

One Cheer for *United States v. Booker*

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I. Introduction

There is a sharp philosophical split among the justices of the Supreme Court with respect to what the Constitution has to say about the administration of criminal law.¹ One faction contends that the Constitution establishes a paradigm of criminal justice that reflects the common law tradition.² The heart and soul of that paradigm is that the criminal law will be administered through an adversarial trial in which a jury of laypeople will make the pivotal decision as to whether the person accused will lose his liberty. The opposing faction rejects the proposition that the Constitution entrenched the common law paradigm into our fundamental law. Other paradigms are constitutionally permissible—and even more desirable—including a “non-adversarial” truth-seeking process in which government officials, not juries, find and declare facts.³ The two opposing factions have clashed several times in recent years with respect to whether the Sixth Amendment right to trial by jury can fit within a sentencing system that allows judges to vary sentences according to facts that were not found by juries. Those factions clashed again in *United States v. Booker*,⁴ a landmark sentencing ruling that has already had

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¹See *United States v. Booker*, 125 S. Ct. 738 (2005). On August 2, 2004, the Supreme Court consolidated the appeal in *United States v. Booker* (No. 04–104) with *United States v. Fanfan* (No. 04–105).

²See *id.* at 753 (Stevens, J., delivering the opinion of the Court in part) (hereinafter “substantive majority”).

³See *id.* at 803–04 (Breyer, J., joined by Rehnquist, C.J., and O’Connor and Kennedy, JJ., dissenting in part). See also *Blakely v. Washington*, 124 S. Ct. 2531, 2557–59 (2004) (Breyer, J., dissenting).

⁴125 S. Ct. 738 (2005).

an impact on hundreds of cases pending in the American criminal justice system.

This article will begin with a brief examination of the federal sentencing guidelines and an overview of the relevant caselaw. The article will summarize the opposing arguments that were advanced before the Supreme Court in *Booker*. The article then examines the chasm that exists between the two opposing factions on the Court and concludes that that chasm, though very real, is not as deep as the rhetoric on both sides would suggest. That is unfortunate because it means that the Supreme Court is not nearly ready to untangle the knots that presently encumber the constitutional right to trial by jury.⁵ The article will conclude by anticipating further changes in federal sentencing law that are looming on the horizon.

II. Background

To appreciate how the *Booker* ruling fits within the Supreme Court's recent caselaw, it will be useful to begin with a brief review of sentencing law. Over the course of American history, the federal and state governments have tried several different sentencing models. During the eighteenth century, sentencing was based upon a system of fixed sentences.⁶ That is, there was a prescribed sentence, established by the legislature, for each particular offense. For example, any person convicted of perjury would receive the same punishment—say, five years imprisonment.

The fixed sentence model did not endure because it was considered to be far too rigid and thus incapable of recognizing a variety of circumstances that ought to bear upon the punishment of offenders. Fixed sentencing gave way to schemes that permitted judges to select a sentence within a range defined by the legislature.⁷ Because sentencing judges were closest to the action, saw the conflicting testimony in person, and so forth, appellate courts were extremely reluctant to overrule their sentences. As a result, the decisions of sentencing judges were well-nigh conclusive. From a holistic perspective, the advent of trial court discretion was widely considered

⁵See *infra* note 82 and accompanying text.

⁶See *United States v. Pinto*, 875 F.2d 143, 145 (7th Cir. 1989). William Blackstone said fixed sentences were “one of the glories of our English law” because punishment “is not left in the breast of any judge.” See *id.* (citation omitted).

⁷See *United States v. Grayson*, 438 U.S. 41, 45–46 (1978).

to be an improvement over the fixed-sentence model. However, from the perspective of an individual defendant who was unfortunate enough to draw an eccentric, biased, or corrupt trial judge, there seemed to be no remedy for an abusive, arbitrary sentence.⁸

The next important development related to federal sentencing was the establishment of a complicated system of probation and parole.⁹ Congress broadened the scope of judicial discretion by empowering judges to “suspend” sentences. That meant that even if the statutory penalty for, say, manslaughter, was a term of one to five years, the judge could suspend the sentence and release the offender for a prescribed term of probation. With parole, Congress delegated discretionary power to the executive branch to decide when offenders should be released from prison. That meant that even if a defendant received a thirty-year prison sentence for a violent offense, he could conceivably be released on parole after serving only a tiny fraction of his prison sentence. This “three-way sharing” of sentencing responsibility between legislators, judges, and parole boards persisted for many years.¹⁰

Over time, dissatisfaction began to grow over the discretionary sentencing regime. The fundamental defect, whether it was real or perceived, was that discretion had led to widespread “disparities” among offenders. Some scholars maintained that there were too many disparities based upon race and socioeconomic status.¹¹ Other scholars said there was just no rhyme or reason to sentencing. “Tough” judges threw the book at too many while the “soft” judges let too many off easy.¹² The upshot was that even though there was no consensus on the diagnosis, a consensus did emerge on the prescription: Mandatory sentencing rules would improve the justice system by bringing greater uniformity and rationality to federal

⁸See Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 *Cato Institute Policy Analysis* 2–3 (November 1, 2002).

⁹In 1910, Congress established a system of federal parole. And in 1925, Congress enacted the National Probation Act, which authorized judges to suspend sentences “upon such terms and conditions as they may deem best.” Kate Stith & José A. Cabranes, *Fear of Judging* 18–19 (1998).

¹⁰See *Mistretta v. United States*, 488 U.S. 361, 364–65 (1989).

¹¹See Luna, *supra* note 8, at 4.

¹²*Id.*

sentencing.¹³ The basic idea was that similarly situated offenders should be treated alike.

Congress enacted the Sentencing Reform Act¹⁴ in 1984. That law created the United States Sentencing Commission, which, in turn, promulgated the federal sentencing guidelines, which went into effect in November 1987. The Sentencing Reform Act sought to curb discretion in the system by abolishing parole and by making the Sentencing Commission's guidelines binding upon the courts.¹⁵ Although trial judges have some discretion to depart upward or downward from the guidelines' sentencing range, the trial judge must state his reasons on the record and his departure is subject to appellate review. The term "guidelines" has always been something of a misnomer since any judge that disregards the guidelines will be overruled by a higher court on appeal.¹⁶ Thus, the so-called "guidelines" really had the force and effect of legally binding rules. Still, it must be remembered that the Sentencing Reform Act did not restore the fixed sentence model. The guidelines allow for some judicial discretion because they establish a *range* of punishment and the trial judge may choose a sentence within that range.

Like the federal government, state governments also experimented with sentencing guideline systems. The impact of these elaborate guideline sentencing schemes upon the constitutional right to trial by jury was not immediately apparent. But that issue eventually came to the fore in *Apprendi v. New Jersey*.¹⁷ Charles Apprendi was arrested and prosecuted for firing several gunshots into the home of his African-American neighbors, who had recently moved into the neighborhood. Apprendi entered into a plea bargain with the government, pleading guilty to illegal possession of a firearm for an unlawful purpose. That crime carried a potential prison sentence of five to ten years. After the plea was entered, however, the prosecutor urged the trial court to enhance Apprendi's sentence pursuant to New Jersey's hate crime law. The trial judge held an evidentiary

¹³*Id.* at 4–5.

¹⁴Comprehensive Crime Control Act of 1984, title II, Pub. L. No. 98–473, 98 Stat. 1976 (1984).

¹⁵See *Mistretta*, 488 U.S. at 367–68.

¹⁶*Id.* at 413 (Scalia, J., dissenting).

¹⁷530 U.S. 466 (2000)

hearing and thereafter concluded, by a preponderance of the evidence, that Apprendi's crime had been racially motivated. As a result of that finding, Apprendi was sentenced to a twelve-year prison term.¹⁸ A constitutional challenge to that sentence ultimately reached the Supreme Court for a resolution.

By a five to four vote, the Supreme Court declared the New Jersey sentencing procedure to be unconstitutional.¹⁹ Justice John Paul Stevens's majority opinion began its analysis by examining the history and purpose of the constitutional safeguard of trial by jury and the requirement of proof beyond a reasonable doubt.²⁰ Finding a historic link between the jury's verdict and the judgment of the court, Justice Stevens declared that a legislative scheme that removed "the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury's verdict alone"²¹ was constitutionally impermissible. *Apprendi* stands for the proposition that any fact that increases the penalty for a crime beyond the prescribed statutory maximum (other than the fact of a prior conviction) must be submitted to a jury and proved beyond a reasonable doubt. Four dissenting justices described the ruling as a "watershed change in constitutional law."²² With this new principle in place, the dissenters said the constitutionality of "sentencing systems employed by the Federal Government and [the] States" was now in "serious doubt."²³

After *Apprendi*, the Supreme Court continued to examine the extent to which the legislature could manipulate the interplay between the trial judge, the prosecutor, and the jury. In *Harris v. United States*,²⁴ the Court confronted whether *Apprendi*'s rationale would apply to facts that trigger a mandatory minimum sentence. William Joseph Harris was a pawnshop owner who sold some marijuana to undercover police officers. As was his practice, Harris had

¹⁸ *Id.* at 468–71 (summarizing facts).

¹⁹ *Id.* at 489.

²⁰ *Id.* at 476–83.

²¹ *Id.* at 482–83.

²² *Id.* at 524 (O'Connor, J., joined by Rehnquist, C.J., and Kennedy and Breyer, JJ., dissenting).

²³ *Id.*

²⁴ 536 U.S. 545 (2002).

been wearing a firearm in a holster while working in his store. Harris was charged with, and convicted of, a drug offense and using a firearm during the drug sale. For those offenses, Harris faced a minimum prison term of five years.²⁵ After trial, he was brought in for sentencing. The trial judge announced that because Harris had “brandished” his firearm during the drug sale, the mandatory minimum sentence would be seven years, not five.²⁶ Harris challenged that sentence because the judge had made a critical factual finding that the government had not alleged or proved to a jury, namely, that a firearm had been brandished. A divided Supreme Court rejected Harris’s challenge, ruling that judicial fact-finding in that particular context was constitutionally permissible.²⁷

On the same day that *Harris* was decided, the Supreme Court issued a related ruling in *Ring v. Arizona*.²⁸ Timothy Ring was convicted by a jury of first degree murder, but under Arizona law a defendant could only face the death penalty if the trial judge found certain aggravating factors.²⁹ In Ring’s case, the judge found such factors to be present and, accordingly, imposed the death sentence.³⁰ On appeal, Ring argued that Arizona’s sentencing scheme ran afoul of the *Apprendi* precedent. The Supreme Court, though once again divided, agreed with Ring’s argument and set aside his death sentence. Arizona could initiate another sentencing proceeding against Ring, but any factual determination that would authorize the imposition of the death penalty would have to be either admitted by Ring or found by a jury.³¹

The next of *Apprendi*’s progeny was *Blakely v. Washington*.³² Ralph Howard Blakely was arrested for the kidnapping of his estranged wife. Blakely was initially charged with first degree kidnapping, but a plea agreement was reached whereby Blakely would plead guilty

²⁵*Id.* at 550–51 (summarizing facts).

²⁶*Id.* at 551.

²⁷For a critique of that ruling, see generally Stephen P. Halbrook, Redefining a “Crime” as a Sentencing Factor to Circumvent the Right to Jury Trial: *Harris v. United States*, 2001–2002 Cato Sup. Ct. Rev. 187 (2002).

²⁸536 U.S. 584 (2002).

²⁹*Id.* at 589–93 (summarizing facts).

³⁰*Id.* at 594–95.

³¹*Id.* at 609.

³²124 S. Ct. 2531 (2004).

to second-degree kidnapping involving domestic violence and the use of a firearm.³³ Under Washington's Sentencing Reform Act, Blakely's conviction carried a sentencing range of forty-nine to fifty-three months. At the sentencing hearing the judge heard the details of the crime from Blakely's wife and was so disturbed by those details that he rejected the prosecutor's sentencing recommendation and imposed an "exceptional sentence" of ninety months—thirty-seven months beyond the "standard" maximum.³⁴ Under Washington law, the trial court could impose an "exceptional" sentence so long as his justification for doing so was grounded in the law and put on the record.³⁵ In this instance, the judge found that the crime was committed with "deliberate cruelty," which was a statutorily enumerated ground for an exceptional upward departure.³⁶ Blakely challenged the legality of the extra three years of imprisonment that the trial court had imposed, and the case wended its way to the Supreme Court.

By another five to four vote, the Supreme Court overturned Blakely's sentence because it violated his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. Writing for the majority, Justice Antonin Scalia returned to the idea that the *Apprendi* rule is a reflection of "two longstanding tenets of common law jurisprudence."³⁷ The first tenet was that a jury should affirm the truth of every accusation.³⁸ The second tenet was that any accusation that failed to allege the existence of a fact essential to the imposition of punishment—for example, failure to allege intent in an accusation of first-degree murder—is not proper.³⁹ Justice Scalia concluded his opinion by observing that the "Framers would not have thought it too much to demand that, before depriving a man of three more years of his

³³ *Id.* at 2534 (summarizing facts).

³⁴ *Id.* at 2535.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 2536.

³⁸ *Id.*

³⁹ *Id.*

liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' rather than a lone employee of the State."⁴⁰

Justice Sandra Day O'Connor filed the principal dissenting opinion in *Blakely*, as she had in *Apprendi*. In the view of the dissenters, Washington's sentencing regime did not run afoul of the Constitution: "[T]he guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence."⁴¹ Justice O'Connor said the consequences of the *Blakely* ruling would produce havoc for the lower courts and put tens of thousands of criminal judgments in jeopardy.⁴²

The federal criminal justice system did experience some minor shockwaves in the immediate aftermath of *Blakely*. The Supreme Court issued the *Blakely* decision in the final days of its term and then adjourned for summer recess. Because the federal sentencing guidelines operated similarly to the guidelines in Washington State, there was some confusion concerning what adjustments, if any, needed to be made in charging documents, plea agreements, and sentencing procedures. The Department of Justice adopted the view that since the Supreme Court addressed only Washington's system, the federal guidelines should continue to operate as before.⁴³ However, out of an abundance of caution for the anticipated legal challenges coming in the wake of the *Blakely* case, indictments were rewritten to include any facts that might bear upon upward departures under the federal guidelines.⁴⁴

As the weeks passed, some federal courts declared the federal guidelines to be unconstitutional while others proceeded in the same

⁴⁰ *Id.* at 2543 (quoting 4 W. Blackstone, Commentaries of the Law of England 343 (1769)).

⁴¹ *Id.* at 2547 (O'Connor, J., dissenting).

⁴² *Id.* at 2550.

⁴³ See Memorandum to All Federal Prosecutors from James Comey, Deputy Attorney General, Regarding Departmental Legal Positions and Policies in Light of *Blakely v. Washington* (July 2, 2004), available at <http://www.usdoj.gov/dag/readingroom/blakely.htm>.

⁴⁴ *Id.*

manner as before. A growing chorus of voices, including a resolution from the United States Senate,⁴⁵ decried the inconsistent rulings in the federal circuits and called upon the Court to bring clarity and order to the federal criminal system.⁴⁶ The Supreme Court responded to the criticism. Less than six weeks after deciding *Blakely*, the Court announced that it would settle the uncertainty regarding the future of the federal sentencing guidelines. The Court agreed to hear *United States v. Booker* on an expedited schedule.⁴⁷ *Booker* was set for argument on the very first day of the Court's upcoming fall term.

III. The Supreme Court Returns to the Fray: *United States v. Booker*

Freddie Booker was charged with dealing crack cocaine. In federal drug cases, the amount of drugs at issue is typically the key factor in determining the jail sentence under the federal sentencing guidelines. The larger the amount of drugs, the longer the prison term.⁴⁸ A jury convicted Booker after hearing evidence that he had 92.5 grams of crack in his duffel bag.⁴⁹ Under the sentencing guidelines, Booker faced a prison term between 210 and 262 months.⁵⁰ However, the trial court, in a post-trial sentencing proceeding, concluded by a preponderance of the evidence that Booker possessed another 566 grams and that he had also obstructed justice.⁵¹ With those findings, Booker could have faced between 360 months to life imprisonment.⁵² The trial judge ultimately imposed a thirty-year sentence.⁵³

⁴⁵Expeditionary Supreme Court Action in *Blakely v. Washington*, S. Con. Res. 130, 108th Cong., 2d Sess. (as passed by the Senate on July 21, 2004).

⁴⁶One newspaper, for example, rebuked the Supreme Court for the "unfathomable" legal confusion it created. The editorial urged the Court to interrupt its "summer vacation" to clarify federal sentencing law. See Clean Up This Mess, Wash. Post, July 26, 2004, at A10.

⁴⁷See Lyle Denniston, Justices Agree to Consider Sentencing, N.Y. Times, August 3, 2004, at A14.

⁴⁸USSG § 2D1.1 assigns base offense levels according to a Drug Quantity Table.

⁴⁹*United States v. Booker*, 125 S. Ct. 738, 746 (2005).

⁵⁰*Id.*

⁵¹*Id.*

⁵²*Id.*

⁵³*Id.*

Booker appealed his sentence, arguing that the trial judge had violated his right to trial by jury by making factual findings and then adding extra prison time to his sentence. The Department of Justice advanced two arguments to support Booker's sentence. First, the government tried to distinguish the federal guidelines from the *Apprendi* rule.⁵⁴ The government seized upon language in *Apprendi* that barred judges from finding facts that raise a sentence above the otherwise applicable "statutory maximum sentence."⁵⁵ *Apprendi* did not apply to the federal guidelines because the guidelines do not create statutory maximums. Since the federal guidelines are promulgated by a Sentencing Commission, and since the Commission is "not a legislature," the *Apprendi* rule is not applicable.⁵⁶ The government's second argument essentially urged the Court to reconsider and reject the *Blakely* holding.⁵⁷

Very few observers expected the Supreme Court to backtrack from the *Blakely* holding, and it seemed a foregone conclusion that the rationale set forth in *Blakely* would also apply to the operation of the federal sentencing guidelines. The real debate in *Booker* was not so much whether the Court would find a Sixth Amendment violation, but rather what ought to be the proper *remedy* for such a violation.

Several remedy options were bandied about. First, the Court could scrap guideline sentencing per se. Second, if guideline sentencing were retained, the Court could insist on jury involvement in the sentencing phase. Though criticized as unworkable, Justice Scalia had pointed to Kansas' statutory framework in his *Blakely* opinion.⁵⁸ After the Kansas Supreme Court found *Apprendi* infirmities in that state's determinate sentencing regime, the state legislature responded by having juries make the necessary factual findings for upward departures in sentences.⁵⁹ The third remedy, and the one proposed by the Department of Justice, would have the Court hold that "the

⁵⁴Brief for the United States at 12, *United States v. Booker*, 125 S. Ct. 738 (2005) (No. 04-104).

⁵⁵*Id.* (emphasis in original).

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Blakely v. Washington*, 124 S. Ct. 2531, 2541-42 (2004).

⁵⁹*Id.* (citing Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws 1018-23 (codified at Kan. Stat. Ann. § 21-4718 (Cum. Supp.))).

Guidelines as a whole are inapplicable in cases in which the Constitution would override the Guidelines' requirement that the district court find a sentencing-enhancing fact."⁶⁰ Thus, the courts "would then exercise sentencing discretion within the congressional minimum and maximum terms, with the Guidelines providing advisory guidance."⁶¹ Any one of these remedies would significantly alter the system of federal sentencing that had been in place for seventeen years.

The outcome in *Booker* took everyone by surprise. The factions that had been clashing with one another in *Apprendi*, *Harris*, *Ring*, and *Blakely* clashed again, but neither faction was able to fully prevail in the case. The "working majority" that had come together to produce *Apprendi*, *Ring*, and *Blakely* came together again, finding that *Booker's* Sixth Amendment right to trial by jury had been violated by the trial court's actions. But that majority could not hold with respect to the question of the proper remedy. The bizarre result was that the faction that reached the conclusion that there was a substantive violation of law found itself in dissent with respect to the proper remedy for that violation. And the faction that discerned no constitutional violation in the first instance declared the appropriate remedy for that violation. Here is the summary of the disposition from the syllabus:

Stevens, J., delivered the opinion of the Court in part, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Breyer, J., delivered the opinion of the Court in part, in which Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ., joined. Stevens, J., filed an opinion dissenting in part, in which Souter, J., joined, and in which Scalia, J., joined except for Part III and footnote 17. Scalia, J., and Thomas, J., filed opinions dissenting in part. Breyer, J., filed an opinion dissenting in part, in which Rehnquist, C.J., and O'Connor and Kennedy, JJ., joined.⁶²

The ultimate disposition of the case dissatisfied everyone except Justice Ruth Bader Ginsburg. That is because Justice Ginsburg was

⁶⁰ Brief for Petitioner at 13, *United States v. Booker*, 125 S. Ct. 738 (2005) (No. 04–104).

⁶¹ *Id.*

⁶² *United States v. Booker*, 125 S. Ct. 738, 745 (2005). See Roger Pilon, *Can Law This Uncertain Be Called Law?*, 2003–2004 *Cato Sup. Ct. Rev.* vii (2004) (discussing the complexity of judicial opinions that are driven by policy concerns, not principles).

the only justice to agree to both the substantive holding and to the holding on the remedy.

Justice Stevens wrote the opinion for the Court on the substantive question—whether Booker’s right to trial by jury was violated. After reviewing the *Apprendi* progeny, Stevens had little trouble evaluating Booker’s complaint. Booker’s sentence was almost ten years longer than the guidelines range supported by the jury verdict alone.⁶³ To justify the additional ten years, the judge found facts (possession of more crack cocaine) beyond those found by the jury.⁶⁴ And those “sentencing facts” were found by a preponderance of evidence standard.⁶⁵ Since the judge’s actions were precisely the type of unconstitutional conduct condemned in *Blakely*, Booker’s sentence had to be overturned.

The dissenters reiterated their previous observation that judges have always found facts when making sentencing determinations and that it is peculiar and misguided for the Court to declare judicial fact-finding unconstitutional.⁶⁶ Justice Stevens rejoined that the dissent had failed to grasp the nettle. Judges have broad discretion to sentence within a statutory range—“[f]or when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant.”⁶⁷ If the debate were strictly a matter of “good policy,” reasonable jurists could disagree on whether it would be more desirable for a judge or jury to make certain findings. The key point, however, is that the defendant’s right to a jury trial has constitutional significance. Justice Scalia made this point plain in *Blakely*:

Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the

⁶³ 125 S. Ct. at 746 (substantive majority).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 803–04 (Breyer, J., joined by Rehnquist, C.J., and O’Connor and Kennedy, JJ., dissenting in part).

⁶⁷ *Id.* at 750. Compare Elizabeth T. Lear, Is Conviction Irrelevant?, 40 UCLA L. Rev. 1179 (1993) (challenging judicial power to punish unconvicted criminal conduct at sentencing).

defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.⁶⁸

When pressed to address this principle, the dissenters would admit that the Constitution does limit the government's power to reclassify elements as sentencing factors, but they would not elaborate—except to say that the government could not go “too far.”⁶⁹

As noted above, the Court was equally divided, by a five to four vote, on the question of how the government's constitutional violation ought to be remedied. Justice Ginsburg joined the faction that had dissented on the substantive violation. Since four of those justices were of the view that there was no jury trial violation, they basically sought to minimize any change to the operation of the federal sentencing guidelines and, in particular, to any broadening of the role of juries. The “remedial majority” announced that it was invalidating two provisions of the Sentencing Reform Act that were “incompatible” with the substantive constitutional holding.⁷⁰ The invalidation of those two provisions had the effect of disabling the mandatory nature of the federal guidelines. The guidelines would now be “advisory” only.⁷¹

Justice Stephen Breyer authored the opinion of the remedial majority. Breyer's analysis was driven by what Congress would have likely preferred had it known that the Court would step in and prevent “the sentencing court from increasing a sentence on the

⁶⁸ *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004) (emphasis in original).

⁶⁹ See *Booker*, 125 S. Ct. at 705 (Breyer, J., joined by Rehnquist, C.J., O'Connor, and Kennedy, JJ., dissenting in part); compare *Blakely*, 124 S. Ct. at 2537 n.6 (the dissent “does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers ‘whatever the legislature chooses to leave to the jury, so long as it does not go too far’ coherent.”).

⁷⁰ See *Booker*, 125 S. Ct. at 759–64 (Breyer, J., delivering the opinion of the Court in part) (hereinafter “remedial majority”).

⁷¹ *Id.* at 756–57.

basis of a fact that the jury did not find (or that the offender did not admit).’’⁷² The answer, according to Justice Breyer, was that the Congress would have preferred that the guidelines system be made advisory—so that the federal system would maintain “a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress intended its Guidelines system to achieve.”⁷³ Turning to the question of how appellate courts should handle sentencing appeals from guidelines that were now advisory, Justice Breyer declared that the new standard of review would be one of “reasonableness.”⁷⁴ Justice Breyer acknowledged the difficulty of trying to discern the legislature’s preference and noted that the Congress was still free to choose another set of revisions in reaction to the Court’s Sixth Amendment jury trial requirement.⁷⁵

Four justices—Stevens, Scalia, Souter, and Thomas—dissented from the Court’s remedy. Justice Stevens, who authored the principal dissent, described the remedial majority’s approach to the matter as “an exercise of legislative, rather than judicial, power.”⁷⁶ How, the dissenters wondered, could the Court excise two statutory provisions from the federal code book while acknowledging that those provisions were “unquestionably constitutional” and could thus be reenacted by the Congress immediately?⁷⁷ The dissenters accused their colleagues of preempting the legislative debate with their own “policy choice.”⁷⁸

IV. Lofty Rhetoric, Limited Impact

Although the *Apprendi* progeny has been marked by lofty rhetoric regarding the importance of the constitutional guarantee of trial by jury and of constitutionalism generally, a close inspection of the

⁷²*Id.* at 757.

⁷³*Id.*

⁷⁴See *id.* at 765–68. Justice Breyer rejected criticism that he was simply inventing a new legal standard by noting that the Sentencing Reform Act specified that very standard in certain circumstances. *Id.*

⁷⁵*Id.* at 768 (“Ours, of course, is not the last word: The ball now lies in Congress’s court.”).

⁷⁶*Id.* at 772 (Stevens, J., joined by Souter and Scalia, JJ., dissenting in part).

⁷⁷*Id.*

⁷⁸*Id.* at 771.

American criminal justice system will show that there is a notable disconnect between the high praise that many of the justices have heaped upon the jury and their satisfaction with the shabby state of that once hallowed institution.⁷⁹

There is, to be sure, a philosophical split among the members of the Court regarding the criminal justice system that is envisioned by the Constitution. One faction has played down the significance of the common law tradition of adversarial justice to modern constitutional controversies.⁸⁰ The fatal weakness of that approach was identified by Justice Scalia when he observed that *Apprendi*'s dissenters are

unable to say what the right to trial by jury does guarantee if, as they assert, it does not guarantee—what it has been assumed to guarantee throughout our history—the right to have a jury determine those facts that determine the maximum sentence the law allows. They provide no coherent alternative.⁸¹

It is lamentable, however, that even though Justice Scalia (and the *Apprendi* majority) has a better answer than Justice Breyer (and the other *Apprendi* dissenters), it is only a partial answer—and one that is still a far cry from what the Constitution actually requires.⁸²

At first, the high praise for the Sixth Amendment guarantee of trial by jury and the common law tradition of adversarial justice rings true, but there is a fatal misstep. The jury trial guarantee, we are told, was “the least controversial provision of the Bill of Rights.”⁸³

⁷⁹ Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. Chi. L. Rev. 867, 922 (1994) (“Our system of criminal dispute resolution differs enormously from the one that the Sixth Amendment was designed to preserve.”).

⁸⁰ *Apprendi v. New Jersey*, 530 U.S. 466, 555 (2000) (Breyer, J., dissenting).

⁸¹ *Id.* at 498–99 (Scalia, J., concurring).

⁸² For a discussion of what the Constitution actually requires, see generally Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33 (2003); Glenn Harlan Reynolds, *Review Essay: Of Dissent and Discretion*, 9 Cornell J.L. & Pub. Pol'y 685 (2000); Hon. Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 Suffolk U. L. Rev. 419 (1999); Timothy Lynch, *Rethinking the Petty Offense Doctrine*, 4 Kan. J.L. & Pub. Pol'y 7 (1994); Ann Hopkins, *Mens Rea and the Right to Trial by Jury*, 76 Calif. L. Rev. 391 (1988).

⁸³ *Apprendi*, 530 U.S. at 498.

True. It was not controversial because the Framers made a conscious decision to let laypersons, not employees of the state, administer criminal justice.⁸⁴ True. "Our Constitution and the common law traditions it entrenches . . . do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."⁸⁵ True. Jury trials may not be the most expedient and efficient method of administering justice, but they stand as "the great bulwark of [our] civil and political liberties."⁸⁶ True. Though inefficient and inexpedient, the right to a jury trial "has always been free[ly] [available]."⁸⁷ Untrue. Indeed, demonstrably false.

Jury trials are a rarity in the American criminal justice system.⁸⁸ The vast majority of cases are not adjudicated at all—they are instead plea bargained. No one can deny the fact that we have essentially adopted a system of charge and sentence bargaining. Still, one can argue that the rarity of jury trials does not necessarily prove that exercise of the right to a jury trial is not "free." True enough, but why would thousands and thousands of criminal defendants enter a guilty plea and forgo their right against self-incrimination and their right to a jury trial? The answer cannot be a matter of sheer happenstance. Fully 95% of federal criminal cases do not go to trial—and that high percentage has been the pattern for many years.⁸⁹ The truth is that government officials have deliberately engineered the system to "assure that the jury trial system established by the Constitution is seldom utilized."⁹⁰ The Supreme Court has facilitated the decline of jury adjudication by permitting prosecutors to retaliate against individuals who wish to exercise their Sixth Amendment right to trial by jury.⁹¹ As the chief judge of the District Court of Massachusetts, William Young, has observed:

⁸⁴ *Id.*

⁸⁵ *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2005) (Scalia, J.).

⁸⁶ *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540–41 (4th ed. 1873)) (alteration in original).

⁸⁷ *Id.* at 498 (Scalia, J., concurring).

⁸⁸ See generally George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (2004).

⁸⁹ See *United States Booker*, 125 S. Ct. 738, 772 (2005) (Stevens, J., dissenting).

⁹⁰ See Note, *The Unconstitutionality of Plea Bargaining*, 83 Harv. L. Rev. 1387, 1389 (1970).

⁹¹ See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (holding that offering a defendant a forced choice between forgoing trial in exchange for a lenient sentence and going to trial based on an escalated charge does not violate the Due Process

Evidence of sentencing disparity visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. . . . Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500%. As a practical matter this means, as between two similarly situated defendants, that if the one who pleads and cooperates gets a four-year sentence, then the guideline sentence for the one who exercises his right to trial by jury and is convicted will be twenty years. Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one's peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial. It is the sheerest sophistry to pretend otherwise.⁹²

Despite the lofty rhetoric about the importance of juries and the common law traditions, the Court is not prepared to grapple with the root of the problem, which is the coercive, retaliatory nature of prosecutorial plea bargaining tactics. Although the constitutionality of plea bargaining was not an issue before the Court in *Booker*, it has been lurking in the background throughout the *Apprendi* progeny, in the thrust and parry between the justices as to how the parameters of the jury trial guarantee would impact the overall criminal justice system. In *Blakely*, for example, Justice Scalia seemed to be allaying concerns that the new Sixth Amendment ruling might impact the percentage of cases that are actually tried before juries when he wrote: “[G]iven the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors’ disposal.”⁹³ In other words, “Don’t fret about the

Clause). For a critique of that holding, see generally Timothy Lynch, An Eerie Efficiency, 2001–2002 Cato Sup. Ct. Rev. 171, 177–78 (2002).

⁹² *Berthoff v. United States*, 140 F. Supp. 2d 50, 67–69 (D. Mass. 2001). For an incisive critique of federal sentencing law, see the sentencing memoranda authored by Chief Judge Young in *United States v. Green*, 346 F. Supp. 2d 259 (D. Mass. 2004).

⁹³ *Blakely v. Washington*, 124 S. Ct. 2531, 2542 (2004). Justice Scalia notes that the “Sixth Amendment was not written for the benefit of those who choose to forgo its protection.” *Id.* True enough, but as Professor Lear has observed, “[T]he framers of the Constitution unquestionably assumed that the jury trial would be the primary method by which guilt and conviction were secured.” See Lear, *supra* note 67, at 1237 n.271; Alschuler & Deiss, *supra* note 79, at 922. And, as Chief Judge Young notes, persons accused of crimes are no longer free to invoke the Sixth Amendment right

prospect of more-crowded court dockets. The right to seek a jury trial will remain under the thumb of the prosecutor.” In the end, the philosophical gulf between the opposing factions of the Supreme Court, though real, is not nearly as wide as the rhetoric on both sides suggests.⁹⁴

V. Prospective Developments in Federal Sentencing

There is no question that *United States v. Booker* is a landmark case in the field of sentencing law. The Supreme Court arrested a pernicious trend in the law that enabled the government to administer punishment by usurping the jury’s traditional fact-finding role and by dispensing with the reasonable doubt standard of proof. The federal sentencing guidelines, which had governed federal criminal cases for seventeen years, were unexpectedly declared to be advisory, not mandatory. Appellate courts were instructed to review appealed sentences under a “reasonableness” standard of review. *Booker* has clearly stirred the pot—and, it is safe to say, that still more change is looming on the horizon.

With respect to future Supreme Court action, the question of how to handle a defendant’s prior criminal record is very likely to change in the near term. Under *Apprendi*, the Supreme Court barred judges from making factual findings that led to increased sentences.⁹⁵ There was only one exception to that rule: findings related to prior offenses.⁹⁶ Over the past five years, it has become increasingly clear that that exception is no longer supported by a majority of the Court.⁹⁷ The departure of Justice O’Connor, a staunch proponent of

to trial by jury. Prosecutorial extortion is rampant and severe. Berthoff, 140 F. Supp. 2d at 67–69. The defenders of the jury trial guarantee on this Court—Stevens, Scalia, Souter, Thomas, Ginsburg—treat these critical points in a nonchalant manner.

⁹⁴Justice O’Connor, for example, greeted the prospect of more jury involvement as “a No. 10 earthquake.” David Kravets, O’Connor Likens Decision to Earthquake, Associated Press, July 22, 2004 (quoting O’Connor). On the other side, Justice Stevens said the right to jury trial—“a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest in concluding trials swiftly.” *Booker*, 125 S. Ct. at 756.

⁹⁵*Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

⁹⁶See generally *id.* at 499–523 (Thomas, J., concurring).

⁹⁷See *Shepard v. United States*, 125 S. Ct. 1254, 1263–64 (2005) (Thomas, J., concurring in part and concurring in the judgment).

limiting *Apprendi* wherever possible, can only hasten this salutary development.⁹⁸

With respect to the lower courts, there are many questions to grapple with in the aftermath of *Booker*—especially for the cases that were pending when the ruling was announced. Many defendants are seeking to be resentenced in light of *Booker*, for example. Courts are sorting those appeals by asking, among other things, whether it should matter whether an objection was registered at the trial to the judicial enhancement of the sentence. Meanwhile, the appellate courts will begin to apply the new “reasonableness” standard of review for sentencing appeals. As trial judges depart from the guidelines that are now merely advisory, will the appellate courts afford broad leeway toward such departures—or adopt a strict posture? The answers to those questions are uncertain. It is simply too early to venture any predictions on how those questions will be resolved.

With respect to future action from Congress, many observers had expected an immediate reaction to *Booker*. That did not happen. However, Attorney General Alberto Gonzales has made it clear that the Bush administration is anxious to curb judicial discretion by establishing a broad array of mandatory minimum sentences and restoring the mandatory nature of the federal sentencing guidelines. According to Gonzales, federal sentencing “works best when judges have some discretion, but discretion that is bounded by mandatory sentencing guidelines created through the legislative process.”⁹⁹ The Bush administration seems to want a system that will give judges flexibility with respect to meting out harsher sentences, but where their ability to offer lenient sentences is tightly restricted—hence the call to Congress to enact more mandatory minimum sentences. The House of Representatives did pass “anti-gang” legislation that would, among other things, establish more mandatory minimum sentences.¹⁰⁰ Since the Senate is also anxious to be seen as “tackling the gang problem,” it is likely to approve a similar bill in the near future.

⁹⁸ As Justice Thomas has noted, “innumerable criminal defendants have been unconstitutionally sentenced” under the “flawed” precedents. See *id.* at 1264.

⁹⁹ Dan Eggen, *Minimum Sentences Urged*, Wash. Post, June 22, 2005, at A2 (quoting Attorney General Gonzales).

¹⁰⁰ Gang Deterrence and Community Protection Act of 2005, H.R. 1279, 109th Cong., 1st Sess. (2005).

From both a constitutional and policy perspective, the outlook on federal criminal law and sentencing seems rather bleak. The federal criminal code is a sprawling mess.¹⁰¹ Jury trial rates are plummeting across the country.¹⁰² And Congress is poised to reverse the marginal improvement that *Booker* brought about by transferring more power from impartial judges to partial prosecutors by enacting more mandatory minimum sentences.¹⁰³ These trends need to be reversed. Congress needs to roll back the power of prosecutors by pruning the federal criminal code, allowing more judicial discretion in sentencing, and respecting the right to trial by jury.¹⁰⁴

¹⁰¹ See John S. Baker, *Measuring the Explosive Growth of Federal Crime Legislation* (Federalist Society 2004), available at <http://www.fed-soc.org/Publications/practicinggroupnewsletters/criminallaw/crimreportfinal.pdf>. See also N. Richard Janis, *Deputizing Company Counsel as Agents of the Federal Government: How Our Adversary System of Justice Is Being Destroyed*, *Washington Lawyer*, March 2005, at 32.

¹⁰² See *Berthoff v. United States*, 140 F. Supp. 2d 50, 68–69 (D. Mass. 2001).

¹⁰³ See note 100, *supra*. For a critique of mandatory minimum sentencing, see Paul G. Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines (and a Critique of Federal Mandatory Minimums)*, 56 *Stan. L. Rev.* 1017 (2004).

¹⁰⁴ See Timothy Lynch, *Changing the Gavel*, *Legal Times*, January 24, 2005, at 66.