 *See infra* note 91 for a discussion of the various meanings of the word "indeterminate" when used in a sentencing context.

cured or reaches what personal injury lawyers call maximum medical improvement.[21]

Strangely, at the precise moment when the rehabilitative ideal was on life support, and Congress, in enacting the Sentencing Reform Act of 1984 ("SRA"),[22] became officially fed up with indeterminate sentencing and all that it implied (wildly varying sentences for like crimes, too much discretion in federal judges), instead of examining the possibility of reposing more sentencing authority in jurors, Congress created a second kind of expert—the sentencing commissioner. These new experts were charged with the difficult task of melding the two pillars of justice—justice in individual cases and justice across cases—in some indescribable yet painfully detailed way.[23] But they were still experts, charged with the same kind of complex task that mere jurors could never hope to handle.

In the institutional turf wars that followed, first between the Court and Congress over the constitutionality of the delegation,[24] then between the Sentencing Commission and sentencing judges over the application of the guidelines,[25] and particularly over the grounds for and frequency of depar-

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21 It was this aspect of rehabilitationism—an increase in state power—that drew the harshest theoretical criticism, mostly from the political left, and contributed so importantly to its demise. *See, e.g.*, AMERICAN FRIENDS SERV. COMM., STRUGGLE FOR JUSTICE: A REPORT ON CRIME AND PUNISHMENT IN AMERICA 147-48 (1971) ("[W]hen we punish the person and simultaneously try to treat him, we hurt the individual more profoundly and more permanently than if we merely imprison him for a specific length of time."); Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 5 (1972) ("Almost wholly unchecked [sentencing power is] . . . terrifying and intolerable for a society that professes devotion to the rule of law."); LIONEL THRILLING, THE LIBERAL IMAGINATION 215 (1957) ("[S]ome paradox of our nature leads us, when once we have made our fellow men the object of our enlightened interest, to go on to make them the objects of our pity, then of our wisdom, ultimately of our coercion."); David J. Rothman, *Deincarcerating Prisoners and Patients*, 1 C.L. REV. 8, 24 (1973) ("[T]he most serious problem is that the concept of rehabilitation simply legitimates too much."). In fact, a case can be made that the current scandalously wide (and long) federal statutory ranges, see *infra* text accompanying notes 88 to 92, are the result of misplaced rehabilitative efforts to cure criminals (no matter how long that takes), rather than unduly harsh retribution.

22 Pub. L. No. 98-473, 98 Stat. 1984 (codified as amended in scattered sections of titles 18 and 20 of the United States Code).

23 The federal sentencing guidelines enumerate more sentencing factors than any known sentencing regimen in the history of mankind. Kevin R. Reitz, *The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes*, 105 COLUM. L. REV. 1082, 1113 (2005). Ironically, that level of detail probably renders the federal guidelines inaccessible to juries, contributing to the widespread, but inaccurate, assumption that in crafting a response to *Booker* Congress need not consider the jury in the institutional mix. *See infra* Part IV.F.

24 Mistretta v. United States, 488 U.S. 361 (1989) (upholding the federal sentencing guidelines against arguments they were a delegation of excess legislative authority and a violation of separation of powers).

25 For example, there was, for a time, considerable dispute over the fundamental question of the extent to which § 3553(b)(1) of the SRA was intended to allow federal judges to depart from guideline

tures,[26] the tension between judge and jury was consistently overlooked, so powerful was the assumption that the jury need not constitutionally play, and could not practically play, any role in sentencing. It was not until *Apprendi* recast these questions by reminding everyone about that pesky Sixth Amendment and that pesky jury, that the controversy finally turned to the real heart of the sentencing dilemma: the boundary between judge and jury.[27]

The entire question of the relationship between the federal sentencing guidelines and the right to jury trial is just a particular version of the same difficult foundational questions about the nature of justice that have plagued criminal law since its inception. If the act of sentencing is a moral act, and neither an act of sheer arithmetic nor an act of cure, then what role, if any, should the jury play? Before we look at *Apprendi's* modern answer, it may help to look back at history's answer.

A. *A Brief History of the Moral Jury*

The jury has historically played an important role in meting out punishment, both by making the sentencing decision itself and, even when that decision was outside its powers, by modulating its verdicts on guilt to mesh with what it believed should be appropriate punishment, either by outright nullification or by deciding levels of culpability. Juries have always done so, and always will. The idea of a durable and sharp division of labor between juries, who find the facts, and judges, who impose sentences, is largely an invention of the twentieth century.[28]

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ranges based on factors not listed as formal grounds for departure. Compare Koon v. United States, 518 U.S. 81 (1996) (holding that such departures are allowed and are to be reviewed on an abuse of discretion standard) with the discussion in STITH & CABRANES, *supra* note 16, at 100-102, detailing the way in which most lower federal courts read *Koon* quite narrowly, resulting in what Stith and Cabranes call "the hegemony of the Commission," but which supporters of the guidelines might call "the intent of Congress." In any event, the Feeney Amendment in 2003 overruled *Koon*. *See infra* text accompanying note 170.

[26] Even when sentencing judges depart based on properly designated criteria, there has been much controversy over whether the departure criteria have themselves been so variably applied as to re-inject into the process almost as much sentencing disparity as there was pre-guidelines. *See* Lisa M. Farabee, *Disparate Departures Under the Federal Sentencing Guidelines: A Tale of Two Districts*, 30 CONN. L. REV. 569 (1998); Michael S. Gelacak et al., *Departures Under the Federal Sentencing Guidelines: An Empirical and Jurisprudential Analysis*, 81 MINN. L. REV. 299 (1996).

[27] *See infra* Part II.C.

[28] The principal inventors were the opponents of the federal sentencing guidelines, who rather consistently overstated the historical pedigree both of judge sentencing itself and the degree of discretion historically given to sentencing judges. See, e.g., STITH & CABRANES, *supra* note 16, at 9-11, who identified the earliest American federal criminal laws as evidence of the deep roots of judicial sentenc-

In the first place, for most of civilization's history, the state simply did not concern itself with what we would today call "the criminal law." With a few notable exceptions,[29] the ancient remedy for wrongs done by one person against another was almost exclusively a matter of private revenge.[30] Only a small number of violations—such as treason or other wrongs directed against the state itself—justified the attention of government.[31] Even then, there are two famous and important historical examples of juries meting out punishment in these proto-criminal cases—the large citizen-juries of the Greek city-states in the archaic and classical periods,[32] and the Roman senatorial juries in the late republic and imperial periods.[33] Both of

ing discretion, when those laws are in fact relatively recent, given the long and mixed history of the relationship between judge and jury discussed in the balance of this Section.

29 The Code of Hammurabi, for example, not only contained a comprehensive set of rules governing personal conduct, but made violators of some of those rules answerable to the state. *See* STANLEY A. COOK, THE LAWS OF MOSES AND THE CODE OF HAMMURABI 1-19 (1903). Its place in history was earned not only because of its scope, and its influence on western civilization through the Jews, but also because it was the first set of laws, and one of only a handful of known ancient laws, to make this remedial transition from private revenge to state-imposed punishment. *Id.* Other examples were Draco's laws from fifth century Athens, which, in addition to their famous severity, were actually the first known set of Greek laws to make homicide an offense punishable by the city-state, apparently in an effort to curb a rise in Athenian revenge killings. *See* DOUGLAS M. MACDOWELL, THE LAW IN CLASSICAL ATHENS 42-43 (1978). The Laws of Moses and the Justinian Code are two other famous examples of law codes that continued civilization's evolution from private revenge to state punishment. *See* COOK, *supra*; O.F. Robinson, *Criminal Trials*, in A COMPANION TO JUSTINIAN'S *INSTITUTES* (Ernest Metzger ed., 1998).

30 Or to be more precise, our modern distinctions between public and private, between crime and tort, are just that—modern distinctions. *See, e.g.*, James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29 (1996). It is rather remarkable to contemplate that trial by battle, which was a formalized kind of private revenge, was not officially abolished in England until 1819, though it had, admittedly, all but disappeared by the end of the reign of Edward III. LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 123 (2nd ed. 1988); Edward J. White, LEGAL ANTIQUITIES 118 (1913).

31 Lindgren, *supra* note 30, at 39. Justinian's Code, for example, recognized only a few crimes against the Roman public, including treason, adultery, assassination and parricide. *Id.*

32 These juries, called *dikasteria*, were very large, typically containing as many as 1,500 citizens. MOORE, *supra* note 30, at 2. They appeared at the end of the archaic period, as early as Solon's time in the fifth century, and persisted, at least in some city-states, especially Athens, throughout the classical period. *See generally id.*; MACDOWELL, *supra* note 29, at 29-33. It seems they began as a method by which disgruntled citizens could appeal the judgments of local magistrates. *See* MACDOWELL, *supra* note 29, at 29-33; MOORE, *supra* note 30, at 2.

33 Ordinary day-to-day Roman trials were non-jury trials decided by individual prefects or other officials. PETER GARNSEY, SOCIAL STATUS AND LEGAL PRIVILEGE IN THE ROMAN EMPIRE 19-25 (1970). But for really important political cases, typically disputes between or among senators, high officials and, later, members of the imperial family, the trial would be held before senatorial juries, called *judices*, an institution the Romans likely copied from the Greek *dikasteria*. *Id.* Once each year, the Senate would designate a large group of its members as potential jurors in all senatorial trials to be held that year. *See* MOORE, *supra* note 30, at 3. From this group, anywhere from fifty-one to eighty-one

these kinds of ancient juries ruled on ultimate guilt, but then also meted out appropriate punishment.[34]

In fact, in a fundamental sense the institution of the sentencing jury, at least in western tradition, predated the relatively modern idea of a judge presiding over a jury trial, let alone that judge taking over the case after a jury verdict of guilt and then imposing sentence. The very first presiding judges were probably those attached to the *Eliaia*, a famous and important court in Athens that began in the fifth century.[35] The judges of the *Eliaia* began simply as officials who announced the outcomes of cases to the throngs of citizens waiting outside the court building.[36] Modern opponents of jury sentencing, especially those who see judges as some sort of new kind of philosopher kings, would do well to consider that the first judges "presiding" over jury trials were more like town criers than venerated wise men.[37]

There is no doubt that English judges at the dawn of the criminal jury trial, in the early 1200s, imposed sentence despite the emergence of the jury. But in fact, this was less a wresting of power than an artifact of the limited role of the early English jury. Like most ancient and medieval juries (with the prominent and important exceptions of the Greek and Roman juries), the earliest version of the English criminal jury was the so-called "presentment jury," or what we would call today a grand jury, whose role was limited to the determination of probable cause.[38] If the presentment jury

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would be selected by lot for any particular trial (the number varying over time), and each litigating side would then strike fifteen, leaving a jury of from twenty-one to fifty-one. *See id.*

34 GARNSEY, *supra* note 33, at 34-35; MACDOWELL, *supra* note 29, at 254-58. Actually, the *dikasteria's* role in punishment was, at least in the classical period, limited to voting for two proposed punishments, one proposed by the prosecution and one proposed by the defendant. MACDOWELL, *supra* note 29, at 253. The judgment of the *dikasteria* was final, and not subject to any appeal, although the victim and/or his family could in some circumstances grant a pardon, and the Athenian people on occasion granted amnesties. *Id.* at 258-59.

35 MACDOWELL, *supra* note 29, at 29-35.

36 Actually, in the early days of the *Eliaia* the presiding judges were typically the magistrates from whose judgments the cases had been appealed. *See* MACDOWELL, *supra* note 29, at 32. But by the end of the fifth century, dissatisfied citizens were appealing the magistrates' judgments so often that the magistrates stopped bothering to render judgments at all, and simply referred disputes, at least the most important ones, directly to the *Eliaia*. *Id.* It was quite common for large groups of citizens to gather outside the *Eliaia* to await the "judge's" announcement of the jury's verdict. Homer places just such a scene on the shield made for Achilles by Hephaestus, the god of fire. HOMER, THE ILIAD, bk. XVIII, LINES 580-92 (Robert Fagles trans., 1990).

37 Even in non-jury contexts, professional judges were rare in ancient societies. They were unknown in Israel before the exile, and even in highly structured and ossified Egyptian systems they do not appear until the New Kingdom. *See* COOK, supra note 29, at 54-56.

38 2 SIR FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 622-23 (2nd ed., 1898). These presentment juries were large, though not as large as the Athenian *dikasteria* discussed *supra* note 32. By the end of the thirteenth century,

concluded that a crime against the King had probably been committed, the trial, and therefore the punishment, was handled in non-jury courts, either royal or ecclesiastical.

Over the next 300 years, the presentment jury slowly evolved into the criminal trial jury, first by referring the guilt phase to a subset of the presentment jurors, then eventually referring the guilt phase to an entirely new set of jurors.[39] The real origins of the English preference that sentences be imposed by judges may thus be largely a matter of the historical accident that the petit jury's predecessor—the presentment jury—was not even involved in determining ultimate guilt, let alone punishment.

Even so, the fact of the matter is that this early English structural preference for sentencing by judges was hardly monolithic. The English criminal system was a menagerie of decentralized, overlapping and disconnected jurisdictions, even after the reforms of Edward I.[40] There was nothing even remotely consistent about any aspect of the criminal jury trial in England for its first several hundred years, including the question of whether the judge or the jury imposed sentence. Though it was no doubt the exception rather than the rule, English jurors imposed sentences in various kinds of criminal courts throughout the Middle Ages, and even as late as the seventeenth century in some manorial courts.[41]

By the end of the eighteenth century, Parliament had assumed much of the sentencing powers the judges had exercised, leaving judges with very little discretion. The substantive criminal statutes of that era had become largely sanction-specific, and the sentencing judge's role therefore largely ministerial.[42] As Blackstone put it, "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law."[43] That is, the moral sentencing au-

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English presentment juries were typically comprised of twenty-four to eighty-four jurors, all of whom were knights selected by the King. MOORE, *supra* note 30, at 49-50, 53-55.

39 *See* THOMAS ANDREW GREEN, VERDICT ACCORDING TO CONSCIENCE 15-16 (1985). Some historians argue that there was a third step in this evolution: that the first English criminal juries actually began as screening devices for trial by ordeal, deciding only what particular ordeal the accused should endure. THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 120 (5th ed. 1956). According to this view, when Pope Innocent III abolished the ordeal in 1215, a ban that found its way into English law in 1219, these proto-juries already existed, which might help explain the suddenness of the presentment jury's emergence. *Id.* at 118-20.

40 *See, e.g.*, H.G. HANBURY & D.C.M. YARDLEY, ENGLISH COURTS OF LAW 31-32 (5th ed. 1979).

41 Bowman, *supra* note 16, at 310.

42 *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 41 (1983).

43 WILLIAM H. BLACKSTONE, 3 COMMENTARIES ON THE LAWS OF ENGLAND 396 (W.L. Dean 1846). This quotation from Blackstone is not metaphorical. He was not describing the power of the "law" to impose sentence as a euphemism for the power of the judge to impose sentence. Scholars agree

thority had moved away from judge (and jury, for that matter) to Parliament.[44]

It was this kind of judge-sentencing tradition—inconsistent, limited, and largely a matter of historical accident—that the American colonists inherited. Although scholars disagree about the extent of jury sentencing in the early colonies,[45] the dispute is really only a matter of timing, since it is well-established that by the time of the Bill of Rights jury sentencing had become quite common (again, that deep symbiosis with democracy), as part of a general wave of sentencing reform that spread across the colonies and new states and was driven in large part by a continuing Revolutionary reaction to the overly harsh penalties of English law and mistrust of English judges.[46] By 1800, jury sentencing was an accepted procedure in a slight majority of states.[47] In fact, for the entire period between 1800 and 1900, a period during which twenty-eight states were added to the union, more states allowed jury sentencing than not.[48]

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that the English criminal judge of the late eighteenth century had considerably less sentencing discretion than his ancestors; the scholarly dispute seems to be a matter of degree. *See* Langbein, *supra* note 42. Certainly, we know Parliament enacted sanction-specific statutes that took away the judge's power to decide between types of punishment—fine, corporal punishment, transportation, death—not unlike mandatory minima take away modern judges' power to sentence defendants to probation or community corrections. Indeed, as discussed *infra* in the text accompanying notes 30-65, jurors' knowledge of the mandatory nature of these sentence-types quite regularly caused them to nullify. What is not clear, however, is how much discretion sentencing judges in this period retained to decide the quantity of the punishment, that is, the amount of the fine or the length of the sentence. *See* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621, 628-29 (2004) (discussing the interplay between jury and judge in pre-1900s England, and suggesting judges had little discretion in setting type or quantity of punishment).

44 To paraphrase Lawrence Peter "Yogi'" Berra, it was déjà vu all over again in 1987, when federal judges lost their sentencing discretion to Congress's designee, the Federal Sentencing Commission.

45 *Compare* Adriaan Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again?)*, 108 YALE L.J. 1775, 1790-91 (1999) (implying that colonial jury sentencing was significant) *with* Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467, 1506 (2001) (asserting that colonial jurors, as compared to jurors in England, played a minor sentencing role in the period prior to the adoption of the Bill of Rights).

46 King & Klein, *supra* note 45, at 1507; *see* Note, *Statutory Structures for Sentencing Felons to Prison*, 60 COLUM. L. REV. 1134, 1155 (1960).

47 *See* Ronald F. Wright, *Rules for Sentencing Revolution*, 108 YALE L.J. 1355, 1373 (1999) (reviewing STITH & CABRANES, *supra* note 16).

48 Actually, nineteenth century American juries sentenced in roughly half the states, but made non-binding sentencing recommendations in several others. *Id.* at 1373. Thus, for the entirety of the nineteenth century, state systems in which the jury had no sentencing input were in the minority. This discussion of jury sentencing in early America is limited to jury sentencing in non-capital cases. As discussed *infra* in Part I.B, jury sentencing was, and has remained, the predominant rule in capital cases.

It was not until the Progressive movement in the early 1900s that the American system began to see a trend away from jury sentencing and toward judge sentencing, a trend that was a direct consequence of the rise of the rehabilitative ideal. Even as late as 1950, thirteen states were still allowing juries to sentence,[49] though that number has today dwindled to five.[50]

B. *The Death Exception*

No phenomenon more completely proves the essential moral character of the act of sentencing than the fact that, despite rehabilitationists' hostility toward jury sentencing, and despite the myth of monolithic judge sentencing perpetrated by the opponents of the federal sentencing guidelines, the vast majority of state systems recognized, and still recognize, an important exception when it comes to imposing the death penalty. Even before *Ring v. Arizona*,[51] of the 38 states with the death penalty, 29 required juries, not judges, to impose the life or death sentence, either by statute or express state constitutional provision.[52] And although the United States Supreme Court has never held that due process or the Eighth Amendment requires death sentences to be imposed by juries, Justices Stevens and Breyer—the same two who seem to be at opposing extremes when it comes to *Apprendi*—have expressed that view.[53]

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49 King & Klein, *supra* note 45, at 1510-11.

50 Those five states are Arkansas, Missouri, Oklahoma, Texas and Virginia. ARK. CODE ANN. § 5-4-103 (Michie 1997); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. TIT. 22, §§ 926.1 & 927.1 (West 2003); TEX. CRIM. PROC. CODE ANN. art. 37.07(2)(b) (Vernon 1981); VA. CODE ANN. § 19.2-295 (Michie 2000). Kentucky also has a statute authorizing juries to impose sentence, KY. REV. STAT. ANN. § 532.055(2) (Banks-Baldwin 1988), but cases have interpreted this provision as contemplating only non-binding recommendations by juries. Murphy v. Commonwealth, 50 S.W.3d 173, 178 (Ky. 2001).

51 536 U.S. 584 (2002). *Ring* is discussed *infra* note 103.

52 Of the remaining nine states, five (Arizona, Colorado, Idaho, Montana and Nebraska) left the capital sentencing decision to the trial judge or to a panel of judges including the trial judge. ARIZ. REV. STAT. ANN. § 13-703 (West 2001) (trial judge); COLO. REV. STAT. ANN. § 16-11-103 (West 2001) (three-judge panel); IDAHO CODE § 19-2515 (Michie 1997) (trial judge); MONT. CODE ANN. § 46-18-301 (2001) (trial judge); NEB. REV. STAT. ANN. § 29-2520 (Michie 1995) (trial judge). Of course, these judge-based capital sentencing schemes have not survived *Ring*. See *infra* notes 55, 103. Four states (Alabama, Delaware, Florida and Indiana) gave the final sentencing decision to the trial judge but with varying degrees of advisory input from the jury. ALA. CODE § 13A-5-46 (1994); DEL. CODE ANN. tit. 11, § 4209 (2001); FLA. STAT. ANN. § 921.141 (West 2001); IND. CODE ANN. § 35-50-2-9 (Michie 1998).

53 Justice Stevens had taken this position for several years. *See* Spaziano v. Florida, 468 U.S. 447, 481-82 (1984) (Stevens, J., concurring in part and dissenting in part). Justice Breyer, while specifically rejecting that position in prior cases, see, e.g., Harris v. Alabama, 513 U.S. 504, 569 (1995), became a convert in *Ring.* 536 U.S. at 616-19 (Breyer, J., concurring in the judgment).

Even when the Court held in *Ring* that judges could not decide aggravating and mitigating facts in death penalty cases (for *Apprendi* reasons, not Eighth Amendment or due process reasons), state courts, federal courts, and state legislatures overreacted in a rather predictable way that reflected the deeply held presumption against judges imposing death sentences. As Justice Scalia quite correctly pointed out in his concurring opinion in *Ring*, the actual holding of the case was not that judges could not do the final balancing between mitigating and aggravating factors, and thus decide life or death, but rather that they could do so only after the juries made the actual findings on mitigation or aggravation.[54] Yet, the almost universal legislative reaction to *Ring* was to eliminate the sentencing role of judges completely, and to turn over to juries not only the task of making findings on mitigation and aggravation, but also the task of balancing those findings and ultimately deciding life or death.[55]

Opponents of the death penalty may be against judges imposing the death penalty for no more complicated reason than that they believe such a rule will produce fewer death sentences.[56] Proponents of the death penalty may be against juries sentencing in death cases for the same reason. But it is hard to imagine any set of neutral principles that would require juries to impose death sentences, but not require juries to impose non-capital sentences that are so large as to be equivalent to death sentences. The "death is different" argument that wrongful convictions cannot be corrected if the

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54 "Those States that leave the ultimate life-or-death decision to the judge may continue to do so-by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase." 536 U.S. at 612-13 (Scalia, J., concurring). But, of course, given the nature of some of the aggravators required by the Court's death penalty cases, imagine what those jury "findings" would have to be before the judge could take over and "balance" them. How, for example, could the jury make a particular "finding" on the degree of heinousness? "This was really really heinous, but that was just moderately heinous?" The fact is, we fool ourselves when we try to pretend that any sentencing, including death sentencing, is capable of this kind of deconstruction. *See infra* Part I.E.

55 Of the five states that committed the capital decision entirely to judges before *Ring*—Arizona, Colorado, Idaho, Montana and Nebraska, see *supra* note 52—the legislatures in three of those states responded to *Ring* by amending their death-penalty statutes to require not only that juries make the findings on aggravation and mitigation, but also that they then balance those findings and make the ultimate sentencing decision. ARIZ. REV. STAT. § 13-703.01.C, D (West 2004); COLO. REV. STAT. § 18-1.3-2001 (West 2002); IDAHO CODE § 19-2515(3)(b) (Michie 2003). Montana has not yet acted, though there is a pending bill to abolish the death penalty in its entirety. H.B. 561, 2005 Sess. (Mont. Feb. 5, 2005). Only Nebraska seems to have followed up on Justice Scalia's observation, by amending their system to require the jury to make findings of aggravation, then reposing in a three-judge panel the obligation of balancing those findings and imposing a life or death sentence. NEB. REV. STAT. § 29-2520 (2002).

56 Indeed, it is hard to understand Justice Breyer's conversion in *Ring* in any other way. *See supra* note 53.

wrongfully convicted person has been executed may (or may not) justify a whole host of distinctions between capital and non-capital procedures in the guilt phase, but it is quite irrelevant in the sentencing phase. We understand what it means to be "wrongfully convicted"—we usually mean an innocent person was found guilty—but what does it mean to be "wrongfully sentenced"?

In fact, when it comes to sentencing, non-capital sentences are virtually unreviewable, as long as the sentence imposed was within the lawful range and of a lawful type.[57] Death sentences, on the other hand, must proceed according to the rather rigid and complex set of procedural pathways required by *Furman v. Georgia* and its progeny, making procedural mistakes during capital sentencing proceedings a fertile ground for appeal.[58] Thus, to the extent we need juries to reduce "wrongful sentences," they would be much more useful in non-capital cases, where the sentences will be largely unreviewable regardless of who imposes them. Yet the rule is the reverse.

The only way to justify the death exception, in a sentencing context, is to say that the ultimate penalty is so important, and the mitigating and aggravating factors so complicated, that we simply do not trust judges to make that fundamentally moral decision. In his dissent in *Spaziano v. Florida*, Justice Stevens expressed these oft-quoted views about the nature of imposing the ultimate punishment, views that, from a retributionist's point of view, apply with equal force whether a defendant faces death by execution, death by extended prison sentence, or "merely" a few years in prison:

> Thus, in the final analysis, capital punishment rests on not a legal but an ethical judgment—an assessment of what we have called [in another case] the "moral guilt" on the defendant. And if the decision that capital punishment is the appropriate sanction in extreme cases is justified because it expresses the community's moral sensibility—its demand that a given af-

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57 Most states, and even the federal sentencing guidelines before Booker, give trial judges virtually unreviewable discretion to pick a sentence within a set legislative or guideline range. Indeed, this is the very notion of a sentencing "range." But see *infra* Part V.D, discussing the *Booker* remedial majority's quite astonishing creation of "reasonableness" sentencing review.

58 408 U.S. 238 (1972). In *Furman*, the Court held that the death penalty could not be constitutionally imposed where the sentencing jury was left with largely unfettered discretion, and could exercise that discretion (and, in the majority's view, often exercised that discretion) in a discriminatory fashion. After *Furman*, in a series of cases beginning with Gregg v. Georgia, 428 U.S. 153 (1976), pluralities of the Court, then majorities, have consistently upheld state death penalty statutes that contain procedures for properly instructing jurors, in a bifurcated penalty phase, to consider aggravating and mitigating factors, then to decide whether, beyond a reasonable doubt, the aggravating circumstances outweigh the mitigating circumstances. *See, e.g.*, Buchanan v. Angelone, 522 U.S. 269 (1998); Lockett v. Ohio, 438 U.S. 586 (1978).

> front to humanity requires retribution—it follows, I believe, that a representative cross section of the community must be given the responsibility for making that decision.[59]

The idea that we need jurors to balance the moral impact, say, of a childhood of abuse against an adulthood of criminal predation, is no less true in death penalty cases than it is in many non-capital felony cases. In both circumstances, we should call upon the same broad representatives of the community—to whom we constitutionally assign the task of assessing factual guilt—some role in assessing moral guilt.

C. *Nullification*

Even when jurors were disenfranchised from imposing sentences directly, they could still express their moral judgment by nullifying, and they were not shy about doing so. As early as the fourteenth century, English criminal jury trials were not just contests over factual guilt, they were also, as Thomas Green has put it, "about who ought to live and who ought to die,"[60] since death was the mandatory penalty for virtually all serious crimes, including many property crimes.[61] Even as late as the seventeenth and eighteenth centuries, English jurors were so regularly offended at the prospect of a mandatory death sentence, and so regularly nullified—either straight out or by convicting the defendant of a lesser charge[62]—that Blackstone coined a phrase for the phenomenon: "pious perjury."[63] The phrase was meant to capture the fact that although such nullification was a violation of the juror's oath, and therefore perjurious, it was nonetheless a "pious" effort to shield convicted criminals from the excesses of English punishment.[64] John Langbein has made the same central point about the role of jurors in this critical period:

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59 468 U.S. 447, 481 (1984) (Stevens, J., concurring in part and dissenting in part) (citing Enmund v. Florida, 458 U.S. 782, 800-01 (1982)).

60 GREEN, *supra* note 39, at 98.

61 4 BLACKSTONE, *supra* note 43, at 98-99.

62 Jurors can nullify simply by acquitting a defendant of a single charge altogether, despite evidence beyond a reasonable doubt of his guilt, or by acquitting him of the higher charge and convicting him of a lesser charge when there is simply no evidence of the lesser. Both kinds of decisions are fairly labeled "nullification," though the latter is certainly a more refined type. Nullification of the latter sort is not to be confused with the idea that even non-nullifying jurors make moral judgments disguised as judgments about levels of culpability, as discussed *infra* Part I.D.

63 3 BLACKSTONE, *supra* note 43, at 238-39, cited, interestingly, by Justice Stevens in his majority opinion in *Apprendi*.

64 *Id.*

> Only a small fraction of eighteenth-century criminal trials were genuinely contested inquiries into guilt or innocence. In most cases the accused had been caught in the act or otherwise possessed no credible defense. To the extent that trial had a function in such cases beyond formalizing the inevitable conclusion of guilt, it was to decide the sanction. These trials were sentencing proceedings. The main object of the defense was to present the jury with a view of the circumstances of the crime and the offender that would motivate it to return a verdict . . . in order to reduce the sanction from death to transportation, or to lower the offense from grand to petty larceny, which ordinarily reduced the sanction from transportation to whipping.[65]

Unlike some commentators, I do not mean to suggest that nullification is an inherent *right* of jurors, though of course it is an inherent *power*, given our tradition of limited judicial review.[66] Nor do I mean to suggest, as a few commentators have, that nullification serves as an important institutional check on judicial or legislative excess, that it should be recognized, or encouraged, as an acceptable part of the jury's decisional arsenal, or even that it is an important tool to stem racism.[67] On the contrary, nullification is at heart anarchical, anti-democratic, and far too blunt to be trusted as a check on any of the branches of government. Spectators of various political stripes may cheer when defendants with whom they identify are acquitted by nullifying juries, but today's cheers will be tomorrow's horror when the vagaries of twelve people's individual sense of "justice," untethered to the law, get turned around to gore the other ox. The tyranny of twelve is simply no solution to the majoritarian problem, especially when those twelve are in fact more likely to be among the majority than not.

But the persistent, even if not currently wide-spread, presence of nullification suggests a reality that cannot be ignored, particularly in the context of criminal sentencing. Jurors know, even if legislatures and some Supreme Court justices do not, that there is an essential unity between crime and

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65 Langbein, *supra* note 42, at 41. This period in England was critical to the development of law in the colonies, which were straining to reform many English legal traditions, including the wide-spread use of the death penalty. *See supra* text accompanying note 46. In fact, the Quakers' invention of the penitentiary in Philadelphia in 1790 was a continuation of this general colonial reaction against the severity of English criminal punishments. MORRIS, *supra* note 8, at 4-5. Of course, that invention became deeply ironic as penitentiaries—invented to allow criminals a relatively short period of time for moral reflection and contrition—became the long-term dumping ground for failed rehabilitation.

66 For a thought-provoking comparison between our confidence in jurors as reflected by our commitment to limited judicial review, and our lack of confidence in them as reflected in our arcane systems for jury selection, see Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153 (1989).

67 *See, e.g.*, Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995) (arguing it is acceptable for black jurors to nullify by acquitting guilty non-violent black defendants); Otis B. Grant, *Rational Choice or Wrongful Discrimination: The Law and Economics of Jury Nullification*, 14 GEO. MASON CIV. RIGHTS L.J. 145 (2004) (putting only a slightly less ridiculous economic gloss on Butler's ridiculous original).

punishment.[68] When jurors are not allowed to express that unity in a controlled and sensible way, by playing some designated role in setting punishment, they will express it in an uncontrolled and senseless way, by nullifying.

D. *Culpability as Moral Judgment*

Jurors prevented from direct sentencing need not violate their oaths in order to have a primary role in assessing the moral turpitude of particular criminal acts. They do it all the time, and have always done it, when they decide levels of culpability.

It would be hard to explain, say, to a visitor from another galaxy, why jurors get to decide "culpability" but then have little or no role in imposing punishment. The task would be impossible if our visitor were a retributionist. To decide "culpability" is in fact to decide something about the depth of the moral breach, and therefore to quantify the price the miscreant must pay to return to the social fold.

The law in the twentieth century has turned the idea of culpability into yet another deconstructed invention of dubious scientific pedigree.[69] No longer is there a shred of moral judgment in the word "culpability"; today it is meant to describe the method by which the law diagnoses a criminal's state of mind. So sophisticated are our alleged powers of diagnosis that there are four recognized strains of the culpability disease: negligent, reckless, knowing and intentional.[70] We might also throw in "with deliberation" to cover first degree murder.

But what do these labels really describe, and how do juries distinguish between them? Many criminologists have recognized that these apparently distinct levels of culpability are in fact indistinguishable from one another, at least at their margins.[71] Instead of representing five discrete states of mind that justify substantially different quanta of retributive response, these traditional levels of culpability are just markers along some sort of continuum of culpability.

Take, for example, the defined difference between "knowingly" and "reckless." "Knowing" behavior is typically defined as being "aware" of

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68 *See infra* Part I.E.

69 Not unlike the federal sentencing guidelines. *See infra* Part I.E.

70 *See* MODEL PENAL CODE § 2.02 (1985).

71 *See, e.g.*, Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Responsibility*, 88 CAL. L. REV. 931 (2000); Douglas N. Hasak & Craig A. Callender, *Willful Ignorance, Knowledge and the "Equal Culpability" Theory: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29 (1994); Kimberley K. Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597 (2001).

the nature of one's conduct and being "aware that it is practically certain" to cause the bad result it caused.[72] "Reckless" conduct is typically defined as "consciously disregarding a substantial and unjustifiable risk" that the conduct will cause the bad result.[73] What in the world is the difference between knowing your conduct is practically certain to cause a bad result and consciously disregarding the risk that it will? On reflection, it is easy to see the same kind of bleeding from one allegedly distinct level of culpability into its neighbor. All the levels collapse at their edges into one another.

Moreover, even as a continuum, the idea of "culpability" in its modern sense is an internal word that masks what is at heart, and has always been at heart, largely an external inquiry. Because we can never know what was inside the criminal's mind at the moment of the crime, and indeed because both the law and our own brains contain a strong predisposition to believe that our fellow citizens all act with the same sense of free will and intentionality we feel inside ourselves,[74] what we call a determination of "culpability" in the new-fangled sense often ends up being a determination of "culpability" in the old-fangled sense of moral outrage. When faced with the impossible task of looking inside the criminal's mind, what jurors actually do, and quite appropriately so, is to start (and often end) with the externalities of the crime. In many of the most difficult cases, and maybe all cases, what the culpability inquiry actually involves is an answer to this single and very external question: "How bad was this criminal?"[75]

I suspect we could replace all the modern culpability definitions with the following instruction, and achieve virtually identical verdicts: "Members of the jury, if you find that Defendant committed the criminal act as defined [which definition would not include any level of culpability], then tell us, on a scale of one to four, how bad the defendant was.[76]

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72 MODEL PENAL CODE § 2.02(b).

73 *Id.* § 2.02(c).

74 *See supra* note 5; *see also* Oliver R. Goodenough, "Responsibility and Punishment: Whose Mind?," in *Law and the Brain*, *supra* note 5, at 1805.

75 Several thoughtful commentators have argued exactly the opposite: that results should not matter at all, and that criminal liability should be grounded entirely on intentionality. *See, e.g.*, Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. L. ISSUES 1 (1994); Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679 (1994); Steven J. Schulhofer, *Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

76 There are, of course, circumstances that really do seem to indicate a lack of intentionality that we have no trouble understanding. We can all appreciate the difference between a mob hit and an accidental shooting during a hunt. The trouble is, in the real world of criminal jury trials, our faux-refined levels of culpability—with their enormous quantum consequences—encourage all defendants to claim their acts were the product of either negligent, reckless or insanely diseased minds. The post-modern assumptions that either no one is ever guilty or we are all equally guilty have been enthusiastically embraced by the criminally accused. I continue to be amazed at how difficult it is for so many defen-

There even seems to be a built-in limit to our tendency to infer intentionality in others. When the criminal acts are so bad, so heinous, so outside the realm of our own experience, they can evoke in us a powerful sense that the actor must be so mentally diseased as to not be sentient in the way we are. The law calls that "insane." I suspect, along the same lines as my suppositions about general culpability, that the percentage of insanity verdicts would be roughly the same if we replaced our woefully confusing psychobabble about "not knowing the difference between right and wrong," "not having the capacity to form specific intent," "suffering from substantially impaired volition," or (worst of all) "suffering from an irresistible impulse," with the following special interrogatory: "Was the Defendant so crazy that you believe he should be treated in a mental hospital instead of punished?"

By suggesting there is a moral core to what the modern criminal law has gussied up as discrete levels of culpability and pseudo-scientific definitions of insanity, I do not necessarily mean to suggest that jurors should actually be instructed in the more direct ways I have hypothesized here. There may, after all, be subtle and in some cases important meanings in the culpability and insanity words we use, meanings that might not always accurately translate to "badness" or "craziness." Moreover, instructing jurors in this more direct fashion might very well invite nullification. Although I cannot overstate the wisdom I have seen in juries over the years, there are some circumstances in the law where a little bit of fiction may not be a bad thing. Pretending that we expect juries to see inside the minds of criminals may be one of those circumstances.

In any event, whether conscious or subconscious, whether acknowledged or unacknowledged, every time juries decide between levels of culpability they are expressing some level of moral reaction to the crime. This ineluctable fact—which operates in every criminal case where a lesser-included or non-included crime is charged or instructed—further belies the fiction that juries decide facts while judges decide punishment.

E. *The Essential Unity of Guilt and Punishment*

There is a reason jurors have relentlessly resisted the law's bifurcation of punishment from guilt. It is not just a matter of activist jurors resenting the power of sentencing judges, or nullifying unduly harsh laws, or even homogenizing levels of culpability. The fact is, sentencing, by its very na-

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dants, who have pleaded guilty to a crime, to admit the factual basis of the crime. Never has the passive voice ("Then the gun went off," "During the struggle she got cut," etc.) been used so often by so many. I do not make these observations snidely. I suspect all of our brains are designed with powerful defenses against submitting too willingly to the condemning power of the group.

ture, is a profoundly gestalt undertaking, in which particular facts, general facts and moral conclusion—both about the crime itself and the criminal—get all wrapped up in a quite indivisible, and indescribable, way.

The biggest mistake of the federal sentencing guidelines is that they assumed sentencing would become less arbitrary, less disparate and more transparent if we segmented crimes and criminals into component parts, assessed those parts in some objective way, then integrated the parts back into a somewhat arbitrary, but at least relatively uniform, result. But the sentencing process is simply not conducive to such deconstruction.[77]

Recognizing the essential unity of guilt and punishment does not, of course, prevent us from attempting to classify different sentencing factors into different categories. That is, if we are unwilling to turn the job of sentencing over to juries entirely, meaning the sentencing judge will need some formal findings from the jury, we should still think about what kinds of factors are more suitable for jury determination than judge determination. One sensible solution, particularly attractive to retributionists, is to allow the jury to decide all so-called "offense-based" facts—facts about the crime itself—and allow the judge to decide so-called "offender-based" facts—facts about the offender's social and criminal history.[78]

Of course, the federal sentencing guidelines do not take this approach. Their architects presumed that every conceivable sentencing factor should be enumerated, decided by judges, crunched into a relatively determinate presumptive sentence range, with judges again, not juries, then given some limited discretion to depart from those presumptive ranges based on yet another set of specifically enumerated factors. The result of this over-refinement, as we shall see, is that when the Court eventually struck the federal guidelines in *Booker*, it was left with remedial choices that were

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77 This same sort of deconstructive fiction has been employed by the Court in its death penalty jurisprudence. We somehow feel better about an inherently subjective process, especially one with awesome consequences like the death penalty, if we pretend to break it down into objective-sounding parts (mitigating and aggravating factors), and then pretend to do something objective to those parts, like "balance" them. *See supra* note 58. I am afraid the popularity of "therapeutic jurisprudence," "restorative justice" and other kinds of legal disease models will only increase this problem of the pseudo-scientific deconstruction of the criminal law. For example, a Columbia University psychiatrist, Michael Stone, has developed a list of twenty-two gradations of criminal "depravity," with nuances so modern and imperceptible as to make the Model Penal Code look like Hammurabi's Code. *See* Daryl Passmore, *EVIL: It's No Laughing Matter*, SUNDAY MAIL (Austl.), April 3, 2005 (Features), at 2 (setting forth "The Depravity Scale," including no. 13, "[r]ageful people with inadequate personalities who kill when they snap" and no. 14, "[r]uthless, selfcentred psychopathic schemers"); *see also* Charles Laurence, *Psychiatrists Devise 'Depravity Rating' to Help Courts Decide on Death Sentences,* SUNDAY TELEGRAPH, February 20, 2005, at 31.

78 One of the best articulations of this approach is by Douglas A. Berman, *Conceptualizing* Blakely, 17 FED. SENT. R. 89 (2004).

significantly narrower than when it struck state guidelines.[79] This over-refinement also means that as Congress contemplates how to respond to *Booker*, one of the critical things it must do is reduce the number of designated sentencing factors.[80]

In any event, it is abundantly clear, because of the essential unity between guilt and punishment, that the jury has always had an important role to play in assessing the magnitude of a particular criminal's wrong. Its role in this regard became constitutionally grounded in 2000, when the Court decided *Apprendi*.

II. *APPRENDI'S* ROOTS

There are two Sixth Amendment propositions that have driven all *Apprendi* jurisprudence, and understanding both will help to demonstrate why the merits majority in *Booker* was right to strike the application of the federal sentencing guidelines, and why the remedial majority was wrong to resurrect them as advisory.

First, the Sixth Amendment's guaranty of a jury "in all criminal prosecutions" has been interpreted to apply only to the guilt phase of the trial, and does not include the right to have the jury perform sentencing (that is, there is no constitutional right to jury sentencing). Second, Congress cannot eviscerate the constitutional guaranty of a jury during the guilt phase by arbitrarily characterizing elements of a crime as "sentencing factors."

A. *Jury Sentencing*

It may seem self-evident (especially to today's trial judges) that the Constitution guarantees a criminal defendant the right to a jury only for the guilt phase and not for the sentencing phase. But in fact the actual language of the Sixth Amendment is far from clear,[81] especially when one compares

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79 *See infra* Part III.

80 *See id.*

81 The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

that language to its counterpart in the Seventh Amendment, which guarantees the right to jury in certain civil cases.[82]

There is no palpable textual reason why the words "criminal prosecutions" and "trial" in the Sixth Amendment should mean only the guilt phase of the trial, while the words "Suits at common law" and "trial" in the Seventh Amendment should mean the whole trial, including both liability and damages.[83] Yet the Court, perhaps succumbing to the over-valued pedigree of judge sentencing,[84] has held that the right to a criminal jury does not include a right to have the jury impose sentence, though, interestingly, it did not expressly reach that result until 1984.[85]

I mention the issue of jury sentencing here not to argue that it is constitutionally mandated and that the Court was wrong to hold otherwise,[86] but rather to remind us that the *Apprendi* "problem" has its origins in the Court holding otherwise. Once the Court severed the criminal trial into a guilt phase that requires a jury and a sentencing phase that does not, it set up the problem that Congress (and state legislatures) might, in the definitions of crimes themselves, invade the right to jury by defining certain facts as sentence enhancers rather than elements. And, of course, that's exactly what Congress (and state legislatures) did, primarily by way of quantity and weapons enhancers in drug laws, but also in a variety of other contexts.

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82 The Seventh Amendment provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

83 Likewise, it is difficult for me to see, as a few others claim to see, a textual basis for distinguishing between offense-based facts, which would trigger the right to jury, and offender-based facts, which would not. *See, e.g.*, Berman, *supra* note 78, at 89. Indeed, Professor Berman relies on the Sixth Amendment's word "crime" for his suggestion that the right to jury only attaches to facts about the crime and not the criminal, but that word is used only in the portion of the text dealing with venue. The more important, and it seems to me controlling, words are in the opening clause: "In all *criminal prosecutions* . . . ." (emphasis added).

84 *See supra* Part I.A.

85 Spaziano v. Florida, 468 U.S. 447, 449 (1984). Equally interesting, it was not until 1998 that the Court expressly held that the Seventh Amendment right to jury encompasses both the liability and damage phases. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

86 Although, I and others have made this argument elsewhere. *See e.g.*, Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003); Iontcheva, *supra* note 18; Lanni, *supra* note 45. *But see* Lillquist, *supra* note 43.

B. *Legislative Invasions of the Right to Jury*

For 200 years, the boundary between federal jury and federal sentencing judge was thought to be impermeable only because Congress had never done anything to threaten it.[87] For the first 150 of those years, there were no boundary problems simply because there were virtually no federal criminal laws and therefore virtually no federal criminal trials. It wasn't until the early 1900s, and especially with the onset of Prohibition in 1919, that Congress began the explosion that has resulted in the unimaginably large body of federal criminal laws that is with us today.[88]

Even from the beginning of that explosion until the late 1970s and early 1980s, there were still no boundary problems because Congress had essentially abdicated, and continues to abdicate, its responsibility to set forth punishments for its newly defined crimes. There is no comprehensive federal system, akin to the Model Penal Code systems in place in state courts,[89] of classifying crimes by seriousness and then imposing relatively narrow presumptive sentence ranges by class. Instead, each new federal crime contained its own organic sentence range, and the ranges are very wide. In fact, it is not uncommon for the range to be infinite, because it is unbounded on the up side; often, Congress provides only a statutory minimum (and sometimes not even that) and no maximum.[90] Statutory "ranges"

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87 There were likewise no significant boundary problems between state juries and state sentencing judges, but for different reasons. As already discussed *supra* in note 48, more than half of all states in the 19th century allowed juries to impose, or at least recommend, the sentence, meaning that there were no boundary problems in those states because there were no boundaries. In the minority of judge-sentencing states, the boundaries remained clear because legislatures did not invade the sentencing judge's discretion with the kinds of mandatory minima and sentence enhancements we began to see in the 1970s and 1980s, as discussed *infra* in notes 93 to 94.

88 Bowman, *supra* note 16, at 313-14.

89 The original Model Penal Code defined three levels of felonies carrying different presumptive indeterminate sentences, or what the Code called "Ordinary Terms." MODEL PENAL CODE § 6.06 (1985). However, it also defined three aggravated levels, or what it called "Extended Terms," which could be imposed upon the finding of one of several different aggravators, including when the defendant is a "persistent offender," a "professional criminal" or a "dangerous, mentally abnormal person." *Id.* §§ 6.07, 7.03. Proposed revisions to the sentencing portions of the Code would retain this general system of presumptive and aggravated ranges, though it would replace indeterminate sentences with determinate ones. Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525 (2002).

90 For example, the punishments for second degree murder, kidnapping and aggravated sex abuse are all "any term of years to life," that is, no range of limitation at all. 18 U.S.C. §§ 1111, 1201, 2241 (2000). Even less serious and much more commonly charged federal crimes have extraordinarily wide statutory punishment ranges. Possession of more than 50 grams of crack cocaine carries a penalty of ten years to life. 21 U.S.C. § 841(a)(1) (2000). Carjacking carries a penalty of zero to twenty-five years if the victim suffers serious bodily injury. 18 U.S.C. § 2119 (2000); *see infra* notes 92-3.

for federal crimes are so large that federal sentencing for most of the twentieth century has been described by commentators as "indeterminate" sentencing.[91]

It was precisely this Congressional abdication by way of unreasonably large sentence ranges, and the resultant wide variations in sentences for like crimes (with the longest sentences often indeterminately cut short by parole officials), that spawned the federal sentencing guidelines in the first place.[92]

Even before these wide sentence ranges were closed by guidelines, many states, and on occasion even Congress, experimented with the idea of including in the definitions of certain crimes themselves aggravated ranges if the crime was committed in particularly egregious ways. Instead of defining a new crime with a higher and/or mandatory minimum penalty (which would have defused the *Apprendi* problem, perhaps forever), legislatures typically kept the elements of the crime the same, and just tacked the aggravated sentence onto the general description of the penalty.

For example, in 1982 Pennsylvania, like many states, added into its existing criminal statutes an aggravator for certain enumerated crimes triggered by the "visible possession of a firearm."[93] Defendants charged with violating any of the enumerated crimes were convicted if the state could prove the traditional elements of those crimes, not including the visible firearm aggravator. Whether their sentence would be aggravated—that is, whether they in fact visibly possessed a firearm during the commission of the crime—would then be determined by the sentencing judge at sentenc-

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91 *See, e.g.*, Marvin E. Frankel, CRIMINAL SENTENCES: LAW WITHOUT ORDER 3-49 (1973); Alan M. Dershowitz, *Indeterminate Confinement: Letting the Therapy Fit the Harm*, 123 U. PA. L. REV. 297, 298 (1974); Jonathan Chiu, United States v. Booker: *The Demise of the Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1312-15 (2005); Nora V. Demleitner, *Is There a Future for Leniency in the U.S. Criminal Justice System?*, 103 MICH. L. REV. 1231, 1260 (2005).

The phrase "indeterminate sentencing" can have a couple different meanings. In its strictest sense, it means a system that allows a court to impose a sentence such as "five to ten years," with the actual release decision made by parole officials. *See supra* note 89 (discussing original Model Penal Code). But under many sentencing systems, including the federal system immediately before the guidelines, even a point sentence such as "five years" can actually be indeterminate if parole officials have the statutory discretion to release defendants before completion of the entire sentence. The general "indeterminacy" of pre-guideline federal sentencing was a description meant not to convey that the sentences themselves were indeterminate in the strict sense, but rather that the sentencing judge had great discretion to impose a point sentence anywhere within the very wide federal statutory ranges.

92 *See infra* Part IV.C.

93 42 PA. CONS. STAT. § 9712 (2004). The effect of this particular aggravator was to increase the already mandatory minimum penalty for this offense. This particular state sentencing provision was upheld against Sixth Amendment attack in McMillian v. Pennsylvania, 477 U.S. 79 (1986), discussed *infra* in notes 95 and 96.

ing, by a preponderance of the evidence, not by the jury in the guilt phase beyond a reasonable doubt.

In effect, by characterizing the visible possession of a firearm as a "sentencing factor" and not an "element," the Pennsylvania legislature deprived defendants convicted of the aggravated version of this crime of the right to have their juries decide whether they did in fact visibly possess a firearm. Was this a violation of the Sixth Amendment? If not, what would prevent legislatures from completely destroying the right to jury trial by moving all manner of traditional elements over to the non-traditional "sentencing factors" side of this ledger?[94]

Until 1999, the Court routinely gave almost complete deference to the lines Congress and state legislatures chose to draw between "elements" and "sentencing factors," deciding each case on an ad hoc basis with little guidance about whether there are any Sixth Amendment limits to the line drawing. For example, in *McMillian v. Pennsylvania*, [95] the Court upheld the Pennsylvania "visible possession of a firearm" aggravator discussed above. While acknowledging a theoretical outer limit to a legislature's ability to characterize traditional elements as sentencing factors, the Court never articulated that limit, and in fact seemed content with the rule that the legislature's characterization of the elements of an offense "is usually dispositive."[96]

C. *The Sixth Amendment Rediscovered*

Even before *Apprendi*, there were rumblings about an end to this deferential approach to legislatures' ability to constrain the right to jury by defining sentencing factors. *Jones v. United States* involved the federal carjacking statute, which provided for a sentence of zero to fifteen years, but zero to twenty-five years if the victim suffered serious bodily injury and 0 to life if the victim died.[97] The Court held that serious bodily injury to the victim was an element of the offense that must be proved to a jury beyond a

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94 For example, could a state re-define all crimes by listing only the prohibited act as an element, and leaving all the traditional levels of culpability as sentencing factors to be decided by the judge at sentencing and only by a preponderance of the evidence?

95 477 U.S. 79 (1986).

96 *Id.* at 85. In a parallel set of rulings, the Court reaffirmed the sentencing judge's wide discretion to consider pretty much any "fact," and to find that "fact" by a preponderance of the evidence. *See, e.g.*, United States v. Watts, 519 U.S. 148 (1997) (sentencing court may consider prior charges of which defendant acquitted); Witte v. United States, 515 U.S. 389 (1995) (double jeopardy does not prevent prior conviction to be used to aggravate current sentence); Williams v. Oklahoma, 358 U.S. 576 (1959) (uncharged conduct may be used to aggravate sentence).

97 526 U.S. 227 (1999). The statute is 18 U.S.C. § 2119.

reasonable doubt before a federal carjacking defendant could be sentenced to more than fifteen years.[98] In doing so, it suggested for the first time that there might be reachable constitutional limits to the ability of legislatures to re-define traditional elements as sentencing factors.[99]

Of course, that suggestion became a reality the very next year, when the Court decided *Apprendi v. New Jersey*.[100] In holding that New Jersey's hate crime statute could not be applied to deprive a defendant of the right to have a jury decide whether the crime was in fact animated by any of the forbidden biases,[101] the Court announced the following rule:

> 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.[102]

Much of the tête-à-tête between the majority and the dissenters was focused on whether application of this announced rule would render the federal sentencing guidelines unconstitutional, even though *Apprendi* itself was of course not a guidelines case.[103] This in turn would depend on how

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98 Unless, of course, the carjacking defendant pleads guilty to an aggravated version, in which case he will have waived his right to jury. *See infra* notes 117 and 121 and accompanying text.

99 This was only a suggestion because *Jones* was decided under the doctrine of constitutional doubt. 526 U.S. at 239-40. The majority held that the federal carjacking statute was ambiguous about whether the victim's bodily injury was an element of an aggravated offense or merely a sentencing factor attached to the un-aggravated offense. *Id.* In resolving this ambiguity in favor of the elements interpretation, the majority concluded that to do otherwise would raise serious constitutional doubts under the Sixth Amendment. *Id.*

100 530 U.S. 466 (2000).

101 The particular statute at issue in *Apprendi* operated to increase Mr. Apprendi's punishment for his assault conviction from a range of five to ten years to a range of ten to twenty years if the judge found, at sentencing, that the defendant "intended to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." *Id.* at 469 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West 2000) (repealed 2001)). Because the New Jersey legislature expressly provided that the determination of prohibited animus was to be made by the judge at sentencing, the Court could not find the statute ambiguous on this point and rely on the doctrine of constitutional doubt, as it had a year earlier in *Jones*. *See supra* note 99 and accompanying text.

102 530 U.S. at 490.

103 *Compare id.* at 497 n.21 ("The Guidelines are, of course, not before the Court.") *and id.* at 523 (Thomas, J., concurring) *with id.* at 561-64 (majority's rule inconsistent with federal guidelines) (O'Connor, J., dissenting). Another important debate between the two sides was whether the announced rule would render unconstitutional those state capital sentencing schemes in which the sentencing decision was reposed in the trial judge, or a panel of judges, rather than the jury. *See Apprendi* opinions cited *supra*. If one characterizes the death sentence as a sentence in excess of the otherwise "statutory maximum" of life, it is hard to see how defendants would not have the right to have a jury decide the aggravating and mitigating factors required by *Furman*. *See supra* note 58 and accompanying text. The Court, just ten years earlier in Walton v. Arizona, 497 U.S. 639 (1990), *overruled by* Ring v. Arizona,

one approached the meaning of "statutory maximum." If, in a guidelines context, the "statutory maximum" were deemed to be the guidelines sentence plus any possible upward departures, then the guidelines would survive *Apprendi* scrutiny, because a guidelines defendant could never be sentenced in excess of the "statutory maximum." On the other hand, if the "statutory maximum" were deemed to be the guidelines sentence without any upward departures, then the guidelines would not survive; a defendant would have a constitutional right to have a jury decide any facts upon which an upward departure were based.

In some ways, the answer to this question is obvious. How can the guidelines-plus-upward-departures number be called the true "statutory maximum" for *Apprendi* purposes any more than the animus-aggravated maximum in the New Jersey hate crime statute could be called the "statutory maximum" in *Apprendi* itself?[104] The whole thrust of *Apprendi* was to acknowledge a defendant's Sixth Amendment right to have a jury decide facts that, like traditional elements, impact the legislatively-set universe of potential punishment. And the essential nature of an "elemental fact," whether legislatures describe it that way or not, is that its presence is necessary before the state may punish a defendant in a legislatively designated higher range.

On the other hand, by tying the rule to this odd notion of "statutory maximum," *Apprendi* threatens to become uncontrollable. Judges can *never* sentence beyond the actual statutory maximum, yet if the *Apprendi* "statutory maximum" is meant to describe the maximum without the facts that actually take the judge to the statutory maximum, the rule threatens all of judge sentencing. Every time we impose sentences, even sentences well within presumptive ranges, we make myriad stated and unstated factual findings.[105]

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536 U.S. 584 (2002), had upheld Arizona's death penalty statute, which left the sentencing decision to the judge, against this very argument. The question raised by *Apprendi*, and expressly discussed by the majority and dissents, was whether a different result would now obtain. *See Apprendi* opinions cited *supra*. Despite the majority's assurances to the contrary, see 530 U.S. at 496-97, less than two years after *Apprendi* the identical death penalty system upheld against Sixth Amendment attack in *Walton* was stricken as unconstitutional in *Ring*, 536 U.S. 584.

104 Similarly, in a death penalty case, how can the "statutory maximum" be death, when the ordinary "maximum," without the aggravators, is something less than death? See *supra* note 103, for a discussion of *Ring*. Justice Scalia makes both of these points in his opinion in Blakely v. Washington, 542 U.S. 296 (2004), discussed *infra* in notes 111 to 113. A similar analysis might apply in a Model Penal Code state: how can the "statutory maximum" be the maximum in the aggravated range, when the presumptive maximum, without the aggravators, is something less?

105 The challenge of basing sentences on the actual facts of the crime becomes almost impossible when defendants plead guilty, especially if the sentencing judge accepts pleas without requiring defendants to admit to the specific facts supporting the plea. The Federal Rules of Criminal Procedure require

This was the real challenge of *Apprendi.* How can the core of the Sixth Amendment's jury guaranty be insulated from legislative incursion without also smothering all judge sentencing in the process? Put another way, how is it that Mr. Apprendi has a right to have a jury decide whether he committed his crime with racial animus, when judges across the country can give defendants the presumptive maximum every day if they find those defendants' crimes were committed with racial animus, without even articulating that finding?[106]

To protect judge sentencing from the ravages of the Sixth Amendment, the *Apprendi* Court created this arbitrary and fictional limitation grounded on the idea that the right to jury has something to do with the notice a defendant has, as he begins his trial, of the "statutory maximum" he is facing.[107] But of course Mr. Apprendi knew that his real statutory maximum was the twenty-five years he could receive if the judge found racial animus.[108] It is impossible to articulate, in pure Sixth Amendment terms, why a scheme that allows judges to consider myriad facts in deciding whether to sentence below or at a single statutory maximum (or, for that matter, whether to give a defendant probation or sentence him to prison) is perfectly constitutional and does not violate the right to jury, yet when that same judge uses those same facts to pierce the first tier of a two-tiered legislatively-designed sentencing system those facts suddenly take on constitutional dimension.

Perhaps no case better illustrates the difficulties caused by *Apprendi's* overly cautious approach to the right to jury than *Harris v. New York.*[109] In that case, the Court held that a fact that increases a *minimum* sentence—and indeed that triggers a *mandatory minimum*—need not be submitted to and found by a jury.[110] In the strangely restrained world of *Apprendi*, a criminal defendant has the right to have a jury decide a fact that might increase his

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the judge to determine that there is a factual basis for the plea. FED. R. CRIM. P. 11(b)(3). But in some state courts defendants may waive the factual basis. *See, e.g.*, COLO. R. CRIM. P. 11(b)(6).

106 This is possible as long as the maximum is a single maximum, and not part of a two step regime where an aggravating fact identified by a legislature allows a judge to exceed what would otherwise be the maximum.

107 530 U.S. at 498 (Scalia, J., concurring).

108 Similarly, Mr. Ring knew when he began his trial that the maximum punishment he faced was death. *See supra* note 103.

109 536 U.S. 545 (2002).

110 *Id.* at 560. Mr. Harris was convicted at a bench trial of violating various federal drug and firearms laws, including 18 U.S.C. § 924(c)(1)(a), which provides for a mandatory minimum sentence of seven years if a firearm is "brandished" during a drug sale. *Id.* at 550. The indictment charging Harris did not allege brandishing, and the trial court made no findings as to brandishing until the sentencing hearing. *Id.* at 551. At that time it found, by a preponderance, that Harris did in fact brandish a firearm, and sentenced him seven years. *Id.* Harris appealed, arguing that *Apprendi* required the fact of brandishing to be proved to the fact-finder at trial beyond a reasonable doubt. 536 U.S. at 557.

sentence range from a one-year maximum to a two-year maximum, but no right to have a jury decide a fact that changes his sentence from potential probation to a mandatory twenty years in prison. What kind of right to jury is that, and where is that limitation found in the text of the Sixth Amendment?

In any event, the relentless post-*Apprendi* march toward the federal sentencing guidelines took its next important step in 2004, in *Blakely v. Washington*,[111] when the Court struck down Washington's state sentencing guidelines.[112] With the identical split seen in *Apprendi*, a majority of the Court concluded that the trial judge deprived Mr. Blakely of his right to jury trial by aggravating the sentence beyond what would otherwise have been the maximum under the Washington state guidelines, based on the trial judge's finding, rather than a jury's finding, of an aggravating factor.[113]

The decision in *Blakely* was much anticipated as an auspice for the fate of the federal sentencing guidelines.[114] The more interesting question,

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111 124 S. Ct. 2531 (2004).

112 *Id*. at 2538. The term "state sentencing guidelines" is a bit of a misnomer. It is no exaggeration to say that the fifty states have fifty different sentencing systems, though they can roughly be divided into three broad categories: indeterminate states (meaning judges or juries sentence within fixed, and broad, legislative ranges); Model Penal Code states (meaning judges or juries sentence within relatively narrow "presumptive" legislative ranges, but may exceed the presumptive maximum and sentence up to a designated "aggravated maximum" if certain findings are made); and guideline states (meaning that a state commission has created narrow presumptive sentence ranges based on certain pre-weighted factors, and aggravated sentence ranges based on the presence of aggravating facts). These descriptions are points along a continuum, and many states have hybrid systems. Even in pure guideline states, no state system even approaches the number of factors, and therefore the complexity, of the federal system. The federal guidelines, just in the first step of fixing a base guideline range, require the fact finder to assess the level of the offense within a range of forty-three different levels, and to match that level against six different levels of criminal history, creating the famous 258 boxes (43 x 6). This is why straightforward "Blakely-ization"—meaning retaining the guidelines but then requiring prosecutors to charge, then juries to find, any aggravating facts—is not feasible for the federal guideline system as is.

113 *See id*. at 2543 ("[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment."). Mr. Blakely was convicted of a domestic violence form of second-degree kidnapping. *Id*. at 2534-35. Under Washington law, the conviction carried with it a statutory range with a ten year maximum. *Id.* at 2535 (citing WASH. REV. CODE ANN. § 9A.40.030(3) (WEST. 2003)). By operation of the various guideline factors (including seriousness, use of a weapon and something called his "offender score"), Blakely's standard sentence was forty-nine to fifty-three months. *Id.* at 2535. Despite the fact that the prosecution was not requesting an aggravated sentence beyond this range, the trial judge sentenced Blakely to ninety months, after finding that he had acted with "deliberate cruelty," which is one of the listed aggravators in domestic violence cases under WASH. REV. CODE ANN. § 9.94A.535(2)(a) (2003). *Id.*

114 *See, e.g.*, Stephanos Bibas, Blakely's *Federal Aftermath*, 16 FED. SENT. REP. 331 (2004); Nancy J. King & Susan R. Klein, *Beyond* Blakely*,* 16 FED. SENT. REP. 316 (2004). Interestingly, as Justice O'Connor points out in her dissent in *Blakely*, until the Court's decision in that case only one reported decision had ever stricken a state guidelines system on *Apprendi* grounds. 124 S. Ct. at 2547 n.1 (O'Connor, J., dissenting) (citing State v. Gould, 23 P.3d 801 (2001)).

and the question to which the Court would return with a vengeance in *Booker*,[115] was the question of remedy, or what some commentators have also called "severability."[116] What should the Washington trial court do on remand? Must Mr. Blakely be re-sentenced within the un-aggravated guideline range (meaning the guidelines can be severed from their unconstitutional aggravators)? Or, may he be sentenced anywhere within the original statutory range (meaning the guidelines are not severable from their aggravators and both are unconstitutional)?

Actually there are three alternatives: (1) not severing, and invalidating the guidelines in their entirety, so that on remand the state trial judge (and all Washington state trial judges in subsequent cases) would be free to impose a sentence anywhere within the original statutory range; (2) severing the guidelines from their upward departures, so that state trial judges would still be bound by the guideline sentence, could depart downward, but could not depart upward; or (3) retaining both the guidelines and their upward and downward departures, but allowing upward departures only if the aggravating fact or facts are found by the jury.[117]

Invalidating the guidelines in their entirety would be the most drastic remedy because they would then be inapplicable in the 95% of cases where defendants plead guilty, despite the fact that those defendants have waived their right to jury and an application of the guidelines to them could not violate *Apprendi*.[118] But in a paradoxical way, this most drastic of remedies might actually be the most deferential to the Washington legislature, since it would treat the guidelines system as an inseparable whole.[119]

The second alternative—keeping the guidelines but invalidating the upward departures—would be less drastic, but would probably do the most violence to the legislature's intent. After all, it makes sense to think of guidelines and their systems of upward and downward departures as a

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115 *See infra* Part III.

116 *See, e.g.*, Albert W. Alschuler, *To Sever or Not to Sever: Why* Blakely *Requires Action by Congress*, 17 FED. SENT. REP. 11, 12 (2004).

117 A fourth possibility—to keep the guidelines and their upward and downward departures in their entirety, but make them advisory rather than mandatory—was not a remedy, to my knowledge, that any lower federal court or state appellate court had ever adopted. Only one commentator that I am aware of, Professor Alschuler, has ever suggested such a remedy, though he was proposing it as a congressional response to the anticipated demise of the federal sentencing guidelines in their entirety. Alschuler, *supra* note 116, at 11. As discussed *infra* in Part IV, the remedial majority in *Booker* bypassed all that messy legislation, and imposed Professor Alschuler's solution from the bench. "Ah, pragmatism," as Professor Alschuler (whom I think I will from now on call Justice Alschuler) e-mailed me shortly after the decision in *Booker*.

118 Provided, of course, that such defendants either specifically admit any aggravating facts or specifically waive their right to have those aggravating facts heard by a jury.

119 *See infra* Part IV.C, discussing Congress's intent in enacting the federal guideline system as an un-severable whole.

comprehensive whole. Cutting off the possibility of upward departures, while maintaining the possibility of downward departures, would likely have the overall effect of reducing sentences far below what the Washington legislature had intended.[120]

The third alternative—keeping the entire system, but just not allowing upward departures to be made based on facts not found by a jury—seems to be the optimal solution. It maximizes the universe of cases to which the guidelines may still be constitutionally applied, just as the Washington legislature had presumably intended. It maintains the flexibility of departures, while minimizing the asymmetry that would occur if all upward departures were eliminated. It narrowly tailors the remedy to the constitutional problem. Guilty pleas are not the problem, and upward departures untied to any aggravating facts are not the problem, so the guidelines continue to apply in full to those situations. The constitutional problem arises only when upward departures are made based on facts not found by the jury. The remedy would prohibit such departures unless those facts were found by the jury.

With no discussion, and very little criticism from the dissent, the *Blakely* majority avoided the severability issue entirely by remanding the case "for further proceedings not inconsistent with this opinion."[121] That is, the Washington state courts were left to decide the constitutional remedy, perhaps an appropriate result given that the Court was dealing with a *state* sentencing scheme.[122]

Just six months after deciding *Blakely*, but this time with the *federal* sentencing guidelines in its *Apprendi* scope, the Court was forced to decide the remedy issue, and did so in a way no one predicted.

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120 *See, e.g.*, United States v. Croxford, 324 F. Supp. 2d 1255 (D. Utah 2004) (noting that such a solution would create unintended asymmetry); Alschuler, *supra* note 116, at 12 (same). I suppose a somewhat less asymmetric severing would be to invalidate all departures, both upward and downward. This would solve the problem of asymmetry, but would of course not address the argument that legislatures likely intended to create some flexibility to their base guidelines, and may well have broadened those guideline bases had they known no departures at all would be permitted. Finally, some proponents of severance have proposed a so-called "topless" solution, in which the guideline minimum would still apply, but the maximum would be the statutory maximum. *See, e.g.*, Frank O. Bowman III, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of* Blakely v. Washington, 41 AM. CRIM. L. REV. 217, 262-63 (2004).

121 124 S. Ct. at 2543. There is some discussion of the severability issue in Justice Breyer's separate dissent, but couched in terms of the difficult remedial options the majority's opinion had left for the Washington trial court and the Washington legislature. *Id.* at 2552-58 (Breyer, J., dissenting).

122 As of August 15, 2005, the Washington Supreme Court had not acted on the remand.

III. THE DECISIONS IN *BOOKER* AND *FANFAN*

After a jury trial in a federal district court in Madison, Wisconsin, Freddie Booker was convicted of possession with intent to distribute at least 50 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii).[123] There was evidence presented at trial that Mr. Booker possessed 92.5 grams of crack.[124] In fact, he did not dispute that there was a total of 92.5 grams of crack in his duffle bag, but he claimed that he did not put it there and did not know about it.[125]

The statute provides for a characteristically "indeterminate" penalty of a minimum of 10 years in prison and a maximum of life in prison.[126] Based on Mr. Booker's criminal history, and using 92.5 grams as the quantity, the federal sentencing guidelines would have required a sentence of between 210 months and 262 months.[127] But at the sentencing hearing the trial judge found that Mr. Booker had possessed an additional 566 grams of crack. Based on that increased quantity, and on the trial judge's finding that Booker had also obstructed justice, the guidelines mandated an enhanced sentence of between 360 months and life. The trial judge imposed the minimum enhanced sentence of 360 months.[128]

On appeal, Mr. Booker argued, among other things, that his sentence violated *Apprendi*.[129] The Seventh Circuit agreed, in a 2-1 opinion in which, like the Court in *Blakely*, it avoided the remedy question by simply remanding the case for further unspecified proceedings.[130]

In the companion case, *United States v. Fanfan*,[131] a federal jury in Maine convicted Duncan Fanfan of conspiracy to distribute and to possess with intent to distribute at least 500 grams of powdered cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(ii) and 846.[132] The jury affirmatively answered a special interrogatory asking whether the amount of co-

123 United States v. Booker, 125 S. Ct. 738, 746 (2005). Section 841(a)(1) prohibits the manufacture, distribution, dispensing or possession of a controlled substance. Section 841(b)(1)(A)(iii) sets the penalty for the manufacture, distribution, dispensing or possession of more than 50 grams of cocaine.

124 125 S. Ct. at 746.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 741.

129 125 S. Ct. at 741.

130 United States v. Booker, 375 F.3d 508 (7th Cir. 2004), *aff'd by Booker*, 125 S. Ct. 738.

131 2004 WL 1723114 (D. Me. June 28, 2004), *vacated by Booker*, 125 S. Ct. 738. There is no reported trial court decision in this case.

132 Section 841(b)(1)(A)(ii) sets the penalty for the manufacture, distribution, dispensing or possession of a controlled substance. Section 846 is the conspiracy provision.

caine was at least 500 grams.[133] Given that quantity, the statutory penalty was a minimum of five years in prison and a maximum of forty years.[134] The federal guidelines mandated a presumptive sentence of sixty-three to seventy-eight months.[135] But the trial judge found that Mr. Fanfan had in fact possessed an additional 2.5 kilograms (i.e., 2,500 grams) of cocaine powder and 261.6 grams of crack cocaine. The judge also found that Mr. Fanfan had been an "organizer, leader, manager, or supervisor in the criminal activity."[136] These enhancers increased Mr. Fanfan's sentencing range to 180 to 192 months.[137]

The sentencing hearing took place only a few days after the Court's announcement of its decision in *Blakely.* Relying on *Blakely*, the sentencing judge refused to consider either the quantity or role enhancers, concluding that to do so would violate Mr. Fanfan's Sixth Amendment right to have a jury decide these enhancers. He sentenced Fanfan to the maximum in the un-enhanced guideline range, 78 months. The Government appealed.

The Supreme Court granted certiorari in both cases, and consolidated them.[138] The same five-Justice majority that decided *Blakely* and *Apprendi*—Justices Stevens, Scalia, Souter, Thomas and Ginsburg—decided the merits portion of *Booker.* Just as in *Blakely*, the merits majority, in an opinion written by *Apprendi* author Stevens, had no problem concluding that sentence increases imposed in the form of upward departures from sentencing guidelines—in this case, the *federal* sentencing guidelines—and based on facts other than prior convictions, come within the prohibitions of *Apprendi*. Thus, the merits majority reversed Booker's enhanced guideline sentence and affirmed Fanfan's un-enhanced guideline sentence.[139]

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133 *Booker*, 125 S. Ct. at 747.

134 21 U.S.C. § 841(b)(1)(B)(ii) (2000). This penalty for the possession of up to 500 grams of cocaine is substantially lower than the penalty for possession of up to 50 grams of crack cocaine. 21 U.S.C. § 841(b)(1)(A)(iii). This is one aspect of the so-called "crack disparity" that has been the subject of intense criticism. *See, e.g.*, David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L. J. 2547, 2553-54 (1995).

135 *Booker*, 125 S. Ct. at 747.

136 *Id.* This is the so-called "role enhancement" under the Guidelines. *Id.* at 746.

137 *Id.* at 747.

138 *Id.* at 738. The Court granted certiorari in *Fanfan* on an emergency basis before any ruling by the circuit court. *See* United States v. Fanfan, 123 S. Ct. 12 (2004), *granting cert. to* 2004 WL 1723114, *vacated by Booker*, 125 S. Ct. 738. The Court is statutorily authorized to grant certiorari under such circumstances. *See* 28 U.S.C. § 2101(e) (2000) ("An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.") In an almost unheard of acceleration of the ordinary briefing schedules, in its order of August 2, 2004, the Court ordered principal briefs filed by September 1, 2004 and September 21, 2004, and set the oral argument for October 4, 2004. *See Fanfan*, 123 S. Ct. at 12.

139 *Booker*, 125 S. Ct. at 769.

The four dissenters—the same four who dissented in *Apprendi* and *Blakely*—in an opinion written by Justice Breyer, continued their refrain that the un-enhanced "maximum" in a guidelines system is not the "statutory maximum."[140]

But unlike in *Blakely*, where the majority simply held the particular application of the state guidelines unconstitutional and reversed Mr. Blakely's conviction with directions that he be re-sentenced constitutionally (that is, either sentenced within the guidelines' presumptive range, within the statutory range, or given an opportunity to have a jury decide any enhancers), Justice Ginsburg defected from the merits majority on the remedy question, to form a new five-Justice remedial majority.[141]

In an opinion written by Justice Breyer, the remedial majority held that the enhancers were not severable from the rest of the guidelines, but that the mandatory nature of the guidelines was.[142] Thus, it ruled that although the entire federal sentencing guideline system was unconstitutional, guidelines and departures alike, sentencing judges should still consider the guidelines as "advisory."[143]

Some may see the remedial majority's opinion in *Booker* as a triumph of pragmatism, an effort to accommodate the restrictions of *Apprendi* in a sensible way that not only avoids throwing the federal trial courts back into the chaos of indeterminate sentencing but that also preserves some semblance of Congress' intent. Certainly, the remedial majority itself seems to see its opinion in this light.[144] In the balance of this article, I will be suggesting that this brand of unrestrained pragmatism is not only disingenuous and dangerous, but that it also overvalues coordination and administrative convenience while seriously undervaluing the constitutionally protected right to jury trial.

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140 *See id.* at 802 (Breyer, J., dissenting in part) ("Today, the Court applies its *Blakely* definition [of "statutory maximum"] to the Federal Sentencing Guidelines.").

141 *See id.* at 746. Justice Ginsburg did so without even writing an opinion, something for which she has been criticized by at least one celebrity opponent of the federal guidelines. Alan Dershowitz, *Prima Donnas in Robes*, TAMPA TRIBUNE, January 27, 2005, at 13.

142 *Booker*, 125 S. Ct. at 756-57 (Breyer, J., delivering the opinion of the Court in part).

143 *Id.* at 757.

144 For example, Justice Breyer characterizes the choice of remedy this way: "These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 767.

IV. PRAGMATISM AND CONSTITUTIONALISM

There is a place for pragmatism in constitutional jurisprudence, but there is also a deep and ever-present tension between pragmatism and constitutionalism.[145] Constitutions, after all, are meant to embrace a core of relatively invariant principles. If the meanings of those principles, at the margins of their own determinable language, are decided by a regimen of interpretation driven primarily by concerns about the effects of a given interpretation, core constitutional principles will forever be threatened by a kind of relentless consequentialist accretion.

There is nothing new about this tension. It is an unavoidable artifact of the limits of language and of the very practical function of law to apply legal principles to decide actual controversies in real cases. There is also no doubt that this tension is embedded not just in our institutions of law but in fact in all judges individually, and indeed in all humans, regardless of our professed views on constitutional interpretation. All interpretive schools—originalism, textualism, aspirationalism, evolutionism and any other "isms"—are saddled, or perhaps we should say blessed, with an irresistible urge by their practitioners to consider not just the theoretical character of a call at the constitutional margins—that is, how far or near to the constitutional core does the interpretation take us?—but also its external effects—what will this do to other cases, to other litigants, to the system as a whole?

In common law systems, constitutionalism and pragmatism do not just stand in uneasy tension. They enjoy a rather complicated reciprocity. The constitutional core directly and immediately informs the effects (by application in particular cases), but the effects also feedback, over time, into the constitutional core (by interpretation over a span of cases). Indeed, when we think about the extent to which a constitutional decision at the margins unacceptably departs from or acceptably advances the core, we are of course thinking in some sense about effects. Even the description of the "distance" from a core constitutional principle to a particular application is of course just a metaphor that hides all manner of pragmatic assumptions. When we talk about the distance between core and application, what we are usually talking about is comparing in some manner the effects of each in the firmament of the real world.

For example, the Sixth Amendment's right to jury trial in criminal cases, an example that is the focus of this article, has meaning only in the real world of criminal trials, and that is just as true for the "core" of the

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145 I do not use the term "pragmatism" to mean the philosophical movement that began in the 1870s with Charles Peirce's and William James' Metaphysical Club. Instead, I mean it in a more, well, pragmatic sense, to evoke a preoccupation with effects.

right as it is for its "extensions." Thinking about constitutions in this real-life grounded way is not very controversial, since constitutions themselves are about the real-life ways the state must relate to individuals and the real-life ways branches of the state must relate to one another.

But there is another, more virulent, strain of pragmatism that occasionally rears its head in constitutional law, the kind of pragmatism that doesn't just gently inform the controversy toward a sensible (even if not self-evident) result, but instead the kind that contorts the constitutional core beyond all recognition in sacrifice to the gods of effect. Admittedly, one commentator's or judge's "reasonable interpretation" may be another's "contort beyond all recognition," but there are some cases, and *Booker* is a glorious example, where the Court's yearning for pragmatic safe harbors instead drives it untethered into uncharted and dangerous waters.

What is especially intriguing about *Booker* is that the Court's two majority opinions nicely illustrate, in a single case, the harm that inconsistent obeisance to the gods of pragmatism can wrought. The Court found itself stuck between two irresistible forces—the pragmatism of the federal sentencing guidelines and the constitutional core of the Sixth Amendment as expressed in *Apprendi*. To its credit, the merits majority held firm in its commitment to *Apprendi* and the Sixth Amendment despite the dramatic practical effects: striking down at least some applications of the federal sentencing guidelines. But the remedial majority did something quite unusual, even unprecedented.

Instead of imposing the narrowest remedies,[146] so as to reflect its allegiance to the pragmatism of the federal guidelines and its continued antipathy toward the very un-pragmatic *Apprendi*, the remedial majority invalidated the mandatory nature of the guidelines in its entirety, then proceeded to pick and choose between the remaining non-mandatory rubble in an effort to guess at what Congress's intent would have been had Congress originally created a system of non-binding sentencing guidelines.[147] This is a bit like tossing out all mention of "water" in the Clean Water Act, and then endeavoring to divine Congress's intent about how the rest is supposed to work. It is hard to imagine a more deeply un-severable core in the federal sentencing guidelines than their mandatory nature.[148] Yet, the remedial ma-

146 Those narrower remedies are discussed *supra* in general in the text accompanying notes 117 to 121.

147 As discussed in the subsections that follow, the remedial majority retains the guidelines but removes the sections that make them mandatory, creates from whole cloth what seems to be a requirement that district judges "consider" the guidelines and "take them into account," removes entirely the section dealing with appellate review of sentences and replaces it with an implied "reasonableness" review, and does not appear to resurrect parole even though the potential harshness of the pre-guidelines system had been tempered by parole.

148 *See infra* Part IV.C.

jority chose to resurrect among the rubble a regimen of "advisory" guidelines, coupled with some manner of appellate review aimed at testing the extent to which federal sentencing judges are or are not properly "advised."[149]

There is a profound irony in the remedial majority's pragmatism. In an attempt to keep some semblance of the federal sentencing guidelines in place in the aftermath of *Apprendi's* relentless teachings about the constitutional boundaries between judge and jury, the remedial majority virtually obliterates the boundaries between the Court and Congress, at least in the context of the doctrine of severability. Along the way, it also blows up the distinction between as-applied and facial constitutional claims, further aggrandizing the Court's ability to reach pragmatic "solutions" to constitutional "problems." And one of the solutions it crafts is to render the federal guidelines non-mandatory not just in the 5% of federal criminal cases that go to trial (and that therefore may suffer from the constitutional infirmity identified in *Apprendi*), but also in the 95% of federal criminal cases that are disposed by plea bargain (and in which we know there is no *Apprendi* problem because defendants waived their right to trial, and therefore necessarily their right to jury trial).[150] What manner of pragmatism is this?[151]

Of course, the Court faced considerable pressures to craft a pragmatic remedy. With an entire Congressional sentencing scheme teetering on the brink, and lower federal courts clamoring for a resolution, the lure of a broad solution to the *Apprendi* problem in the context of the federal guidelines is quite understandable. The Court's willingness to address the question of remedy is likewise completely understandable. No one, not even the remedial dissenters, suggested that the Court should punt on the remedy issue the way it had in *Blakely*, where remedial deference to Washington's state courts made some sense. Such restraint in *Booker* would simply have

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149 Post-*Booker* sentencing review is discussed *infra* in Part IV.D.

150 Of course, a defendant could plead guilty in a way that preserves his or her right to raise various *Apprendi* issues on appeal. Indeed, Mr. Apprendi himself did that very thing. Justice Stevens, in his *Booker* dissent, points out that the remedial majority not only unnecessarily dispenses with the guidelines in the 95% of federal cases that are plea bargained, but that even as to the 5% that go to trial, only half of those tried cases result in sentences that are enhanced. 125 S. Ct. at 772 (Stevens, J., dissenting). Thus, the remedial majority turns a constitutional challenge that at most would affect 2.5% of federal criminal cases into a remedy that dispenses with the guidelines in all 100%. *See infra* Parts V.A and V.F.

151 There is an almost petulant quality to the remedial majority's opinion. "Okay, you love *Apprendi* so much? We'll show you. We'll inflict the maximum possible damage on the guidelines—damage no litigant asked us to inflict, damage that we need not inflict in this as-applied case, damage that cuts out the heart of Congress's intent—just to show the world how out of control *Apprendi* has become."

left the lower federal courts in substantially the same disarray they were in before.[152]

What is less understandable, even unimaginable, was the remedial majority's willingness, in the bargain, to obliterate almost beyond recognition settled principles of facial unconstitutionality and severability, not to mention Congress's palpable intent expressed in the mandatory nature of the guidelines. Even more disturbing, for purposes of this article, was the remedial majority's dismissive approach to the jury as a solution, if not to the whole of the *Apprendi* problem, then at least to the problem of crafting a remedy that would do the least violence to judicial restraint and to congressional intent.

A. *The Pragmatic Demise of the As-Applied Doctrine*

Before one even gets to the problem of severability, one must get past the fact that Mr. Booker's challenge to the federal sentencing guidelines was an *as-applied* challenge.[153] He did not claim the federal sentencing guidelines were unconstitutional on their face; indeed, such a claim would have been preposterous.[154] As Justice Stevens emphasized in his dissent to the remedial opinion, the overwhelming majority (somewhere around 97.5%) of sentences imposed under the federal sentencing guidelines are perfectly constitutional, because they come after guilty pleas or, even if they come after trial, they do not involve upward departures.[155] Moreover, Justice Stevens also recognized the critical fact that, had the remedial majority simply announced that the guidelines had been unconstitutionally applied to Mr. Booker because of the upward departure, federal prosecutors in many future cases could solve the *Apprendi* problem by listing some

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152 *See supra* text accompanying notes 121 to 122.

153 Justice Thomas disagrees with this proposition. In his separate dissent to the remedial opinion, he argues that the issue of "severability" in its broadest sense not only requires courts to consider whether unconstitutional portions of statutes may be severed from constitutional portions, but also, in an as-applied situation, whether an unconstitutional application of the statute to the complainant can be severed from its constitutional application to others. *See Booker*, 125 S. Ct. at 799-800 (Thomas, J., dissenting). Justice Stevens rejects that argument, and contends that the Court has never proceeded with a severability analysis in an as-applied situation. *See id*. at 776 n.6 (Stevens, J., dissenting). At least under the facts in *Booker*, these two approaches not only lead to the same dissenting conclusion—the Court cannot invalidate the mandatory nature of the guidelines because Congress would never have intended that result. *See infra* Part IV.F.

154 In fact, Mr. Booker argued that the federal sentencing guidelines should remain in place, and that he should be re-sentenced in the unaggravated guideline range. *See* Brief of Respondent at 28-44, *Booker* (No. 04-104), *available at* 2004 WL 2138120 (September 21, 2004).

155 *Booker*, 125 S. Ct. at 772 (Stevens, J., dissenting); *see supra* note 146.

offense-based aggravators in the indictment, then proving them to the jury.[156]

In circumstances such as those presented by *Booker*—where a statutory scheme is found unconstitutional in a particular, and particularly narrow, application—the as-applied doctrine is a well-settled restraining principle that generally prevents courts from tossing the perfectly constitutional baby out with the unconstitutional bathwater.[157] The as-applied doctrine is not only an important ligature that restrains courts from invalidating whole statutory schemes where such invalidation is unnecessary, but it also represents an appropriate level of deference to the other two branches, who are presumed to be capable of enacting and enforcing potentially unconstitutional laws in a constitutional manner.[158]

The remedial majority's response to this argument is simply to announce that the Court is obligated "to determine likely intent, not by counting proceedings but by evaluating the consequences of the Court's constitutional requirement . . . ."[159] That is, the remedial majority feels a pragmatic compulsion to find some provisions facially unconstitutional, to then reach the severability issue, and to thereby determine Congress's intent, despite the fact that the as-applied doctrine is specifically designed to restrain this very sort of pragmatic compulsion. Pragmatism 1, Restraint 0.

B. *The Pragmatic Demise of the Doctrine of Severability*

There are long-standing principles governing when courts may and may not invalidate entire statutory schemes when only parts of those schemes are found unconstitutional. These principles all emanate from the notion that to allow courts the unfettered power to pick and choose between portions of a statutory whole raises the spectre of courts doing substantial violence to legislative intent. Thus, the primary rule is that when a court finds only part of an act unconstitutional, the constitutional portions are not affected "[u]nless it is *evident* that the legislature would not have enacted

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156 *Id*. at 774-75 (Stevens, J., dissenting).

157 *See, e.g.*, Chicago v. Morales, 527 U.S. 41, 54-55, n. 22 (1999); United States v. Salerno, 481 U.S. 739, 745 (1987); United States v. Raines, 362 U.S. 17, 23 (1960).

158 As Justice Stevens put it in his dissent:

> [The as-applied cases] stress that this Court is ill suited to the task of drafting legislation and that, therefore, as a matter of respect for coordinate branches of Government, we ought to presume whenever possible that those charged with writing and implementing legislation will and can apply "the statute consistently with the constitutional command."

Booker, 125 S. Ct. at 776 (Stevens, J., dissenting) (quoting Time, Inc. v. Hill, 385 U.S. 374, 397 (1967)).

159 *Id.* at 758.

[the constitutional provisions] independently [of the unconstitutional provisions]."[160]

In place of this well-settled binary inquiry, which courts may undertake only after a portion of a statute is declared facially unconstitutional,[161] the remedial majority creates an unprecedented kind of severability review that asks a very different question, and asks it *before* it has identified any particular section of the federal sentencing guidelines as being unconstitutional: Given that the merits majority has declared that application of the federal sentencing guidelines to Mr. Booker is unconstitutional (without, of course, declaring any particular provision facially unconstitutional), what mix of provisions would be both facially constitutional and most reflective of Congress's intent?[162] This is certainly a pragmatic way to construct a remedy, but it is most definitely not what the law of severability has been for 200 years, nor, as we shall see below,[163] the kind of restrained analysis most likely to result in a set of remaining provisions recognizable by the legislature that passed the whole. Pragmatism 2, Restraint 0.

But there is an even deeper mystery to the remedial majority's severability analysis. The remedial majority feels free, for the first time in any reported opinion, to consider as a "part" of a statute subject to severability analysis the words that make the statute a statute, that is, the words that make the statute mandatory. To be sure, Congress chose to animate the guidelines' mandatory nature in a separate section of the statute, § 3553(b).[164] But as discussed below, this was done to *emphasize* the mandatory nature of the guidelines, not to make that mandatory nature the poten-

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160 *Id*. at 776 (Stevens, J., dissenting) (emphasis added) (quoting Champlin Refining Co. v. Corporations Comm'n of Okla., 286 U.S. 210, 234 (1932)).

161 *But see supra* note 151.

162 Justice Stevens describes the remedial majority's unprecedented recasting of the severability analysis this way:

> There is no case of which I am aware . . . in which this Court has used "severability" analysis to do what the majority does today: determine that *some* unconstitutional applications of a statute, when viewed in light of the Court's reading of "likely" legislative intent, justifies invalidation of certain statutory sections in their entirety, their constitutionality notwithstanding, in order to save the parts of the statute the Court deemed most important.

Booker, 125 S. Ct. at 777 (Stevens, J., dissenting).

163 *See infra* Part IV.C.

164 § 3553(b) provided in part:

> The court *shall* impose a sentence of the kind, and within the range, referred to in subsection (a)(4) [the guideline range determined by the Sentence Commission formula] unless the court finds that there exists aggravating or mitigating circumstances of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.

18 U.S.C. § 3553(b) (2000) (emphasis added), *invalidated by Booker*, 125 S. Ct. 738. It is that third word—"shall"—that contains, in the remedial majority's view, the whole of the constitutional problem. *See Booker*, 125 S. Ct. at 750.

tial object of severance.[165] Identifying § 3553(b) as a stand alone "provision" that is facially unconstitutional, not only stands Congress's intent on its head, it renders all severability review potentially devastating. Laws by their very nature are mandatory, and therefore the mandatory nature of any given unconstitutional law could *always* be identified as the offending "portion" and "severed," leaving all the offending provisions intact but "advisory."

Imagine a facially unconstitutional statute designed to address the problem of racially disparate incarceration rates: "Section 1: Two of every three white defendants convicted of felonies are to be sentenced to prison. Section 2: Two of every three African-American defendants convicted of felonies are to be sentenced to probation. Section 3: Sections one and two are mandatory." An unscrupulous court, bent on preserving the pragmatic spirit of this facially unconstitutional law, might notice that the only part that really renders the statute unconstitutional is Section 3—the part that makes the other two sections mandatory—and might conclude that Section 3 can be severed so that the remaining sections remain as "advisory."

This is close to what the remedial majority has done with the federal sentencing guidelines. In a grudging effort to separate the guidelines' unconstitutional core from their beloved pragmatic spirit, the remedial majority has converted federal sentencing law into federal sentencing suggestions.[166]

C. *The Pragmatic Demise of Congressional Intent*

Of course, the principal victim of the remedial majority's unrestrained pragmatism is Congress, and the intent Congress unambiguously expressed in creating, and then maintaining, a comprehensive guidelines system whose most significant aspect was unquestionably its mandatory nature. The sentencing body left after the remedial majority's surgery is nothing like Congress intended, and nothing like Congress would have intended given the holding of the merits majority. We know this not only because of what Congress said at the time it adopted the guidelines system, but also because on several different occasions, one as recently as 2003 (long after *Apprendi*), Congress has considered and rejected advisory systems like the one created by the remedial majority.

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165 *See infra* Part IV.C.

166 And of course the irony is that the remedial majority could have retained 97.5% of the federal guidelines, spirit and law alike, had it simply found the guidelines unconstitutional as-applied to the other 2.5%. *See supra* Part IV.A.

To be sure, the federal sentencing guidelines were the result of significant political compromise. But the unquestioned point upon which both sides agreed was that the disparity of indeterminate sentencing must be reduced. They also agreed that the heart of the disparity problem was the virtually unbounded sentencing discretion of federal judges.[167]

In the debates that preceded the 1984 adoption of the SRA, Congress considered, and rejected, several proposals for advisory guidelines.[168] Indeed, the very first Senate version of the SRA contained a system of advisory guidelines,[169] and that advisory version never made it out of the Senate. All subsequent versions, including the final one, which passed on a vote of 85 to 3, provided for mandatory guidelines.[170] The final version from the House provided for advisory guidelines, but in conference the House's advisory approach was again rejected, and the final Senate version became law.[171]

Over and over during the debates between mandatory and advisory schemes, Congressmen from all political stripes made it clear that they believed only a mandatory system of guidelines could turn around a century of unrestrained federal sentencing discretion.[172] Even after the SRA was in place, Congress rejected several attempts to make the guidelines advisory.[173] It not only rejected those attempts, in 2003 it adopted the so-called Feeney Amendment, in which it expressed its disapproval with what it considered too many downward departures by providing for de novo review for all departures and by directing the U.S. Sentencing Commission to limit the number of departures.[174] Here is what a senior member of the Senate Judiciary Committee had to say about what the Feeney Amendment was aimed to correct:

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167 *See, e.g.*, Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185 (1993), cited by Justice Stevens in his remedial dissent, *Booker*, 125 S. Ct. at 783 (Stevens, J., dissenting).

168 STITH & CABRANES, *supra* note 16, at 43-48.

169 S. 669, 98th Cong., 2d Sess. (1984).

170 H.R. 6012, 98th Cong., 2d Sess. (1984). *See also* STITH & CABRANES, *supra* note 16, at 43-48 (explaining in detail the evolution of S. 1437 from its initial advisory version to its final mandatory version).

171 STITH & CABRANES, *supra* note 16, at 43-48.

172 Justice Stevens quotes from people as politically diverse as Senators Biden, Hatch and Laxalt. 125 S. Ct. at 783-84 (Stevens, J., dissenting).

173 Hatch, *supra* note 167, at 189.

174 The Feeney Amendment was an amendment to The Prosecutorial Remedies and Other Tools to End Exploitation of Children Today Act ("PROTECT Act"), 117 Stat. 650, 667 (codified in scattered section of Titles 18 and 42). The Feeney Amendment itself is collected in a note to 18 U.S.C. § 3553 (Supp. 2004).

> [T]he game is over for judges. You will have some departure guidelines from the Sentencing Commission, but you are not going to go beyond those, and you are not going to go on doing what is happening in our society today on children's crimes, no matter how soft hearted you are. We are sick of this, judges. You are not going to do this anymore except within the guidelines set by the Sentencing Commission.[175]

Does this sound like a Congress that would have chosen to make the guidelines advisory rather than adapt them to the narrow requirements of the Sixth Amendment?

D. *The Pragmatic Demise of Limited Sentencing Review*

In addition to excising the provision making the guidelines mandatory, § 3553(b), the remedial majority excised one other provision it found severally unconstitutional, § 3742(e), which dealt with what courts of appeal must determine on review of sentences. The remedial majority claims it excised this entire subsection because it contained "critical cross-references to the (now-excised) § 3553(b)(1)."[176] But in fact, it was quite unnecessary to invalidate the entire subsection.

Before the remedial majority's surgery, § 3742(e) recognized four bases for sentence review: the traditional pre-guidelines circumstance where the sentence was "imposed in violation of law" ((e)(1)); two types of illegal sentences specifically related to the guidelines (where the judge incorrectly applies the guidelines or imposes a sentence above or below the applicable guideline range) ((e)(2) and (3)); and a "plainly unreasonable" standard specifically limited to sentences for which there is no applicable guideline ((e)(4)).[177] Only subparagraph (e)(3) actually cross references § 3553(b), and thus the remedial majority need only have excised that subparagraph.[178]

Even if the idea were to excise all parts of § 3472(e) that could even arguably be interpreted as referring to the mandatory nature of the guide-

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175 149 Cong. Rec. S5113, 5121-22 (daily ed. April 10, 2003) (remarks of Sen. Hatch). I recognize, of course, that a single Senator's views do not Congressional intent make. But a fair reading of the floor debates on both the SRA and the Feeney Amendment, and everything in between, makes it clear that Congressmen of all political persuasions, and especially Senators, understood that the essential feature of any system of federal sentencing guidelines would have to be that they are mandatory.

176 125 S. Ct. at 765.

177 18 U.S.C. § 3742(e) (2000).

178 Justice Scalia notes that the remedial majority's surgery on § 3742, in addition to being too radical, was also not radical enough. It retained other subsections that deal with sentence review, including, just as one example, subsection (f)(1), which assumes the mandatory nature of the guidelines every bit as much as the excised (e)(3), indeed in language that is almost identical. 125 S. Ct. at 794-95 (Scalia, J., dissenting).

lines—which would be another dramatic departure from the law of severability—there was no conceivable reason to excise paragraphs (e)(1) or (e)(4), except to allow the remedial majority to fill the vacuum with an entirely new and comprehensive standard of sentence review. And that's exactly what it did.

Having just unnecessarily eliminated all of § 3742(e), the remedial majority felt free to "imply" a new review standard: unreasonableness.[179] This was an astonishing feat.[180] Before the federal sentencing guidelines, appellate review of sentences was generally limited to the question of whether the sentence was of the type and length authorized by statute. Courts of appeal were generally without the power to review the discretion exercised by trial courts in imposing lawful sentences.[181] So powerful was this rule against de novo review of sentences that even when Congress adopted the guidelines system in 1984, and explicitly provided for appellate judicial review of sentences in § 3742, the Court nevertheless held on several occasions that the power to review sentences contained in § 3742 was still limited, and still precluded any review of sentences imposed within the proper guideline range, initially allowing reasonableness review only for departures from those ranges.[182]

Yet in one explosive instant of applied pragmatism, the remedial majority turns the world of limited sentencing review inside out. Having created a federal sentencing system where the restraining limits of the guidelines are now just "advisory"—meaning federal trial judges now have the same authority they had before 1987 to impose sentences within the almost limitless ranges of the statutes—the remedial majority then creates a system of review under which appellate courts now have the right to review every one of those sentences for "reasonableness."

The effect, and perhaps the intent, of this new species of comprehensive reasonableness review may be to cut the heart out of the merit majority's opinion itself. What is left when the severability dust settles is a system of advisory guidelines the remedial majority says sentencing judges are "require[d] . . . to consider,"[183] coupled with a standard of review under which the courts of appeal may have the power to reverse any sentence

179 125 S. Ct. at 765-66.

180 Justice Scalia describes this legerdemain as "rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." *Id.* at 791 (Scalia, J., dissenting).

181 *See* Dorszyinski v. United States, 418 U.S. 424 (1974). *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443-47 (1997) (discussing pre-Guidelines history of limited sentence review).

182 Koon v. United States, 518 U.S. 81 (1996); Williams v. United States, 503 U.S. 193 (1992). As mentioned above, the Feeney Amendment made all review of departures de novo. *See supra* text accompanying note 175.

183 *Booker*, 125 S. Ct. at 757.

imposed outside the guideline range. That is, the mandatory guideline scheme the merits majority found could not constitutionally be applied to Mr. Booker may now in effect be mandatorily applied to everyone. As Justice Scalia questions: "Will appellate review for 'unreasonableness' preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges?"[184]

E. *The Pragmatic Demise of Federal Parole*

Performing elective surgery on the innards of a legislative scheme as comprehensive and complex as the whole corpus of federal sentencing can result in mistakes. The remedial majority either did not consider, or chose not to discuss, the question of federal parole.

In the pre-guideline days of indeterminate sentencing, the harshness of federal sentences imposed at the high end of the almost limitless statutory ranges was tempered by the authority of the United States Parole Commission to release prisoners before completion of their full sentence.[185] But because sentence disparity was thought to emanate both from indeterminate initial sentences and from indeterminate parole decisions, Congress eliminated parole when the guidelines became effective.[186]

Now that the remedial majority has stricken the federal guidelines in their entirety, and returned us in a certain manner to the days of indeterminate sentencing,[187] what is the status of parole? Would Congress have intended that parole be resurrected along with indeterminate sentencing? The *Booker* surgeons do not tell us.[188]

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184 *Id.* at 795 (Scalia, J., dissenting). I do not necessarily mean to argue that a retributive sentencing system must necessarily have limited appellate review. Limited review would probably be appropriate if juries did the sentencing, but as long as Congress and the majority of states allow single judges to impose sentences, it might be sensible to have that single judge's moral quantification reviewed by some standard that is closer to de novo than abuse of discretion.

185 18 U.S.C. § 4205(b) (repealed 1984).

186 The Parole Commission is still in business. It deals with prisoners sentenced before 1987 and performs a few other functions. *See* United States Parole Commission Extension and Sentencing Commision Authority Act of 2005, Pub. L. No. 109-76, 119 Stat. 2035 (2005).

187 This means that sentencing judges must consider the guidelines, and that their ultimate sentences will be reviewable for reasonableness.

188 Professor Alschuler raised this issue prior to *Booker*, see Alschuler, *supra* note 116, and Justice Stevens complains about it in his dissent. *See Booker*, 125 S. Ct. at 788 (Stevens, J., dissenting). Yet the word "parole" does not appear once in the remedial majority's opinion. As of August 15, 2005, there have been no reported lower court cases discussing post-Guidelines parole, but it is probably a safe bet that the lower courts will be taking the remedial majority's silence to mean that federal parole has not been resurrected.

F. *The Moral Jury as the Ultimate Pragmatic Target?*

The remedial majority's conclusion is remarkable: Given two choices—(1) keeping the guidelines mandatory and applying them to 97.5% of all federal cases, and in the other 2.5% allowing upward departures based on aggravating facts only when those facts are charged and proved to a jury;[189] or (2) invalidating the guidelines in 100% of federal cases, but resurrecting them as advisory—the remedial majority is confident Congress would have chosen the latter. This conclusion almost fails the laugh test, and its lynchpin is the remedial majority's dismissive view of the role of the criminal jury. The remedial majority raises five arguments to support its conclusion, and underlying each of these arguments is a palpable hostility to the criminal jury as moral arbiter.

The remedial majority first argues that § 3553(a)(1) of the SRA—mandating that "the court" apply the guidelines—means "'the judge without the jury,' not 'the judge working together with the jury.'"[190] Even if the remedial majority's textual arguments on this point were strong, and they are not,[191] the point is completely tautological. Congress may have intended judges to apply the guidelines without any input from juries, but of course the merits majority ruled that to do so in certain limited circumstances violates the defendant's constitutional right to jury trial.

The remedial majority's reliance on one ambiguous word in the SRA—"court"—to conclude that Congress would never have intended juries to find aggravating facts is all the more remarkable given its willingness to excise quite unambiguous words about Congress's intent that the guidelines be mandatory. As Justice Stevens points out in his dissent, the question is not whether Congress originally contemplated that guideline fact-finding would be done by judges and not juries, but rather whether judge fact-finding was so critical to the overall scheme that Congress would rather have dispensed with the system altogether rather than allow juries to find certain aggravating facts in a small number of cases.[192] The answer, at least to one open to the role of the moral jury, is obvious.

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189 As mentioned *supra* in the text accompanying note 146, Justice Stevens correctly notes in his dissent that 97.5% of all federal criminal cases terminate in guilty pleas or go to trial but do not result in any upward departures. *See Booker*, 125 S. Ct. at 772 (Stevens, J., dissenting).

190 *Booker*, 125 S. Ct. at 759.

191 Indeed, one pro-Guidelines commentator argued, before *Booker*, that the federal sentencing guidelines are perfectly consistent with *Apprendi* precisely because there is nothing in the SRA that mandates judge fact-finding. Phil Fortuno, *A Post*-Blakely *Era or Post*-Blakely *Error?*, 38 COLUM. J.L. & SOC. PROB. 1, 2-6 (2004).

192 *Booker*, 125 S. Ct. at 779 (Stevens, J., dissenting).

Second, the remedial majority trots out the "real conduct" argument that Justice Breyer and the other *Apprendi* dissenters have always used to object to the proposition that there must be enforceable limits to the ability of legislatures to gut the Sixth Amendment's jury guaranty.[193] But the real conduct argument is not an argument that bears on the boundary between judge and jury—who better to determine the real conduct of the defendant than the jury that heard all the facts about that conduct?—but rather on the boundary between legislature and court. Moreover, the lack of real conduct sentencing is a much bigger problem in plea bargained cases than in tried cases,[194] but of course the remedial majority's remedy was constructed in response to a constitutional problem that is non-existent in plea bargained cases.

The fact is, a certain degree of loss of real conduct sentencing is unavoidable given *Apprendi*, a fact the anti-*Apprendi* remedial majority seems unable to accept.[195] Here again, the pragmatism of having real conduct sentencing in 100% of federal cases is apparently so important to the remedial majority that it is willing to risk a return to pre-Guideline levels of disparity because it cannot imagine that Congress would have intended 2.5% of its pragmatic regimen to be sullied with jurors, even when that sullying is constitutionally mandated.

The remedial majority's third argument is that leaving the federal guidelines as is, and expecting prosecutors to be able to charge the same range of guideline facts pre-trial that judges used to consider post-trial, "would create a system far more complex than Congress would have in-

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193 *Id.* at 759-61; *see, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 555-56 (2000) (Breyer, J., dissenting), although Justice Breyer uses the term "manner-related differences." "Real conduct" sentencing, also sometimes called "real offense sentencing" is a phrase meant to describe a sentencing mechanism, more than a sentencing philosophy, designed to allow sentencing judges (or juries) to be able to distinguish between defendants convicted of the same crime based on the differences in what they actually did. Despite its benevolent and rather non-controversial purpose, some commentators have quite correctly observed that real conduct sentencing can be unfair and even unconstitutional, depending on what "conduct" is considered relevant, and how that conduct is to be proved (a particularly daunting task given that most convictions result from guilty pleas). *See*, *e.g.*, Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993). Despite these potential difficulties, for a retributionist real conduct sentencing is an absolute must, since the punishment must fit the actual crime.

194 Presumably, a sentencing judge that listened to all the facts of a tried case will be sentencing based on those facts. The lack of real conduct sentencing becomes a more significant problem in plea-bargained cases, when one kind of conduct is pleaded down to a different kind of conduct, and especially when judges allow defendants in such cases to waive the factual basis. *See supra* note 105.

195 As Justice Stevens puts it: "The [remedial] majority is correct . . . that my preferred holding would undoubtedly affect 'real conduct' sentencing in certain cases. This is so because the goal of such sentencing—increasing a defendant's sentence on the basis of conduct not proved at trial—is contrary to the very core of *Apprendi*." *Booker*, 125 S.Ct. at 780-81 (Stevens, J., dissenting).

tended."[196] That is true, but, again, only for the 2.5% of cases that are tried and that result in upward departures. The argument that grafting the constitutional requirement onto the existing guideline system will so complicate 2.5% of the system that Congress would choose instead to scrap 100% of the system is preposterous on its face, and again reflects not only the remedial majority's continuing hostility toward *Apprendi*, but its unwillingness to let prosecutors and juries attempt to work around *Apprendi* in those few cases that would have required it.

The fourth argument is perhaps the most contrived. Rather than concede that the dissents' less aggressive remedies would leave the guidelines system in tact and mandatory in the vast bulk of cases and create a potential *Apprendi* problem only in tiny fraction, the remedial majority turns this reality on its head. It claims the infirmities in the 2.5% will infect the 97.5% because plea bargains happen "in the shadow of trial."[197] There is no doubt that a feedback phenomenon exists that can transmute changes in how cases are tried into changes in how cases are plea-bargained, since plea-bargaining consists of the two sides gaming the trial outcome. But the remedial majority can hardly complain about this marginal increase in feedback uncertainty when its own solution has rendered the entire federal sentencing system wholly uncertain.

Finally, the remedial majority adopts a version of the asymmetry argument made by some of the commentators: Congress would never have chosen a system in which it is more difficult to obtain upward departures than downward departures.[198] Again, though, this frames the question in a strangely unrestricted manner, as if the Court were free to imagine what parts of a constitutional statute Congress would and would not have preferred.[199] The reality is that the federal guidelines are unconstitutional as-applied to at most 2.5% of all federal criminal cases.[200] Given that reality, the only question for the Court was whether Congress would have chosen to retain the guidelines for 97.5% of the cases and allow prosecutors to

196 *Id.* at 761. It would be complex because the existing federal guidelines contain so many factors that it would be unrealistic to expect prosecutors to charge them, and juries to make special findings about them. *See supra* note 111. It is not just a question of the *number* of federal sentence factors; they would also be inappropriate for juries because they mix offense-based facts, most of which the jury would have no trouble deciding, with offender-based facts, which often could not be presented to the jury, at least in a unitary trial, without prejudicing defendant. As discussed *infra* in the text accompanying notes 204-07, the legislative solution to this problem is to pare down the guideline factors to a handful of offense-related aggravators.

197 125 S. Ct. at 762.

198 *Id.* at 744. *See supra* note 119 and accompanying text.

199 *See supra* Part IV.B.

200 *See supra* note 185.

charge, and juries to find, as much real conduct as they could in the other 2.5%, or whether Congress would have rather invalidated the entire system.

In the end, the remedial majority's whole approach is infected with a remarkable level of jury skepticism that is not only unwarranted but also devalues the jury's constitutional role. Even if the Court were free to consider the entire universe of theoretical reactions Congress could have had to the merits majority's holding, none could have preserved judge-based aggravation based on facts not found by the jury. This is not because jury fact-finders are necessarily better "real conduct" sentencers than judges (though I think they are), or because juries impose less disparate sentences, or because of any other policy judgments. It is because defendants have a constitutional right to have juries find such aggravating facts.

There is a disturbing self-justification to the remedial majority's remedy. By attributing to Congress hypothetical sentencing policies it imagines Congress would have adopted if only it would have known that only juries can find facts that aggravate sentences, and then by giving those imagined policies weight that equals or exceeds the constitutional imperative of the Sixth Amendment, the remedial majority sets up a system in which it simultaneously exaggerates the constitutional problem and underestimates the jury's role in its solution.

V. HOW SHOULD CONGRESS RESPOND?

Even before *Booker* was announced, most commentators urged a cautious "wait-and-see" approach. "Let the complexities percolate; let lower courts engage in the pragmatic business of applying the Court's remedy for several years, and then see where we are," was a common refrain.[201] But of course that was before the Court did its own percolating and its own pragmatic application, and came up with a remedy that invalidated all the federal guidelines and replaced them with advisory guidelines the application (or non-application) of which will now be subject to reasonableness review.

Doing nothing is still a defensible position for both supporters and opponents of the guidelines. Some supporters may hope, as, presumably, do Justice Breyer and the rest of the remedial majority, that federal trial judges will show the same allegiance to an advisory system of guidelines that they did when the guidelines were mandatory. Some opponents may hope that we revert to a fully indeterminate system that maximizes the sentencing discretion of federal judges. But for those of us who care more about the

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201 *See, e.g.*, Douglas A. Berman, Marc L. Miller, Nora V. Demleitner & Ronald F. Wright, *Go Slow: A Recommendation for Responding to* Blakely v. Washington *in the Federal System* (written testimony submitted to the Senate Committee on the Judiciary, July 13, 2004).

retributive purposes of the criminal law, and the jury's constitutional role in achieving those purposes, than about the false choice between unconstitutional guidelines and an unacceptable return to indeterminate sentencing, waiting is not a good option. There may never be a better time for Congress to reinvigorate federal sentencing with retributive purpose. Here is one suggestion about how it might go about doing so, and solve the *Apprendi* problem forever.

First, Congress will need to revamp the entire federal criminal code along the lines of the Model Penal Code.[202] That is, the wide and often unlimited ranges now contained piecemeal in each federal criminal statute[203] should be removed, and replaced with a relatively few number of classes of crimes (few compared to the 43 levels contained in the guidelines), ranked according to seriousness. Each class should be associated with a presumptive sentence range. Those sentencing ranges need to be considerably narrower that the current often limitless statutory ranges, though they should probably be wider than current guideline ranges.[204] Sentencing judges (or juries, if Congress really wants to be aggressive about restoring the moral jury and solving the *Apprendi* problem) could then sentence anywhere within the presumptive range without finding any special facts beyond the elements necessary to convict the defendant of the charged crime.[205]

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202 *See supra* note 89.

203 *See supra* text accompanying notes 89-92.

204 If Congress wanted more determinacy than wider-than-guidelines ranges would provide, it might elect to set a presumptive point sentence within designated presumptive ranges, as several states have done. *See, e.g.*, ARIZ. REV. STAT. §§ 13-701 to 13-711 (2005) (designating presumptive point sentence for each class of crime); IND. CODE ANN. §§ 35-50-2-3 to -7 (West 2004), *amended by* 2005 Ind. Legis. Serv. P.L. 71-2005 (S.E.A. 96) (WEST) (same); OHIO REV. CODE § 2929.14(A)-(B) (2003) (designating presumptive minimum as the presumptive point sentence), *invalidated by* State v. Montgomery, 159 Ohio App. 3d 752 (2005); TENN. CODE ANN. § 40-35-111(e)(1) (2003) (designating presumptive maximum as the presumptive point sentence).

205 In my Model Penal Code state, Colorado, we have six designated classes of felonies with the following presumptive ranges:

Class	Presumptive Range	Examples
1	Life to death	1° murder
2	8 to 24	2° murder, 1° kidnapping, state RICO
3	4 to 12	1° assault, 1° burglary, agg. robbery, drugs (sched. I), securities fraud
4	2 to 6	2° assault, 2° burglary, simple robbery, drugs (sched. II)
5	1 to 3	1° trespass, drugs (sched. III), marijuana (> 8 oz.), forgery
6	1 to 1.5	Criminal impersonation, issuing two or more false financial statements

COLO. REV. STAT. § 18-1.3-401(1)(a)(V)(A) (2003). I have not included any sex offenses in my list of examples because, although they are generally classified as class three and four felonies, all are subject

Even with such a classification system, Congress need not pigeon-hole every single federal crime into one of a handful of classifications. It could specially provide for higher sentences for particular kinds of crime, as several Model Penal Code states have done. For example, Colorado has provided that a defendant convicted of any sex offense in which the defendant caused bodily injury to the victim, or used threats, force or intimidation against the victim, is automatically subjected to a higher penalty range than the presumptive range.[206] The same is true for a designated list of "crimes of violence."[207] In this way, Congress could, if necessary, accommodate crimes whose seriousness it felt fell between any two adjacent classifications.

Congress could also re-define some crimes to include some traditional offense-based aggravators.[208] For example, it could define possession of a controlled substance up to a certain quantity as one crime with a certain level of seriousness, and aggravated possession as a separate crime with a higher level of seriousness. The carjacking statute, as another example, could easily be revised to describe two different crimes—carjacking and aggravated carjacking (where the victim dies or suffers serious bodily injury). The use or brandishing of weapons could likewise be used either to describe separately-defined aggravated crimes or be applied to a set of designated crimes to aggravate their seriousness. The effect of all of this, of course, would be to allow prosecutors to charge, and juries to find, particularly common aggravating facts, thus avoiding any *Apprendi* problem.

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to mandatory aggravation, and are also subject to special provisions for indeterminate sentencing. *Id.* §§ 18-1.3-901 (2004).

206 In particular, the range is elevated to a mandatory minimum equal to the midpoint of the presumptive range and a maximum equal to double the presumptive maximum. *Id.* § 18-1.3-406(a) to (b).

207 *Id.* § 18-1.3-406(2)(a)(I).

208 Congress would not necessarily be limited to offense-based aggravators. It is not uncommon in state systems to define a separate aggravated version of a particular crime based, for example, on a defendant having suffered a prior conviction for that crime. *See e.g.*, COLO. REV. STAT. § 18-4-205(3) (2004) (fraud by check involving less than $100 is a misdemeanor, but is a class six felony if defendant has twice before been convicted of it). In these circumstances, although the defendant would need to be charged with the aggravated version, the jury need not (and, indeed, should not unless the trial were bifurcated) make any recidivism findings. Those findings could be made by the judge, by a preponderance, without violating *Apprendi*, since recidivism has always been a traditional exception to the *Apprendi* rule. *See supra* text accompanying note 102. In fact, Congress has already adopted one type of general recidivism aggravator in the Armed Career Criminal Act, 18 U.S.C. § 924(e), which mandates a fifteen-year minimum prison sentence for anyone possessing a firearm after three prior convictions for certain serious drug offenses or violent felonies. *See* Shepard v. United States, 125 S. Ct. 1254 (2005) (in order to determine whether an earlier guilty plea was to a crime within the federal definition of "violent felony," sentencing judge may look to the jurisdiction's defined elements, charging documents and plea agreement and any facts that defendant expressly admitted, but not to police reports or affidavits in support of the arrest warrant).

If Congress felt the need to be a bit more determinate, as some states have, it could also establish—or more likely, direct the Sentencing Commission to establish—a general system of aggravated ranges, and rules for such aggravation. For example, it might list a half dozen offense-based facts as general aggravators. The presence of any of those facts, which would have to be pleaded then proved to the jury, would aggravate the sentence in some predetermined way, by increasing the presumptive maximum and perhaps also increasing the presumptive minimum and/or making the minimum mandatory.[209] The rules for aggravation could be as simple as doubling the maximum regardless of the aggravating fact, or could involve a much more complicated guideline-looking system of ranked and weighted aggravators.

Congress would likely want to identify in a similar fashion a set of offense-based mitigating facts that would have the effect of decreasing the presumptive range, by lowering the minimum, lowering the maximum or lowering both. Again, as with the aggravators, the presence of any of these mitigators might simply result in a gross reduction of the presumptive range, or they might be ranked and weighted in a more complex fashion akin to guidelines.

Depending on the width of their chosen presumptive and aggravated ranges, and especially on the harshness of the upper end of those ranges, Congress might also want to consider reinstating federal parole.[210] It is not easy for a retributionist like me to suggest such a reform, since at least in theory, parole is quintessentially rehabilitative. But parole has the benefit of reducing the harshest extremes of what may well remain, given the political realities, punishment levels that would be inconsistent with a retributionist perspective.[211]

Finally, *Blakely*-izing the federal system in this manner would mean Congress could return to the traditional approach of giving appellate deference to the moral arbiters of punishment, be they judges or juries. Sentences under this kind of proposed system should be reviewable only for legality (was defendant sentenced to a lawful place for a lawful amount of time?), and perhaps also for abuse of discretion when it comes to making any aggravating findings.[212]

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209 But if aggravators increased the minimum sentence, as is common in Model Penal Code states, Congress might want to overrule *Harris*, discussed *supra* in the text accompanying note 109, and require that designated offense-related facts that increase minimum sentences also be pleaded then proved to the jury.

210 *See supra* Part IV.E.

211 *See supra* note 8.

212 *See supra* Part IV.D.

Such a redesigned system would not only have all the benefits of limiting the discretion judges or juries could exercise in imposing sentence (thus satisfying the legislative branch's obligation to set in some rough fashion the seriousness of crimes), of restoring the jury to its role as moral arbiter and of solving the *Apprendi* problem, but would also be based on state sentencing systems that have been in existence for decades. A wealth of *Apprendi* jurisprudence has already been developed in these state systems, which should significantly decrease the uncertainty inherent in any newly revamped federal sentencing scheme designed along the lines suggested here.

There are, admittedly, several drawbacks to this proposal. It will require Congress to step up to the plate and stop abdicating its responsibility to quantify the seriousness of federal crimes. This means that it will be called upon, as most state legislatures were long ago called upon, to agree on a general set of classes of crime based on seriousness, agree to presumptive sentences for each class, and then, perhaps hardest of all, place every federal crime into one of the designated classes or a special hybrid class. All the same political pressures that caused Congress to abdicate these fundamental responsibilities in the first instance,[213] and even to abdicate them to the Sentencing Commission when it had its global chance in 1987 to do otherwise, will admittedly make this kind of re-design difficult.

Likewise, deciding which particular crimes, if any, to redefine as aggravated and non-aggravated varieties, and whether to designate a certain limited number of offense-based facts as general aggravators and general mitigators, will be no small challenge, either technically or politically.

Blakely-izing the federal system in this manner will also necessarily diminish the extent of real conduct sentencing, since, as discussed above, a Model Penal Code approach designed to allow prosecutors to charge aggravating facts, and juries to find them, will necessarily require a significant reduction in the number and scope of pre-trial sentencing factors.[214] This would tend to increase sentencing disparity, depending on the size of the revised statutory ranges.

Finally, any system more complex than setting fixed and inviolate legislative ranges—that is, any system in which legislatures attempt to increase real conduct sentencing by articulating specific aggravators—will necessarily increase the power of prosecutors, by giving them the option of charging or not charging given aggravators. This could reintroduce the same kinds of sentencing disparity that real conduct sentencing is designed to eliminate, by simply shifting the source of the disparity from the discretion of judges and parole officers to the charging discretion of prosecutors.

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213 *See supra* text accompanying notes 89-92.

214 *See supra* note 192; *supra* notes 200-203 and accompanying text.

But in the end, there is every reason to believe that this kind of approach—simplifying the structure of federal sentencing then *Blakely*-izing it—will work, and that its considerable benefits will outweigh its costs. It is already working in a great many states, where truly pragmatic legislatures have rejected the extremes of the federal guidelines approach as well as the extremes of its wholly indeterminate counterpart. Having Congress establish relatively narrow presumptive sentencing ranges, then allowing judges or juries to do real conduct sentencing within those ranges, is a reasonable response to the uncertain condition in which *Booker* has left federal sentencing. In the bargain, it will restore not only Congress's retributive voice, but the moral jury's retributive voice as well.

CONCLUSION

The difficulty with the remedial majority's opinion in *Booker* runs deeper than its pragmatic willingness to do substantial violence to Congress's sentencing intent and to important principles of judicial restraint. The engine for its unrestrained pragmatism seems to be an institutional ear disturbingly deaf to the re-emergence of retribution and to the jury's age-old role in exacting it. Congress has an opportunity, unlike any it has had since the beginning of the 1900s, to put the federal sentencing house into some semblance of order. It will be a daunting task, both technically and politically.

But if this Congress wants to put its sentencing money where its political mouth seems to be, it should embrace retribution, acknowledge that we do not imprison people to rehabilitate them, reign in the scandalously wide sentences now permitted by federal law into a handful of relatively narrow ranges, and reduce the number of chargeable and provable aggravators. Doing so will not only retain the salutary purposes of the federal sentencing guidelines—minimizing disparity by maximizing real conduct sentencing—it will also solve the *Apprendi* problem by allowing the jury to do what it has done throughout its history: participate in a significant way in the moral act of imposing criminal punishment.